

EQUALIZING PREGNANCY:
The Birth of a Super-Statute

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Contents

INTRODUCTION	1
I. THE BIRTH OF EQUAL TREATMENT FOR PREGNANT WORKERS	9
A. Classifying the Uniqueness of Pregnancy.....	11
1. Locating the Interpretive Source.....	11
2. Accreting Reasonable Cause.....	17
B. Equalizing Treatment.....	20
C. Guiding Equal Opportunity.....	29
II. CONSTRUCTING JUDICIAL EQUALITY.....	33
A. Pregnancy Discrimination and the Constitution	34
B. <i>Gilbert</i> : “The day of infamy!”	41
1. Staking Out Normative Ground.....	43
2. Distinguishing Pregnancy and Sex Discrimination	49
III. GENERATING PUBLIC LAW	58
A. Forging the Coalition	58
1. Grappling with <i>Gilbert</i>	59
2. Coalitional Contours	62
3. Normative Deliberation	69
B. Campaign Mobilization and Public Debate	77
1. Setting the Terms of Debate	77
2. Activating Debate	83
CONCLUSION.....	111

INTRODUCTION

*The Supreme Court has today legalized sex discrimination . . . The Court's decision denied millions of working women fair and equal treatment. Employers can treat pregnant women as harshly as they like, firing them, refusing to hire them, and forcing them to take long unpaid leaves of absence.*¹

- Susan Deller Ross (Director of the Women's Rights Project of the American Civil Liberties Union), December 7, 1976

Sherry O'Steen was caught in a constitutional transition. Abandoned by her husband during her unexpected pregnancy, O'Steen depended on her income from work on an assembly line at the local General Electric (G.E.) factory. But her livelihood was cut off when she was forced by G.E. into unpaid sick leave for the remainder of her pregnancy. "I didn't tell nobody at work until I started showing," O'Steen recalls, "but one day my boss came and told me 'You're too big now, you're going to have go.'"² Stripped of her wages and denied temporary disability benefits from G.E., O'Steen could not afford electricity, oil for heating, or sufficient food during her pregnancy as she cared for her two-year-old daughter alone.³ G.E. had guaranteed employees insurance and leave benefits for temporary disabilities arising for any reason—from vasectomies to hair transplants—but the sole exception was pregnancy.

According to the Supreme Court, pregnancy discrimination remains constitutional today.⁴ In a 1974 decision never revisited by the Court, the majority validated pregnancy discrimination as constitutional under the Equal Protection Clause: "While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . Lawmakers are constitutionally free to include or exclude pregnancy from the

¹ Quoted in Lesley Oelsner, *Supreme Court Rules Employers May Refuse Pregnancy Sick Pay*, THE N.Y. TIMES, Dec. 8, 1976, at p. 1.

² Sherry O'Steen, Interview with author, April 8, 2005.

³ *Id.*

⁴ *Geduldig v. Aiello*, 417 U.S. 484 (1974); *see also* *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993) (citing favorably *Geduldig's* holding that pregnancy discrimination is not sex-based discrimination under the Equal Protection Clause).

coverage of legislation.”⁵ The Court applied precisely this narrow conception of sex discrimination to the private sector as well, rejecting O’Steen’s claim that pregnancy discrimination was sex-based in violation of Title VII of the Civil Rights Act.⁶ Yet today, the right of women to be free from sex discrimination on the basis of pregnancy is foundational in American society, binding private actors, legislatures, agencies, and courts alike. We can locate such a foundational right not in the judicially-articulated Constitution, but instead in the constitutional norms of what William Eskridge and John Ferejohn have called a “super-statute.”⁷

This Paper explicates the penetration into American public law of a new equality norm that redefined the meaning of sex discrimination in two critical ways in the face of stereotypes attached to real biological differences. First, setting aside their different views about the best way to secure workplace equality, previously divided legal feminists united to condemn as facial sex discrimination the “*whipsaw effect*”⁸ of pregnancy-based exclusions: On the one hand, women like Sherry O’Steen were forced into unpaid leave or fired based on a presumption of disability due to pregnancy, regardless of their capacity to work; on the other hand, women were unequally penalized for this absence by loss of the seniority, sick leave, and medical insurance that all other temporarily disabled workers received. This essential premise unified legal feminists in opposition to the Supreme Court insistence that “*pregnancy . . . is not a gender-based discrimination at all.*”⁹ Additionally, on the foundation of this feminist consensus that pregnancy discrimination is sex discrimination, an intensive normative debate took place *within* the legal feminist community and other organizations about the proper conceptual framework for targeting the discrimination. This second question in

⁵ *Geduldig*, 417 U.S. at 497 n.20.

⁶ *General Electric v. Gilbert*, 429 U.S. 125 (1976).

⁷ William Eskridge and John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

⁸ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 118 (1977) (statement of Susan Deller Ross, Co-Chair, Campaign to End Discrimination Against Pregnant Workers).

⁹ *Gilbert*, 429 U.S. at 144 (emphasis added).

defining the modern equality norm was whether sex equality in the workplace should be delivered through *special treatment* for pregnant workers or through *equal treatment* for all workers experiencing temporary disabilities for any reason. While a six-man majority on the Supreme Court refused even to view this classification as sex discrimination at all, this Paper shows how liberal and labor feminists, unions, pro-choice and pro-life organizations united to repudiate the Supreme Court by generating a new normative baseline for modern equality jurisprudence that declares unlawful the whipsaw of pregnancy discrimination and that extinguishes facial exclusionary policies through an equal-treatment framework.¹⁰

Before Sherry O’Steen’s case reached the Supreme Court, the Equal Employment Opportunity Commission (EEOC) had been the primary site of generative norm elaboration under Title VII of the Civil Rights Act. In the absence of any legislative history concerning pregnancy and only scarce discussion of sex discrimination,¹¹ the administrative agency spent years confronting individual cases in which women’s pregnancy, childbirth, and related medical conditions were exploited as grounds of sex discrimination in the workplace.¹² Based on this experience and a robust debate within the agency, the EEOC targeted the whipsaw of employer’s overt exclusionary policies by constructing an equal-treatment framework in its formal 1972 Guidelines. In *General Electric v. Gilbert* the Supreme Court rejected this administrative norm elaboration and applied to Title VII the

¹⁰ It bears emphasizing that while this Paper explicates the generation of a new pregnancy equality baseline to prohibit the overt exclusionary policies deployed by employers and sanctioned by the Supreme Court, this principle also exerts a broader normative impact over time in its application as part of Title VII, which incorporates a disparate-impact measure of discrimination in facially neutral policies as well. Consequently, my future study of the interpretation and implementation of this normative baseline will evaluate employers’ potential accommodation duties in structuring the workplace under Title VII’s disparate impact standard and through further affirmative employer obligations imposed at the state and federal levels. *See infra* notes 337-338 and accompanying text. For this Paper, my focus remains the normative debate and education process driven by legal feminists in the different state arenas that gave rise to the foundational principle that facial pregnancy discrimination does constitute unlawful sex discrimination.

¹¹ *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 (1968).

¹² *See infra* Section I.A.

Court's narrow constitutional conception of sex discrimination, which sanctioned pregnancy classifications as based not on gender but rather the difference between "pregnant women and nonpregnant persons."¹³ Twenty-two months later, Congress repudiated the Court's sex discrimination vision and instead vindicated a fundamental principle of equal treatment that explicitly prohibited pregnancy-based exclusions as unlawful sex discrimination. This Paper examines the morphogenesis of a super-statutory principle by exploring the conceptual and institutional forces that produced this equality norm and led to the passage of the transformational Pregnancy Discrimination Act of 1978.¹⁴

The Paper contributes to three recent theoretical projects by examining the interaction between the women's movement and the legislative-administrative-judicial dialogue that shaped the pregnancy equality norm. First, this Paper responds to the call to bridge the scholarship gap between social movements and the law.¹⁵ In the constitutional arena, scholars have directed greater attention to the influence that social movements wield on the content and development of fundamental law.¹⁶ In examining race and gender campaigns for constitutional equality, for instance, commentators have shown that the Supreme Court channels the way social groups present their goals in constitutional

¹³ *General Electric v. Gilbert*, 429 U.S. 125, 135 (1976).

¹⁴ 42 U.S.C. § 2000e(k) (2000).

¹⁵ Edward Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001). As one scholar has observed, "[l]aw professors have a lot to learn from sociologists and political scientists who have studied social movements" and, conversely, "law professors ought to be able to make some contribution to these theories." William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 1 (2001). For a seminal work identifying the overlap between scholarship on movements and the law, see JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978).

¹⁶ See, e.g., Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85 (2001); Eskridge, *supra* note 15; Reva B. Siegel, *Text in Contest: Gender and the Constitution From A Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001); see also Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003) (identifying the interaction between constitutional law and constitutional culture mediated by the Court). For an alternative framework articulating the importance of interpretive communities like social movements within a jurisprudential vision of the law, see Robert M. Cover, *The Supreme Court, 1982 Term—Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (observing that "[w]hen groups generate their own articulate normative orders concerning the world as they would transform it, as well as the mode of transformation and their own place within the world, the situation is different—a new nomos...is created").

terms and that these claims reshape the movements themselves. Recent scholarship has also revealed the need for greater judicial attention to the shape of constitutional norms according to democratically legitimate expressions by social movements through structural vehicles like Congress's Section 5 power.¹⁷ Reva Siegel has underscored the essential role of movements in shaping constitutional meaning, as well as the reciprocal importance of constitutional text in authorizing and driving claims by nonjudicial actors. As Siegel argues, "if the social movement activities . . . did not satisfy Article V criteria for constitutional lawmaking, these activities set up pathways of communication between the citizenry and judiciary that drew upon understandings and practices that are an entrenched feature of our constitutional culture."¹⁸ In this spirit, I explore movements' mobilization and debate in the generation of a legally-enforceable equality norm that sex discrimination on the basis of pregnancy is wrong. The Paper considers how the internal dynamics of a movement shape – and are reshaped by – the development of public law through dialogue across different state forums. The role of legal feminists and other movement activists both inside and outside the state arena provide critical insights into the hotly debated shape of equality for pregnancy discrimination.

This highlights a second, related theoretical project. Some legal scholars have begun to look beyond the court-centered – or "juricentric"¹⁹ – indicia of the development of public law to consider the social construction and institutional affirmation of transformative legal norms outside the courts, even despite judicial hostility. Specifically, the Paper directs new attention to the largely ignored administrative agency forum for legal norm elaboration as an essential part of the inter-institutional

¹⁷ Robert C. Post and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003). For a fine illustration in the context of the rise of sex discrimination law, including attention to the Pregnancy Discrimination Act, see *id.* at 1980-2019.

¹⁸ Siegel, *supra* note 16, at 319. For an alternative model of how constitutional norms are generated outside the courts and beyond the four corners of Article V, see BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

¹⁹ Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003).

dialogue that produced the robust pregnancy equality principle. By drawing attention to the dialogic process of norm generation and elaboration by democratically legitimate legislatures and agencies, the Paper locates the force of fundamental change outside the formal rules of recognition for movements' reinterpretation claims under the Fourteenth Amendment or amendatory claims under Article V. Six Justices of the Supreme Court rejected feminist claims that pregnancy discrimination was gender-based and directly marginalized women in the workplace. But the administrative and legislative arenas vindicated this consensus about the whipsaw of pregnancy discrimination and established an equal-treatment principle as the groundwork for further norm elaboration to secure equal opportunity in the workplace. Thus, expanding upon insights from court-centered examinations into the link between constitutional culture and the meaning of the Constitution, this study considers how legal debates in the administrative and legislative arenas interacted with the Court's restrictive vision of sex discrimination to define the shape of a super-statutory equality principle.

Finally, the Paper sheds new light on the earliest debates among legal feminists over the generation of the equality principle that ultimately formed the core of the Pregnancy Discrimination Act. Most legal scholarship on the 1970s women's movement has focused on how constitutional litigation strategies succeeded²⁰ and why the campaign for the Equal Rights Amendment ultimately failed.²¹ Even where commentators have stepped beyond the arena of interpretive or amendatory constitutional claims by the women's movement, the focus has remained largely on the courts as the institutional motor force of normative change.²² Limited historical and legal portraits of the passage of the Pregnancy Discrimination Act have grappled with either the institutional significance of

²⁰ See, e.g., STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974); KAREN J. MASCHKE, *LITIGATION, COURTS, AND WOMEN WORKERS* (1989); LESLIE FRIEDMAN GOLDSTEIN, *THE CONSTITUTIONAL RIGHTS OF WOMEN* (1988).

²¹ See, e.g., JANE MANSBRIDGE, *WHY WE LOST THE ERA* (1986).

²² See, e.g., MICHAEL MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (Chicago: University of Chicago Press, 1994); LAWRENCE MOREHOUSE, *JUDICIAL PROCESS AND TITLE SEVEN LITIGATION* (1990) (unpublished dissertation).

Congress's rejection of the *Gilbert* decision or especially the subsequent judicial interpretations of the Pregnancy Discrimination Act (PDA). Yet this Paper reveals the importance of scrutinizing the historical roots of the concepts at stake in *Gilbert* and the PDA campaign in order to understand their transformative meaning. I identify critical shortcomings in the limited historical portrait relied upon by the Court in its decision to sanction pregnancy-based exclusions as gender-neutral.

Within the arena of constitutional change, the internal dynamics among legal feminists in their strategies and normative debates for change have critically informed the shape of modern sex equality.²³ As Serena Mayeri has shown, the women's movement had to overcome years of bitter division about the proper way to secure constitutional equality, and ultimately legal feminists succeeded by pursuing a dual strategy of formal amendment and judicial reinterpretation.²⁴ This study of the movement campaign provides an important backdrop for my examination. As Mayeri revealed, divisions among legal feminists over constitutional strategies in the 1960s reflected a deep division between "equalitarians" and "protectionists."²⁵ This Paper looks outside the formal constitutional arena to show how these historical normative differences were overcome by legal feminists in critical new ways in the context of pregnancy discrimination.

Shortly after the decision in *Roe v. Wade*, a report from the ACLU Women's Rights Project soon wondered: "But what about women who want to have children?"²⁶ As the number of women entering the labor market grew exponentially in the late 1960s and 1970s, the choice of whether to have babies was fraught with peril, particularly for those households in which women provided the sole or primary income. The lack of Title VII congressional findings on pregnancy-based exclusions

²³ Serena Mayeri, *Constitutional Choices Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 770 (2004).

²⁴ *Id.* at 770.

²⁵ *Id.* at 762. See *infra* note 68 and accompanying text.

²⁶ Trudy Hayden, *Punishing Pregnancy: Discrimination in Education, Employment, and Credit*, American Civil Liberties Union, Women's Rights Project (October 1973), at 1.

left a critical interpretive void that this Paper will show was ultimately given normative content through the interaction of the women's movement with the administrative, judicial, and legislative arenas.

Part I of this Paper explores the administrative source of the pregnancy antidiscrimination norm in the EEOC. A critical ground of the Supreme Court's decision rejecting Sherry O'Steen's claim was an apparent contradiction in the EEOC's interpretation of Title VII, which the Court cited to undermine deference to the very agency charged with enforcement of Title VII:

The EEOC guideline . . . is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title. More importantly, the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute.²⁷

Part I mobilizes new historical materials and primary interviews to offer fresh insights into the formation of the EEOC's interpretative position on pregnancy discrimination under Title VII. I demonstrate that the EEOC's initial position was not the product of any deliberative debate within the nascent agency. In fact, when the Commission did actively consider how to situate pregnancy within the Title VII proscription on sex discrimination, the "equal treatment" non-discrimination norm as a baseline to attack facial pregnancy exclusions prevailed only after deep debate involving a competing "special treatment" approach to pregnancy to achieve equal employment opportunity.

Part II then examines how the women's movement mobilized a judicial campaign to entrench the EEOC's 1972 Guidelines implementing an equal-treatment norm against pregnancy discrimination as the authoritative baseline for both Title VII and constitutional claims. This Part shows how the Supreme Court applied its narrow vision of sex discrimination to reject the equal-treatment norm. It also identifies how the roots of an expansive coalition were planted in the judicial

²⁷ General Electric v. Gilbert, 429 U.S. 125, 142 (1976).

appeals lodged by the women's and labor movements to overturn the Court's sanction of overt pregnancy discrimination.

Finally, Part III reveals how a diverse coalition formed a *Campaign to End Discrimination Against Pregnant Workers* and successfully repudiated the Court's distinction between gender-based and pregnancy-based discrimination. By drawing on previously unexamined sources, this Part shows that the coalition launched a sophisticated legislative campaign and public debate to educate members of Congress about how pregnancy discrimination bars the doorway to women's equality of opportunity in the workplace. Part III demonstrates that at the heart of this campaign was women's focused determination to combat the whipsaw of exclusionary employment policies by instantiating in the Pregnancy Discrimination Act a foundational principle building upon the debates of the legal norm entrepreneurs in the EEOC. Entrenchment of this super-statutory principle provided the fundamental normative baseline upon which courts, agencies, and legislatures would subsequently develop an expanding framework for equality of opportunity for women by structuring the workplace to incorporate pregnancy as a natural condition of employment.

I. THE BIRTH OF EQUAL TREATMENT FOR PREGNANT WORKERS

The meaning of the equality principle embodied in the PDA cannot be understood without attention to its conceptual roots. While many in Congress claimed to be restoring their original intent in Title VII by overriding *Gilbert* in the PDA,²⁸ the complete absence of discussion of pregnancy in the passage of Title VII suggests we may look elsewhere to locate the normative and institutional link between pregnancy and equality. Further, the PDA did embrace the 1972 EEOC Guidelines

²⁸ See, e.g., *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. (1977) (statements of Sen. Mathias, Williams, and others).

(“the Guidelines”) as the model of equality to include pregnancy-based discrimination within proscribed sex discrimination, but what is missing is greater attention to the historical and legal origins of the Guidelines themselves. In *Gilbert*, the Court and petitioners merely dismissed the Guidelines banning pregnancy discrimination as evidence of EEOC “waffling,”²⁹ a “changed”³⁰ position – seven years after Title VII was passed – that was an outright reversal of the Commission’s official, “contemporaneous”³¹ position.

Contrary to these prevailing portraits, closer examination of the institutional and conceptual roots of the 1972 Guidelines reveals years of incremental deliberation across offices within the EEOC. First, Section A identifies the administrative environment in which a case-by-case judgment of pregnancy discrimination was generated by one particular office in the Commission. Next, Section B demonstrates that, both within that office and across the agency, the EEOC legal conception of pregnancy-based discrimination remained subject to extensive debate and deliberation, primarily centering on two competing approaches – one emphasized special treatment, the other demanded equal treatment. Finally, Section C explicates the equality principle instantiated in the 1972 EEOC Guidelines that would form the heart of the Pregnancy Discrimination Act.

²⁹ See, e.g., Brief of Petitioner at 42, *Gilbert*, 429 U.S. 125 (1976).

³⁰ ALFRED BLUMROSEN, MODERN LAW 136 (1993).

³¹ *Gilbert*, 429 U.S. at 142.

A. Classifying the Uniqueness of Pregnancy

The late amendment of the Civil Rights Act to include “sex” as a prohibited ground of discrimination has been extensively recorded and analyzed.³² Added by amendment from Congressman Howard Smith one day before the Act passed to “do some good for the minority sex,”³³ the amendment was expected to be a “poison pill.” Indeed, every male member of Congress who voiced support for the amendment ultimately voted against the House bill as a whole. As a result, while the provision ultimately remained in the Civil Rights Act, the absence of hearings on the gender provision of Title VII meant that the scope and meaning of “sex discrimination” remained unclear in its early implementation by the EEOC. In fact, the first Executive Director of the EEOC, Herman Edelsberg, publicly dismissed the sex discrimination provision as a “fluke . . . conceived out of wedlock.”³⁴ The EEOC itself also lacked any substantial enforcement powers, limited during its earliest years to interpretive guidance and conciliation. Thus, as a resource-strapped agency overwhelmed by the substantial number of race-based complaints quickly filed by organized civil rights groups, the EEOC struggled to define the place of pregnancy-based classifications within Title VII’s prohibition of sex discrimination.

1. Locating the Interpretive Source

The Commission’s lack of any comprehensive interpretation of Title VII’s applicability to pregnancy-based classifications was apparent within the first year of operation. The EEOC “Guidelines on Discrimination Because of Sex” issued in 1965 made no mention of pregnancy, leaving unresolved its status as a lawful ground of discrimination in employment. By the end of its

³² See, e.g., CHARLES AND BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

³³ 110 CONG. REC. 2,577 (88th Cong., 2d Sess., 1964).

³⁴ Statement of Herman Edelsberg, NYU Annual Conference on Labor, 61 LAB. REL. REP. 253-5 (April 25, 1966).

first year of operation, it was clear the Commission considered pregnancy an issue that remained open for discussion:

The prohibition against sex discrimination is especially difficult to apply with respect to the female employees who become pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment . . . The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely. The Commission decided that to carry out the Congressional policy of providing truly equal employment opportunities, including career opportunities for women, *policies would have to be devised which afforded female employees reasonable job protection during periods of pregnancy.*³⁵

This initial administrative posture affirms a focus on the uniqueness of pregnancy as a status distinct from other grounds of equality analysis. Importantly, however, it also conveys the Commission's uncertainty about how "job protection during periods of pregnancy" would be achieved, as policies remained to be devised. This is important to bear in mind in evaluating the case-by-case opinions issued by the General Counsel in the Commission's first year of operation.

With only five attorneys, minimal oversight and an overwhelming influx of interpretive demands, the Office of the General Counsel issued opinion letters concluding that employers' exclusion of pregnancy from temporary leave, disability, or other benefit programs was *not* sex discrimination illegal under Title VII. In the first letter, dated October 17, 1966, the General Counsel assured an inquiring company:

A company group's insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes from this long term salary continuation program those disabilities which result from pregnancy and childbirth, *does not violate Title VII, inasmuch as, according to EEOC policy, treatment of illness or injury should not be equated with treatment of maternity.*³⁶

Again several weeks later, a GC Opinion Letter stated, "an insurance or other benefit plan may simply exclude maternity as a covered risk, and such exclusion would *not* in our view be discriminatory."³⁷ These opinion letters suggest a conclusive finding by the Commission that pregnancy fell outside the potentially emancipatory breadth of the sex discrimination ban in Title

³⁵ EEOC, FIRST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 1965-66, at 40 (emphasis added).

³⁶ General Counsel Opinion Letter, Oct. 17, 1966.

³⁷ General Counsel Opinion Letter, Nov. 10, 1966, CCH E.P.G. ¶ 17,304.49 (emphasis added).

VII. Yet another Opinion Letter in that same week from the General Counsel complicates the apparently conclusive Commission policy. The letter begins on a similar note:

The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.³⁸

Despite this claimed categorical distinction between disabilities from pregnancy and those from other illnesses, the letter concludes: "Accordingly, we believe that to provide substantial equality of employment opportunity...there must be special recognition for absences due to pregnancy,...[F]or this reason,...*a leave of absence should be granted for pregnancy whether or not it is granted for illness.*"³⁹

Although couched in the language of "Commission policy with respect to pregnancy," the origin of these statements within the EEOC is critical. As the actual author of both letters has confirmed, while the opinions conveyed were circulated to the commissioners before release there was no discussion or deliberative endorsement of these legal positions outside the General Counsel's office.⁴⁰ In fact, within this office of five attorneys, Acting General Counsel Richard K. Berg generated these interpretations entirely on his own:

I sat down and wrote them. We had mail and we tried to answer the questions as they came in. For us it was essentially not an adversarial relationship with the private sector. We were trying to get cooperation.

You cannot imagine what a pickup team this was. . . . If this question were raised now, you'd almost go to a notice-and comment rulemaking, because you'd want to get the range of input on something like that. But we didn't have the luxury or time to do something like that. The Act was in effect, and you just had to deal with it.⁴¹

The General Counsel's limited resources, the fluid nature of its Opinion Letters generation, and its pursuit of voluntary cooperation by employers, together reveal an office oriented not towards debate and intense discussion of whether pregnancy-based exclusions fell outside Title VII's equality norm

³⁸ General Counsel Opinion Letter, Nov. 15, 1966. *Reprinted in* EEOC Decision CCH 4130, at ¶ 6084.

³⁹ *Id.* (emphasis added).

⁴⁰ Richard K. Berg, Interview with author, March 11, 2005.

⁴¹ *Id.*

but instead an effort to meet the enormous initial demands on the agency.⁴² A second attorney of the five in the General Counsel's office, David Cashdan, confirmed this account: "There really was not much in the way of an organized Opinion Letter program."⁴³ Berg had worked in the Justice Department's Office of Legal Counsel while Title VII was crafted in Congress, and he explained how this affected his approach to legal interpretation:

I didn't regard the pregnancy problem as any big social issue. My approach was not aggressively feminist, but I just tried to call them as I saw them. It was a technical problem that we had to give a solution to

I characterized it as "unique to the female sex" so not sex discrimination . . . There was no way that you could, on a verbal level, say "this is equality of treatment," whatever you did. . . . There were certain expenses which, even in those days, were usually voluntarily incurred, and there's nothing in the statute that requires the employer to essentially subsidize this event. On the other hand, it would be unreasonable to permit an employer to attach more adverse consequences than nature intended. The woman can come back to work and she should be treated like anyone else who, after something similar, came back to work.⁴⁴

Despite the apparent decisiveness with which these Opinion Letters assured companies that pregnancy was not a ground of sex discrimination, it is critical that as late as 1967 one attorney in the General Counsel's office documented in an unpublished paper that the question of the lawfulness of pregnancy-based exclusions remained unresolved:

During the course of its first three years of existence, the Commission has not developed a comprehensive policy of pregnancy. The statement in the First Annual Report that 'the Commission does not have a comprehensive policy of pregnancy' applies at the end of the third year of operation.⁴⁵

The attorney, Sonia Pressman Fuentes, concluded that neither the GC nor the Commissioners themselves had reached a comprehensive policy but, instead, had followed a case-by-case "middle road" approach.

⁴² Confirming this potential for a lack of authoritative resolution in the General Counsel's office, one commissioner noted that the GC had even been required, on other occasions when issues were publicly contentious, to provide two competing opinions. This was intended to ensure the commissioners received both sides of the debate despite internal GC office conflicts. This arose, for instance, in evaluating preemption questions about the validity of state protective labor laws under Title VII. Aileen Hernandez, Interview with author, April 5, 2005.

⁴³ David Cashdan, Interview with author, March 10, 2005.

⁴⁴ Richard K. Berg, Interview with author, March 11, 2005.

⁴⁵ Sonia Pressman Fuentes, *Prohibition in Sex Discrimination on the Basis of Pregnancy*, at 1 (unpublished draft, 1967).

In addition to the localized decision-making evident in these opinion letters, the lack of any discussion and influence from actors outside the Commission is extremely significant. Berg emphasized that the General Counsel's office felt restricted from any broad deliberations precisely out of concern about choosing one side over another among women activists, who were still divided about how to enforce the sex discrimination provision of Title VII altogether:

There were real questions among women outside the EEOC about how broadly the sex discrimination provision should be interpreted. There was a real division between the feminists, the woman activists, the Betty Friedan-types on the one hand, and on the other hand the old line of women, the people in the Department of Labor administering protective legislation for women who grew up with the notion that maximum hours and wage protection helped most women workers

Essentially we sat back and said – this is all new to us: Whose side should we be on? That really troubled us with respect to the attitude that should be taken towards women's protective legislation.⁴⁶

Without a united position outside of the agency, broader concerns about the structural applications of the sex discrimination ban trumped the commissioners' attention to pregnancy. Commissioner Richard Graham, an original presidential appointee to the EEOC, noted the primary attention paid to conceptualizing sex discrimination in several major areas, but not pregnancy:

We didn't grapple with the issues of pregnancy at first. We were really concerned about the big, repeated cases that were before us when the Commission was founded – the airline pilots and stewardesses, in particular, and then close upon the heels of that was the question of the "Help Wanted—Male" and "Help Wanted—Female" ads. That's where we had to make decisions as to what our policy would be and what actions we would take to bring national behavior in line with Title VII.⁴⁷

Commissioner Aileen Hernandez, also an original presidential appointee to the EEOC, added:

There wasn't any major discussion to treat pregnancy one way or another under Title VII at that time because we were dealing as fast as we could with the overwhelming numbers of complaints in racial and ethnic discrimination and in sex discrimination just where the complaints were coming in. That was flight attendants and the classified newspaper ads, not pregnancy then.⁴⁸

In fact, during the very period when the General Counsel letters were issued, Ms. Hernandez described the Commission as structurally paralyzed from acting on any contentious issues because two of the five Commissioner positions were left vacant throughout the summer and fall of 1966.

⁴⁶ Richard K. Berg, Interview with author, March 11, 2005.

⁴⁷ Richard Graham, Interview with author, March 15, 2005.

⁴⁸ Aileen Hernandez, Interview with author, April 5, 2005.

Chairman Franklin Delano Roosevelt, Jr. had resigned to run for governor of New York, and Commissioner Graham's term had expired. Yet the law creating the EEOC specified that three votes were needed for any Commission action, leaving a 2-1 split on nearly every "new policy" area that required a Commission position. Commissioner Hernandez explained that she ultimately resigned in frustration:

We had only three functioning members of the Commission and two of us were very supportive of strong Title VII enforcement in divisive areas like the flight attendants issue while one refused to join us. So we had very few meetings and the staff dealt with things based on decisions already made The Commission was almost in limbo.⁴⁹

It was in this administrative environment that the Acting General Counsel made what he considered to be an easy, technical interpretation of Title VII as condoning pregnancy-based exclusions, without any deliberative discussion or formal interpretive conclusions by the Commission. It was based on this initial source that the *Gilbert* Court rejected the EEOC's equality norm banning pregnancy discrimination because it "flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute."⁵⁰

Even on the primary issues of sex discrimination that did command the commissioners' direct attention and consideration, the notable lack of outside input and sustained pressure from women's organizations stood in sharp contrast to the black civil rights organizations. This is best captured in the formation of the National Organization of Women (NOW) itself, as Commissioners Graham and Aileen Hernandez, along with GC attorney Sonia Pressman Fuentes, together worked with Betty Freidan and others to encourage the formation of an organized group to command the attention of the nascent administrative agency. As Section B will show, the change in environment would be critical to the new discussion that shaped the EEOC Guidelines years later.

⁴⁹ *Id.*

⁵⁰ *General Electric v. Gilbert*, 429 U.S. 125, 142 (1976).

2. *Accreting Reasonable Cause*

Examination of the Commission's Reasonable Cause decisions directly challenges the normative finality which the *Gilbert* majority perceived in the General Counsel Opinion Letters. Entitled "EEOC Decisions" in reporters, these findings indicate whether the Commission found reasonable cause to believe that discrimination had occurred. Importantly, recommendations for these findings originated from the Office of Compliance, a unit within the EEOC entirely distinct from the Office of the General Counsel. The Office of Compliance reviewed the deluge of formal complaints that poured into the EEOC in its early years, with staff divided among three units: *Investigations*, *Advice and Analysis*, and *Conciliation*. Since the Commission had no enforcement power to bring litigation before 1972,⁵¹ during the entire period prior to the 1972 Guidelines it was the Reasonable Cause finding that was the most critical case output after the Investigations unit and the Advice and Analysis unit had completed their work.⁵² Only after a finding of reasonable cause that Title VII had been violated could the Conciliation unit intercede on behalf of complainants "by persuading the employer to correct the discriminatory practice and compensate the injured party."⁵³ As head of the Conciliation unit within the Office of Compliance, Alfred Blumrosen explained that he considered the Reasonable Cause decisions "in the first few years an important technique to inform the later

⁵¹ See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974) (noting that when Congress enacted Title VII, "[c]ooperation and voluntary compliance were selected as the preferred means for achieving this goal," empowering the EEOC to work with state and local agencies to "settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit"). Even after Congress amended Title VII to grant the EEOC enforcement authority to investigate individual charges of discrimination and institute civil actions against employers or unions, still the Court has noted that "Title VII [did] not provide the Commission with direct powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts. The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices. 42 U.S.C. §§ 2000e—5(f) and (g) (1970 ed. Supp. II). Courts retain these broad remedial powers despite a Commission finding of no reasonable cause to believe that the Act has been violated." *Id.*

⁵² Alfred Blumrosen, Interview with author, February 11, 2005.

⁵³ See, e.g., Clinton L. Doggett and Lois T. Doggett, *THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION*, at 44. Although the Commission gained enforcement authority in 1972, conciliation remains a primary tool of the EEOC triggered only by a "reasonable cause" finding that discrimination has occurred.

guidelines and to start letting the regulated community know what the regulatory agency – even without real enforcement power – thought that the statute meant.”⁵⁴

Animating the Commission’s Reasonable Cause decisions were three distinct conceptions of how pregnancy-based exclusions related to Title VII’s sex discrimination ban. Considered together, these approaches confirm that, far from static, the Commission’s policy for ensuring equal employment opportunity under Title VII evolved on a case-by-case basis across a variety of situations in which pregnancy-based classifications affected women’s employment. First, despite the claimed Commission policy not to treat pregnancy-related and non-pregnancy-related disabilities as alike in evaluating employment plans, the Commission deployed precisely this logic of equal treatment. Evaluating the case of an employer’s benefit plan which stipulated that “weekly benefits are not payable for disability due to pregnancy,” the Commission concluded:

The old [insurance] plan provided that weekly benefits are not payable for disability due to pregnancy. It is undisputed that other than pregnancy, all non-occupational disabilities were covered by the plan. It is also undisputed that weekly payments are paid for a maximum of 13 weeks during any one continuous period of disability. *We conclude that . . . to deny female employees, who were physically disabled due to pregnancy, weekly benefits for 13 weeks was to discriminate because of sex within the meaning of Section 703(a) of the Act.*⁵⁵

This Commission finding of discrimination captures the equal-treatment approach, notably applied in 1971 without any official Guidelines on pregnancy in place.

Second, the Commission began to explicitly base its evaluation of pregnancy-based exclusions on the Supreme Court’s holding in *Griggs v. Duke Power Company*,⁵⁶ the first decision to validate a disparate impact measure of discrimination under Title VII. Rather than compare employers’ treatment of disabilities stemming from pregnancy with that of disabilities from other conditions, the Commission found reasonable cause to declare that discriminatory behavior existed under a disparate impact standard unless the exclusive impact on women was justified by a valid

⁵⁴ Alfred Blumrosen, Interview with author, February 11, 2005.

⁵⁵ EEOC Decision No. 71-1474, 1971 CCH at ¶ 6221 (March 19, 1971) (footnote omitted; emphasis added).

⁵⁶ 401 U.S. 424 (1971)

business necessity. Like its norm elaboration declaring that Title VII prohibits pregnancy discrimination even before the Supreme Court so interpreted the Act, the EEOC's holding that the disparate impact standard was applicable to women also preceded the Court's own such determination.⁵⁷ In a 1970 decision, the Commission deployed this logic to declare discriminatory a policy denying maternity leave and discharging employees in the sixth month of pregnancy:

Such a policy has a foreseeable adverse effect upon the terms and conditions of females' employment, without an equivalent effect upon males. . . .

. . . Since it lacks a showing of business necessity, Respondent's maternity leave policy discriminated against females as a class because of their sex within the meaning of Section 703(a) of Title VII.⁵⁸

Finally, the Commission also evaluated whether reasonable cause existed according to the narrower principle of sex discrimination which Berg articulated as General Counsel. Quoting the 1966 General Counsel Opinion Letter, one EEOC Decision evaluated an employer's policy which made maternity leave available to female employees only "depending upon the individual circumstances surrounding the incident":

We believe that to provide substantial equality of employment opportunity . . . there must be special recognition for absences due to pregnancy. [F]or this reason, a leave of absence *should* be granted for pregnancy whether or not it is granted for illness. . . .

. . . Reasonable cause exists to believe that Respondent is committing an unlawful employment practice . . . by maintaining a pregnancy leave policy which discriminates against female employees because of their sex.⁵⁹

⁵⁷ 433 U.S. 321, 329 (1977) ("[T]o establish a prima facie case of discrimination, plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Then the employer must meet the burden of showing that any given requirement has a manifest relationship to the employment in question. *Griggs v. Duke Power Co.*").

⁵⁸ EEOC Decision No. 71-308, 1971 CCH at ¶ 6170 (September 17, 1970). Similarly, the Commission held one company's "leave-of-absence" policy to violate Title VII under a disparate impact standard because only maternity leave required one year seniority while "leaves of absence for other reasons may be taken by employees (both males and females) who have not acquired one year seniority":

There is no evidence that a substantial business justification exists for denying females maternity leave until they have acquired a full year of seniority, and we can conceive of no justification which would outweigh the significant adverse impact of such a policy upon the employment opportunities of Respondent's present and potential female employees.

EEOC Decision No. 72-1919, 1972 CCH at ¶ 6370 (June 6, 1972). *See also* EEOC Decision No. 71-413, [1970] CCH at ¶ 6204 (November 5, 1970) (declaring discriminatory an employer's refusal to credit towards seniority a female employee's time spent on maternity leave because "any employment policy or practice which adversely affects females because of their pregnancy must be justified by business necessity....There is no [such] showing....").

While emphasizing a distinction between pregnancy-based disabilities and other medical conditions, this finding of reasonable cause nevertheless conveys the Commission's commitment to removing pregnancy as an obstacle to equality of employment. The decision also provides a conceptual preview of the different views of pregnancy with which legal feminists grappled in this early period, nonetheless ultimately joining together to condemn the whipsaw of pregnancy discrimination.⁶⁰

Most importantly, the range of conceptual frameworks repudiating pregnancy-based exclusions used in these Reasonable Cause decisions underscores the Commission's incremental approach throughout the period prior to the 1972 Guidelines. The Office of the General Counsel was not involved in the writing or publishing of the EEOC's Decisions regarding reasonable cause. Consequently, review of several administrative units across the agency reveals that the Commission's conception of the relationship between pregnancy and equality was far from resolved in 1966. Section B next explores how the legal norm of equality was deliberately and conclusively crafted to take account of pregnancy-based exclusions directly within the meaning of prohibited sex discrimination.

B. Equalizing Treatment

Although an array of disparate groups were unified in their campaign to secure equal treatment as a normative baseline through the Pregnancy Discrimination Act, the roots of the pregnancy nondiscrimination norm reveal that this equal-treatment approach was not the only one considered even among women activists. Indeed, an extensive deliberation process generated the equal-treatment approach to pregnancy discrimination only after an alternative was rejected as a way to secure equality of employment opportunity. This Section reveals the unexamined historical circumstances and legal

⁵⁹ EEOC Decision No. 70-360, 1970 CCH at ¶ 6084 (December 16, 1969) (internal notations omitted); *see also* EEOC, FIFTH ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 1969-70, at 13.

⁶⁰ *See infra* Section I.B.

reasoning that shaped the *form* of the EEOC's 1972 Guidelines and, by extension, the PDA itself. Two legal norms of equality were hotly debated within the Commission.

In a previously unexamined document written in 1967, GC Attorney Sonia Pressman Fuentes outlined “*Two Conflicting Theories For Protecting Women Regarding Pregnancy.*”⁶¹ In this document, Fuentes identified the terms of the normative debate within the EEOC over the next five years and ultimately the basis for the 1972 Guidelines. “The first theory,” Fuentes wrote, “holds that pregnancy should be treated in the employment relationship as any other temporary disability such as sickness.” This conforms to what feminists later called an “*equal treatment*” approach to securing equality of opportunity for women. As Fuentes outlined, a key premise in the equal-treatment approach is that it mandates employers offer “essentially the same procedure which would be followed for a male employee who becomes disabled for an extended period of time.”⁶² The second theory, later called the “*special treatment*” approach, “holds that pregnancy is a unique disability requiring special provision for the protection of mother and child.”⁶³

Three features of this early normative dichotomy bear observation. First, even as Fuentes documented these early poles in the normative evolution of pregnancy equality, an essential point of convergence according to her analysis and the ensuing debate within the EEOC discussed below is that legal feminists from both perspectives agreed that pregnancy discrimination was sex discrimination. Adducing medical evidence of women's capacity to work beyond the arbitrary termination or forced leave policies of employers,⁶⁴ and noting the exponentially growing number of women entering the labor force in the child bearing age group,⁶⁵ Fuentes concluded unequivocally

⁶¹ Sonia Pressman Fuentes, *Prohibition in Sex Discrimination on the Basis of Pregnancy*, at 9 (unpublished draft, 1967).

⁶² *Id.* at 9.

⁶³ *Id.* at 2-3.

⁶⁴ *Id.* at 20.

⁶⁵ *Id.* at 1-2.

that the promise of Title VII's mandate for equality of opportunity depended on elimination of the whipsaw of pregnancy discrimination. What was at stake in the competing theories was not this baseline norm that pregnancy discrimination was sex-based, but rather the proper conceptual remedy "for the protection of women during pregnancy."⁶⁶

Second, within the debate about the proper foundational remedy, the roots of these competing approaches reflected deep historical differences among legal feminists in the constitutional arena. As one scholar described, since the early 1920s legal feminists had been divided into two camps.⁶⁷ One group, the "equalitarians" or liberal feminists, argued in the constitutional arena argued that sex equality depended on elimination of all legal distinctions between men and women. For liberal feminists, any special laws for women did not "protect" them on the basis of any unique characteristics but rather served only as legal excuses for subordination. The other faction, the "protectionists" or labor feminists, rejected equal treatment as dangerous to women's equality in the workplace and instead campaigned for protective labor legislation including minimum wage, maximum hours and weightlifting regulations, all intended to structure the workplace to the benefit of women based on their real differences from men.⁶⁸ Similarly, early in the debate over a pregnancy equality norm two competing frameworks existed for how to secure women's equal status in the workplace, one which sought to eliminate any structural distinctions based on sex and the other which focused on women's unique reproductive capacity to justify different treatment as protection against pregnancy-based exclusions.

Finally, it is notable that even as both frameworks reflected a commitment to combat exclusion of women from the workplace due to their real reproductive difference, neither remedial

⁶⁶ *Id.* at 2.

⁶⁷ Mayeri, *supra* note 23, at 762.

⁶⁸ "Protective" labor laws continued through the 1960s, with many laws limiting women "for their benefit" while other protective laws such as minimum wage statutes actually providing benefits were extended to cover men as well. See BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 261 n.42-45 and accompanying text (1974).

norm had been endorsed by the Commission well after the General Counsel letters suggested sanction of pregnancy-based exclusions altogether. Fuentes had concluded in 1967: “[W]e can safely say that the Commission has neither accepted nor rejected either theory and has *as a general rule, followed a middle road.*”⁶⁹ Sparking debate was the entrance of the future co-chair of the coalition that helped to pass the PDA, attorney Susan Deller Ross.

In the late 1960s Fuentes had led the discussion with other GC attorneys to consider mandating the special-treatment approach. As Fuentes explained:

What I wanted the Commission to do was to say that pregnancy is a unique condition. It happens only to women. Because of that it needs to be treated uniquely and *we need to set standards that employers have to give certain maternity leave and benefits to women.*⁷⁰

In one proposal, for instance, Fuentes advocated a mandate that employers guarantee women a set period of six weeks for leaves of absence, and even if it is possibly unpaid the women are guaranteed the right to return without loss of seniority or position. Interestingly, Fuentes herself had earlier described the roots of this special-treatment approach in the protective labor laws governing women for several decades. As she described in 1967, the “Labor Department, particularly the Women’s Bureau, appears to lean towards that view. It is of interest, for example, that that unit has usually been the champion of state and other protective laws . . . in a similar vein.”⁷¹ Indeed, one commentator conveyed the concerns of equalitarians about this approach, noting that women’s biological differences – which she termed “the womb factor” – have long been cited to justify “restrictive policies [] developed out of an interest in ‘protecting women’ . . . from long hours as well as from overtime pay and advancement.”⁷² The primary criticism of the special-treatment approach

⁶⁹ Fuentes, *supra* note 61, at 3 (emphasis added).

⁷⁰ Sonia Pressman Fuentes, Interview with author, October 20, 2004.

⁷¹ Fuentes, *supra* note 61, at 3.

⁷² Patricia Huckle, *The Womb Factor: Pregnancy Policies and Employment of Women*, in WOMEN, POWER AND POLICY 144-161, at 145 (Ellen Boneparth, ed.); *see also* Blumrosen, *supra* note 30, at 135-136, 184; Wendy W. Williams, *Equality’s Riddle*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 333-335 (1985).

was that its claim to emancipate women through guaranteed benefits would be used to perpetuate assumptions of dependency on males.⁷³

An equal-treatment principle to combat pregnancy-based exclusions challenged this special-treatment approach for securing equal employment opportunity. As a new attorney in the EEOC who was fresh out of law school in 1970, Susan Ross injected a critical voice in support of an equal-treatment norm to combat pregnancy discrimination within Title VII's sex discrimination provision. Ross explained that, after arriving at the EEOC, "I struggled with myself on which approach was better."⁷⁴ During Ross's first year at the EEOC, she recalled reading a statement of principles generated from the Citizens' Advisory Council on the Status of Women, which was composed of twenty women who were private citizens appointed by the President. The Council publicly articulated for the first time an equal-treatment norm to govern classifications based on pregnancy and childbirth. In a statement of principle adopted on October 29, 1970, the Council concluded:

Childbirth and complications of pregnancy are, for all *job-related purposes*, temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of any employer, union, or fraternal society. . . .

No additional or different benefit or restrictions should be applied to disability because of pregnancy or childbirth, and no pregnant woman employee should be in a better position in relation to job-related practices or benefits than an employee similarly situated suffering from other disability.⁷⁵

The Council's statement did not bear any binding force for executive agencies, but as a new attorney in the EEOC Susan Ross joined the discussions about conceptualizing pregnancy in Title VII by noting the importance of this equality principle for pregnancy-based classifications:

⁷³ The Supreme Court rationale in *Muller v. Oregon* for protective legislation codified this perceived link between women's dependency and special treatment:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. . . .

. . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right.

208 U.S. 412, 421-422 (1908) (emphasis added).

⁷⁴ Susan Deller Ross, Interview with author, October 20, 2004.

⁷⁵ Reprinted in CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1970, at 4 (March 1971).

I had read from the Citizens' Advisory Council – Catherine East was the staff person and I knew her from when I testified before Congress for my writing on women's equality issues. The Council's work was for "neither better nor worse but the same" as the only way to ensure real protection for women.⁷⁶

Nancy Stanley, another attorney who joined the EEOC in 1971, also participated in this period of deliberation led by Ross before they agreed to espouse a position contrary to the special-treatment approach favored by Fuentes. As Stanley described:

When I came to the EEOC Susan [Ross] had already adopted this as her project. There was already another approach to guidelines in existence advanced by another woman in the office – Sunny [Fuentes] – that special benefits should be provided for pregnant women. Susan asked me what I thought about this and we talked about this for a while. I said equality, not special benefits, and Susan had agreed.⁷⁷

Additionally informing the normative debate within the EEOC were medical studies of women's employment conditions before and after childbirth. The place of such medical studies in the EEOC's internal deliberations is not documented beyond their purpose to rebut claims by advocates of protective but veritably restrictive labor laws that would mandate the exclusion of pregnant women from employment due to health dangers. Across numerous studies in medical literature, the EEOC relied upon the conclusion that "without complications . . . not only is it medically established that there is no deterioration in a pregnant woman's mental and physical capacity by reason of pregnancy, but several recent studies indicate it is in fact enhanced."⁷⁸

From the competing conceptual frameworks to extinguish pregnancy discrimination emerged their common baseline principle that exclusionary pregnancy policies were sex-based and exerted a dangerous impact on women's potential for equality of opportunity in the workplace. Together, the discussions from Fuentes and Ross were critical in directing the Commission's attention to the issue of pregnancy-based exclusions because, as Chairman Brown noted plainly, "We didn't see an awful lot of the opinion letters. We saw some of them . . . There had not been very much attention to

⁷⁶ Susan Deller Ross, Interview with author, October 20, 2004.

⁷⁷ Nancy Stanley, Interview with author, February 4, 2005.

⁷⁸ Brief for Respondent at 108, *Gilbert*, 429 U.S. 125 (1976).

pregnancy during the time . . . When we finally considered it, the issue was then how it was going to be treated.”⁷⁹ Even as she worked to persuade the Chairman and other commissioners to endorse the equal-treatment framework, Ross anchored her framework on the same baseline norm that informed Fuentes’ remedy: the whipsaw of pregnancy discrimination as facial sex discrimination. As Ross described:

The problem in those days was that pregnant women who were able to work were treated as being unable to work and then when they were in the hospital in labor and paying medical cost, and couldn’t work—then they were treated as if could! So it was a Catch-22.⁸⁰

Fueling the Commission’s fundamental commitment to combat pregnancy discrimination as sex discrimination under Title VII was also the greater activism of women’s groups outside the agency setting. Even as Ross and Fuentes represented the competing poles from the constitutional arena of legal feminists, the nascent social groups themselves had begun to press for attention to pregnancy as a critical issue of sex discrimination both in public pronouncements and, critically, in the filing of complaints.

Just as the accretion of Reasonable Cause decisions marked the incremental evolution of the Commission’s conceptual approach to pregnancy-based exclusions, Commissioner Hernandez described the importance of having feminist groups mobilize the law to demand enforcement in this area:

It took a while to get to pregnancy because we weren’t getting those cases in the beginning . . . Just like the pressure that came in from the race and ethnicity communities had a big impact on the Commission’s interpretations, the same was true for sex discrimination. . . . We had to have some kind of overpowering number of people saying it was discrimination so we could look at it. We didn’t have a whole lot of initiative to go out and start our own cases and we didn’t have the staff or money to do it.⁸¹

It was in direct response to this concern that NOW and other organizations began to debate internally the special versus equal-treatment approach while repeatedly conveying a united opposition to exclusionary pregnancy policies as sex discrimination. In fact, even as a GC attorney, Sonia Fuentes

⁷⁹ William Brown III, Interview with author, March 11, 2005.

⁸⁰ Susan Deller Ross, Interview with author, October 20, 2004.

⁸¹ Aileen Hernandez, Interview with author, April 5, 2005.

attended weekly meetings of the NOW leadership at rotating residential apartments in Washington, D.C. as the issue gained prominence on the Commission’s agenda. Mary Eastwood, a co-founder of NOW who was serving at the time as a staff attorney in the Justice Department’s Office of Legal Counsel, conveyed the baseline equality consensus within NOW rejecting the whipsaw effect of pregnancy discrimination: “What we all knew was that some women can work right until the day of childbirth and really get back to work as fast as possible. Other women are much more disabled from pregnancy.”⁸² Nonetheless, the fervor of the additional debate even within NOW over equal versus special treatment was essential for increasing the pressure on the agency: “Listening to arguments between Betty Friedan and Catherine East on the whole pregnancy issue, I remember they were just yelling at each other! Catherine was afraid that [mandated] pregnancy leave would cause employers to discriminate against women more.”⁸³ As Commissioner Hernandez explained, as NOW and other groups gained prominence, “they began to probe into these things with position papers . . . The Commission got a lot of help and also a lot of pressure from those organizations to move more effectively and dramatically.”⁸⁴

Ultimately the Commission embraced the unambiguous normative commitment to eliminate the whipsaw of pregnancy discrimination as a *prima facie* violation of Title VII’s sex discrimination ban, and the debate between Ross and Fuentes was resolved by the Commission in favor of the equal-treatment approach as the normative basis of the 1972 Guidelines. Ross notes that “[w]e hashed it out in the General Counsel’s office and worked it out in written drafts,” and she further shared her approach in discussions with Patricia King, the assistant to EEOC Chairman William Brown III.⁸⁵ Reflecting the broad normative consensus underpinning the competing remedial

⁸² Mary Eastwood, Interview with author, March 14, 2005.

⁸³ *Id.*

⁸⁴ Aileen Hernandez, Interview with author, April 5, 2005.

⁸⁵ *Id.*

frameworks, Fuentes, as a key participant in shaping the debate leading to the Guidelines, was assigned along with Ross to draft the 1972 Guidelines even after Fuentes's special-treatment approach was not chosen:

They went with the route where the employers have to treat men and women equally. I actually espoused the rationale which lost – and then I was told to draft the guidelines on the other rationale. The Commissioners decided which theory, they told me what to do, and I wrote it.⁸⁶

This deliberation within the EEOC should not obscure the greater attention that was paid to other sex discrimination matters occupying much of the Commission's time outside of the predominant focus on race. As Chairman Brown acknowledged, "In those early years sex discrimination was not really considered that important. And then gradually the number of cases alleging discrimination based on sex very quickly began to build and we had battles with the airlines over flight attendants . . . [and] with the advertisements in the newspapers."⁸⁷ Thus, while the constant factor in the Commission's case-by-case approach through 1972 was its commitment to prohibiting burdensome classifications based on pregnancy – whether under special-treatment or equal-treatment standards – only after debate and deliberation among legal feminists in the EEOC did the Commission finally direct the codification of a comprehensive legal norm prohibiting sex discrimination on the basis of pregnancy.

⁸⁶ Sonia Pressman Fuentes, Interview with author, October 20, 2004.

⁸⁷ William Brown III, Interview with author, March 11, 2005.

C. Guiding Equal Opportunity

On April 5, 1972 the EEOC issued the first Guidelines to directly interpret Title VII's meaning for pregnancy-based classifications. Under the heading: "Employment policies relating to pregnancy and childbirth," the Commission declared:

- (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of title VII.
- (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extension, the accrual of seniority and other benefits and privileges, reinstatement, and payment insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.
- (c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.⁸⁸

Three features of these Guidelines held important implications for the pregnancy equality norm.

First, the Guidelines unambiguously endorsed the equal-treatment principle but incorporated the essential contention of the labor feminists that the structure of the workplace must be accommodated to recognize pregnancy as a normal condition of employment. Declaring any pregnancy-based exclusion a *prima facie* violation of Title VII, section (a) of the Guidelines defined pregnancy-based exclusions as unlawful sex discrimination. This reflects the consensus condemnation of the whipsaw of pregnancy discrimination revealed through case-by-case examinations in different officers of the EEOC over time. Section (b) unambiguously endorsed an equal-treatment mandate, governing employer's health and temporary disability insurance plans, sick leave rules, pension and seniority rights during leave, and reinstatement rights. Attacking a range of exclusionary pregnancy policies betraying employer animus through overt disparate treatment, the provision required that women's inability to work as a result of pregnancy, childbirth and miscarriage

⁸⁸ 37 Fed. Reg. 6819, 6837 (April 5, 1972) (codified at 29 C.F.R. § 1604.10).

be treated like all other disabilities. Employers could not choose to treat the incapacity to work due to pregnancy or childbirth differently from the policy for any other temporary disability. If employees were allowed to take a leave of absence while maintaining seniority and pension rights, the employer could not deny an employee leave on those same terms for maternity.

It bears emphasizing that even while endorsing the equal-treatment principle, the Guidelines also reflected a critical commitment to the ideals of labor feminists condemning pregnancy discrimination from a different perspective. Significantly, the Guidelines do not mandate special treatment for employees during pregnancy or after childbirth. There is no specified period of pregnancy benefits, such as a six-week period of unpaid leave proposed by Fuentes for workers recovering from childbirth. Under section (b), if an employer allows no sick leave or no temporary disability benefits, then that employer is *not* obligated to provide any such accommodations exclusively on the basis of pregnancy. However, section (c) marks a critical limitation on this preceding application of the equal-treatment principle. While no special-treatment mandate is explicitly articulated in the Guidelines, the disparate impact standard of section (c) does expressly forbid termination of a pregnant employee as a result of an inadequate leave policy without a defensible justification of business necessity. To be sure, the provision is notably limited to barring only the disparate impact on women from termination policies. Nevertheless, section (c) reflects a normative balance against a strictly equal-treatment framework and marks an incremental incorporation of the labor feminist concern with structuring the workplace to recognize reproductive difference and accommodate it as a normal condition of employment. This balance crucially informs the shape of the fundamental equality norm instantiated in Title VII through the Pregnancy Discrimination Act.

Second, the Guidelines never presume that a woman is disabled at some arbitrary moment by her pregnancy or recovery from childbirth. This presents a critical contrast with the presumption in the General Counsel's office in the first year of the EEOC where, without extensive discussion, an

Opinion Letter concluded that “maternity is a temporary disability unique to the female sex” with additional risks that justify its exclusion from employer insurance policies. By contrast, the 1972 Guidelines reflect more closely several of the Reasonable Cause decisions explicated above, mandating employers’ equal treatment of women only to the extent that pregnancy or childbirth actually causes a temporary disability. This relocates the authority to the individual woman and her private doctor concerning her capacity to continue or temporarily to cease work on standards equal to the choice of any employee facing other medical conditions or temporary disabilities. Thus, as Ross noted two years after the Guidelines were issued, this equality principle rebuts employers’ “fears . . . based on the assumption that pregnant women are disabled from working for most of the pregnancy.”⁸⁹ The Guidelines empowered women to determine their own capacity to work during pregnancy rather than being forced into unpaid leave while still capable of work.⁹⁰

Finally, while Section B detailed the process of deliberation and the terms of debate within the limited community of legal feminists focused on pregnancy discrimination, the lack of formal public input to the Guidelines reveals a limitation to the normative authority behind these EEOC Guidelines. Specifically, the preamble published with the Guidelines on April 5, 1972 confirms the lack of broad public participation:

Because the material herein is interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable. The Guidelines shall be applicable to charges and cases presently pending or hereafter filed with the Commission.⁹¹

While most regulatory policymaking by administrative agencies is subject to a notice-and-comment period to solicit public input, the lack of public participation and discussion limited the EEOC’s

⁸⁹ BABCOCK ET AL., *supra* note 68, at 317.

⁹⁰ It bears observation that the Guidelines applied this principle to classifications arising from women’s unique childbearing capacity but did not address the equal treatment principle of nondiscrimination in *childrearing*. The principle was later mobilized and developed further to remedy the social construction of the workplace along lines that perpetuate dependence on women for childrearing as well in the campaign for the Family and Medical Leave Act. *See infra* note 338 and accompanying text.

⁹¹ 37 Fed. Reg. 6819 (April 5, 1972).

claim to normative authority outside its institutional jurisdiction. To be sure, the greater prominence of organizations in the emerging women's movement by this time in the early 1970s injected momentum for the equality principle enshrined in these Guidelines. Yet even the emerging movement was not focused deeply on pregnancy discrimination at this time, and the EEOC itself enjoyed only procedural regulatory authority under Title VII, not substantive administrative regulations accorded the force of law.⁹² The Guidelines nevertheless anchored a new legal path of equal treatment for pregnancy discrimination within the executive arena until the mid-1970s. Further, as far as public debate among outside actors to affirm this new principle, the primary impact of the Guidelines was its signaling effect to the broader public in the ensuing inter-institutional dialogue among the agency, Congress, and the judiciary endorsing this norm but confronting the Supreme Court's attempt to undermine a legal baseline of pregnancy-based equality. Part III shows how the campaign for the PDA occupies precisely this niche of public participation in authoritatively codifying this new foundational right.

⁹² The EEOC was authorized "from time to time to issue . . . suitable procedural regulations to carry out the provisions of this subchapter." 42 U.S.C. § 2000e-12(a) (2000).

II. CONSTRUCTING JUDICIAL EQUALITY

*Nobody—and this includes Judges Solomonic or life tenured—has yet seen a pregnant male.*⁹³

The Supreme Court’s decision in *General Electric v. Gilbert* was received as nothing short of “stunning.”⁹⁴ After the EEOC had issued its 1972 Guidelines, six federal courts of appeal and eighteen federal district courts had all interpreted Title VII according to the EEOC’s normative framework, displaying widespread judicial consensus about the meaning of “discrimination on the basis of...sex.”⁹⁵ Yet the Court rejected the unanimous interpretation of twenty-four federal courts and the federal agency responsible for enforcing Title VII. Faced with contrary interpretations of Title VII in the lower courts, the Supreme Court embraced a more constrained normative framework from outside of Title VII precedents. Strikingly, the Court applied to Title VII its narrow vision of sex discrimination under the Constitution.

This Part examines how the intellectual and strategic roots for the Pregnancy Discrimination Act were planted in the constitutional and statutory litigation campaigns of the mid-1970s. Through case studies in *Geduldig* and *Gilbert*, the tension between competing fundamental equality norms becomes palpable. It also shows how the contours of the PDA coalition and its legal arguments for statutory reform were shaped by the reform terrain of judicial campaigns. Section A provides a brief portrait of the treatment of pregnancy and sex discrimination by the Court under the Constitution. Section B then examines closely the contending legal norms mobilized under Title VII in *Gilbert* and

⁹³ Brief for Petitioner at 15, *Struck v. Sec’y of Defense*, adapted from Chief Judge Brown’s opinion dissenting from denial of a motion for rehearing *en banc* in *Phillips v. Martin-Marietta Corp.*, 416 F.2d 1257, 1259 (5th Cir. 1969), *vacated and remanded*, 400 U.S. 542 (1971).

⁹⁴ Ruth Bader Ginsburg and Susan Deller Ross, *Pregnancy and Discrimination*, THE NEW YORK TIMES, January 25, 1977, at 35.

⁹⁵ 42 U.S.C. § 2000e-2(a)(1).

their decisive implications for the norm entrepreneurship and strategic institutionalization of a new super-statutory principle in the Pregnancy Discrimination Act.

A. Pregnancy Discrimination and the Constitution

In the constitutional arena, one might have expected the Court to find some support for pregnancy discrimination claims under the Fourteenth Amendment. In January 1974, the Court had declared unconstitutional two school boards' mandatory leave policies that forced pregnant teachers into unpaid leaves of absence.⁹⁶ Yet in this decision, *Cleveland Board of Education v. LaFleur*, the Court refused to even evaluate the policies in an equality framework barring sex discrimination. Instead, the Court struck the policies as violations of the Due Process Clause for imposing arbitrary timing requirements in mandatory unpaid leave. Concurring in the teachers' victory, Justice Powell did specify that "[i]t seems to me that equal protection analysis is the appropriate frame of reference" but "not every government policy that burdens childbearing violates the Constitution."⁹⁷ Similarly, Justice Blackmun's reflections on *LaFleur* also revealed a clear rejection of the arbitrary deadline for mandatory maternity leave but expressed discomfort with the ambiguous equal protection standard suggested by Justice Powell.⁹⁸ Nevertheless, any uncertainty about the Court's narrow conception of equality in the sex discrimination context was resolved six months later, when Justices Powell and Blackmun joined the 6-3 majority in *Geduldig v. Aiello* to declare discrimination on the basis of pregnancy acceptable under the Equal Protection Clause.

In *Geduldig*, the Court considered whether California could constitutionally pay benefits to persons temporarily disabled from work for any reason with the sole exception of pregnancy-related disabilities. Under the California Unemployment Insurance Code, compensable disabilities included

⁹⁶ *Cleveland Bd. of Ed. v. LaFleur* 414 U.S. 632 (1974)

⁹⁷ *LaFleur*, 414 U.S. at 802.

⁹⁸ "Maternity Leave Cases: Justice Powell's Concurrence" (on file with the Library of Congress in the Papers of Harry A. Blackmun, Box 110, Folder No. 1).

any mental or physical illnesses making an individual “unable to perform his regular or customary work.”⁹⁹ This included individuals incapacitated by voluntary surgical procedures like hair transplants or sex-unique disorders like prostate disease. But the Code unequivocally excluded from coverage the inability to work due to pregnancy: “In no case shall the term “disability” or “disabled” include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.”¹⁰⁰ Along with pregnant women, the only other people disqualified from receiving payments under the Code were individuals confined by courts to institutions for drug addiction, alcoholism, or sexual psychopathy.¹⁰¹

One woman challenging this pregnancy discrimination was Augustina Armendariz, who was denied disability benefits by California when she was temporarily unable to work after suffering a miscarriage. Armendariz had paid into the California disability insurance fund throughout her fifteen years of employment, but she was denied temporary income after her miscarriage. As she recalled in frustration:

I wasn't asking for charity. I had paid into my account! It was a situation where men who could have made themselves disabled by some choice were allowed to get disability, and yet me, working for 15 years, I was not allowed to get it. . . . I got even angrier to see there was that much discrimination, that men were just in total control of the whole situation.¹⁰²

Attorney Peter Weiner, Armendariz's employer at the time, joined with attorney (and former co-clerk) Wendy Williams to challenge this pregnancy-based exclusion in court. As Williams later argued to the Court, “[T]he individual who receives a benefit or suffers a detriment because of a physical characteristic unique to one sex benefits or suffers because he or she belongs to one or the

⁹⁹ CAL. UNEMP. INS. CODE § 2626 (West 1972). This section has since been amended. See CAL. UNEMP. INS. CODE §§ 2626, 2626.2 (Supp. 1973).

¹⁰⁰ *Id.*

¹⁰¹ CAL. UNEMP. INS. CODE § 2678 (West 1972) (quoted in Comment, Geduldig v. Aiello: *Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 444 (1975))

¹⁰² Augustina Armendariz, Interview with author, October 29, 2004.

other sex.”¹⁰³ In an effort to extend the scrutiny of the *Frontiero v. Richardson* plurality,¹⁰⁴ Williams even urged the Court to subject classifications based on sex-unique physical characteristics to strict scrutiny, the judicial review already deployed for classifications based on race, ethnicity, or national origin.¹⁰⁵

The *Geduldig* Court not only refused to subject sex discrimination to heightened scrutiny but further held that pregnancy classifications are not sex discrimination at all. After an extensive analysis of the risk-bearing features of state insurance schemes, only a single footnote in *Geduldig* addresses the contested relationship between pregnancy-based classifications and sex discrimination:

While it is true that only women can become pregnant, it does not follow that that every legislative classification concerning pregnancy is a sex-based classification Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis¹⁰⁶

Thus concluding that pregnancy classifications were not necessarily sex-based, the Court insisted that pregnancy-based exclusions must be analyzed like any other general classification in a rational basis framework. Only invidious intent to use pregnancy as a “pretext” for sex discrimination would make this gender-unique characteristic an unlawful ground of classification. This extremely narrow conception of sex discrimination animated the Court’s evaluation of California’s specific insurance program: “There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”¹⁰⁷ Importantly, this reasoning reflected the nature of the Court’s sex equality jurisprudence. Emerging quite incrementally, the Court’s meaningful enforcement of the Equal Protection Clause ban on sex discrimination during this period

¹⁰³ Brief for Appellees at 31, *Geduldig*, 417 U.S. 484 (1974).

¹⁰⁴ 411 U.S. 677 (1972).

¹⁰⁵ Brief for Appellees, *Geduldig*, 417 U.S. 484 (1974).

¹⁰⁶ *Geduldig v. Aeillo*, 417 U.S. 484, 497 n.20 (1974).

¹⁰⁷ 417 U.S. at 496-97.

reflected a pointed concern with analogizing gender questions to its racial equality jurisprudence.¹⁰⁸ Consequently, the Court framed the relevant distinction as one between pregnant women and non-pregnant men and women to suggest that women’s unique reproductive capacity could not logically fit the Constitution’s sex equality paradigm. In the area of pregnancy, the Court reasoned, men and women simply were not similarly situated. This also reflected the Court’s broader refusal to engage women’s historical experience of pervasive exclusion from the workplace due to the whipsaw of pregnancy discrimination.¹⁰⁹ Notwithstanding the *Geduldig* opinion’s scant analysis of the nexus between pregnancy and sex discrimination relegated to a single footnote, the question of whether pregnancy discrimination was sex discrimination dominated the debate among the Justices’ chambers about the overall holding in this case.¹¹⁰

The impact of *Geduldig* was initially uncertain for several reasons. First, given the extremely limited equality analysis provided by the Court, it was not immediately clear whether the Equal Protection Clause would remain inhospitable to *any* pregnancy-related constitutional challenges or whether the holding would be limited to schemes with such unique “insurance concepts.”¹¹¹ To be sure, the symbolic import of *Geduldig* was unmistakable, a plain message that Fourteenth Amendment litigation would not provide the path to gender equality.¹¹² Nevertheless, legal feminists

¹⁰⁸ Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 953-960 (2002).

¹⁰⁹ *See id.*

¹¹⁰ Memoranda, *Geduldig v. Aiello* and *Circulation by Justice Stewart* (on file with the Library of Congress in the Papers of Harry A. Blackmun, Box 188, Folder No. 12).

¹¹¹ 417 U.S. at 492. The Fourth Circuit Court of Appeals, which was considering *Gilbert* just as *Geduldig* was announced, viewed the Supreme Court’s analysis in *Geduldig* quite narrowly in this way, limiting the decision to its Fourteenth Amendment context in upholding the *Gilbert* plaintiffs’ sex discrimination claim under Title VII. *Gilbert v. General Elec. Co.*, 519 F.2d 61, 666-67 (4th Cir. 1975), *rev’d*, 429 U.S. 125 (1976).

¹¹² As Mayeri, *supra* note 23, observes, after *Geduldig* Yale Law School Professor Thomas Emerson – one of the primary intellectual architects of the case for the Equal Rights Amendment (ERA) – told the Connecticut General Assembly consider rescission of the ERA: “Whatever hope there may once have been of achieving equal rights for women thru interpretation of the fourteenth amendment must now plainly be abandoned.” Statement of Thomas I. Emerson Before the Government Administration and Policy Committees of the Connecticut General Assembly on Proposed Resolution to Rescind Connecticut’s Ratification of the Equal Rights Amendment (Mar. 1977) (Thomas Emerson Papers, 92-M-56, Box 24, Folder: ERA: Current Basic Materials, on file with the Sterling Memorial

wondered whether other settings might have produced a different normative reception by the Court. As an attorney for the Women’s Rights Project of the ACLU, Ruth Bader Ginsburg had hoped to bring a more potent test case of pregnancy discrimination but it was procedurally mooted just before oral argument in the Supreme Court.¹¹³ Williams recalled: “[Ginsburg’s] case was actually a better case than *Geduldig* to raise the equal protection argument, so we were both very unhappy that her earlier case got mooted out.”¹¹⁴ Nonetheless, the *Geduldig* Court’s specific analysis of the insurance program betrayed the severely constraining underlying equality norm that could have broad implications despite its exploration in a single footnote.

Second, *Geduldig* was a challenge resolved largely in an analytic framework that was specific to constitutional rational-basis scrutiny and that relied upon a definition of sex discrimination unresponsive to competing institutional norm elaborations.¹¹⁵ Although appellants, appellees, and several amici in *Geduldig* vigorously debated the judicial deference owed to the EEOC Guidelines interpreting the meaning of sex discrimination under Title VII, the *Geduldig* majority opinion did not address at all the interpretive authority or findings of the EEOC. Of course, this unfavorable ruling

Library, Yale University); see also Testimony of Emerson on Ratification of the Equal Rights Amendment, supra note 319, at 9 (“One can only conclude that resort to the Supreme Court is a lost hope.”).

¹¹³ *Struck v. Sec’y of Def.*, 460 F.2d 1372 (9th Cir. 1971), vacated and remanded to consider the issue of mootness, 409 U.S. 1071 (1972). In this case, Captain Susan Struck was ordered by the Air Force to either have an abortion on the base, or leave the service. After Captain Struck lost her challenge to these regulations in the federal district and appeals court of the Ninth Circuit, the U.S. Solicitor General intervened and the Air Force granted a waiver for Captain Struck, thus mooted the case. In *Struck*, Ginsburg had established the theoretical framework for recognizing pregnancy discrimination as a violation of the Equal Protection Clause. See Brief for Petitioner at 16, *Struck*, 409 U.S. 1071 (1972) (No. 72-178) (“The Air Force regulation directing Captain Struck’s discharge is a blatant example of stereotypical prejudice that shuts out consideration of individual capacities. The regulation singles out pregnancy, a physical condition unique to women involving a normally brief period of disability, as cause for immediate voluntary discharge. No other physical condition occasioning a period of temporary disability, whether affecting a man or a woman, is similarly treated.”); see generally Ruth Bader Ginsburg, Statement “Litigating for Gender Equality” in *Women’s Rights in Theory and Practice*, Woodrow Wilson International Center for Scholars, May 21, 2002.

¹¹⁴ Wendy Williams, Interview with author, October 20, 2004. Attorney Marcia Greenberger, a signatory to one of the *Geduldig* amicus briefs, confirms this account that Ruth Bader Ginsburg “had been handling a case dealing with pregnancy discrimination in the military. She had thought that would have been the right case to get the Supreme Court to address pregnancy discrimination under the Constitution, but the case was settled out.” Interview with author, February 4, 2005.

¹¹⁵ See 417 U.S. at 494-95.

did not bode well for the Title VII challenge simultaneously making its way to the Supreme Court, a sign that was not lost on the advocates who would wage the *Gilbert* challenge before the Court two years later under the Civil Rights Act. *Gilbert* was initially filed in federal court in 1972, the same year as *Geduldig*, but the latter reached the Supreme Court first. In fact, the General Electric Company (G.E.) – the petitioner in *Gilbert* – filed amicus curiae briefs in *Geduldig* in an attempt to undermine the interpretive authority of the EEOC before its own case reached the Court. As G.E. reminded the Court in *Geduldig*: “[A]lthough the case represents a narrow equal protection issue under the Fourteenth Amendment, its outcome may affect the interpretation and implementation of Title VII...”¹¹⁶ The potential import of *Geduldig* was also apparent to other business, labor, and rights organizations, as the list of amici mirrors those involved in related litigation or in *Gilbert* as amici.¹¹⁷ Interestingly, even within the Supreme Court, deliberations were apparently shaped by the forthcoming evaluation of *Gilbert*, just as *LaFleur*’s resolution may have been affected by the pending case of *Geduldig*. Within the chambers of Justice Blackmun, who voted with the majority in *Geduldig*, one bench memo to the Justice noted that “the real impact of our decision here [in *Geduldig*] will be on private employee disability programs rather than upon any state program.”¹¹⁸ And yet, the majority in *Geduldig* devoted no attention to the EEOC’s norm elaboration based on years of case experience and only passing reference in a footnote to the central equality principle at stake in both cases to condemn the whipsaw of pregnancy discrimination as *prima facie* sex discrimination. In this light, the Court’s unfavorable constitutional resolution suggested a potentially hostile reception to the statutory demand for equality protection against pregnancy discrimination.

¹¹⁶ Jurisdictional Statement of Amicus Curiae General Electric, at 4, *Geduldig*.

¹¹⁷ Amicus briefs for California were filed by General Electric and American Telephone & Telegraph, and by the United States Chamber of Commerce and the National Association of Manufacturers. For the plaintiffs, amicus briefs were filed by the International Union of Electrical, Radio and Machine Workers, the AFL-LCIO, and such women’s rights organizations as the Women’s Equity League and the National Organization for Women.

¹¹⁸ Memoranda, *Geduldig v. Aiello* (on file with the Library of Congress in the Papers of Harry A. Blackmun, Box 188, Folder No. 12).

The immediate jurisprudential impact of *Geduldig* on interpretations of the Civil Rights Act may have been most apparent to those advocates who had enjoyed years of success invoking Title VII in the lower courts. Ruth Weyand, a labor union attorney who argued the Title VII pregnancy cases from 1972 to 1976 in twenty-four federal courts, knew full well not only the dangerous analytic precedent in *Geduldig* but also the ominously similar fact pattern presented in the private sector in *Gilbert*. In an unpublished interview, Weyand made clear her feeling that “the problem in the Supreme Court was created by *Geduldig v. Aiello*.”¹¹⁹ Asked in 1977 whether she would have advanced the Title VII claim if the constitutional holding of *Geduldig* had already been issued, Weyand responded candidly: “No. I would have gone for legislation instead if *Geduldig* had come down before the [*Gilbert*] district court decision.”¹²⁰ Instead, just two years later Weyand appeared before the Supreme Court to challenge General Electric’s exclusion of pregnant workers from its comprehensive disability benefits program. Once again the Court confronted whether policies excluding workers solely on the basis of pregnancy constituted sex discrimination, but this time the fundamental question was posed outside the constitutional arena.

¹¹⁹ Ruth Weyand, Interview with Dr. Anne Costain, April 13, 1977 (on file with author).

¹²⁰ *Id.* Marcia Greenberger also expressed surprise that *Geduldig* preceded *Gilbert*, explaining that as director of the Women’s Rights Project at the Center for Law and Social Policy she had expected the stronger Title VII platform to provide the foundation for later equal protection reasoning: “The original expectation of many people was that the *Gilbert* case would precede any constitutional adjudication on this issue.” Interview with author, February 4, 2005.

B. Gilbert: “The day of infamy!”¹²¹

As much as the *Geduldig* Court avoided extensive explication of the constitutional relationship between discrimination on the basis of sex and pregnancy, in *Gilbert* the issue placed squarely before the Court was its normative conception of equality and the nexus to pregnancy discrimination. At issue was General Electric’s temporary disability benefit plan, which paid 60% of straight time wages up to \$150 per week for three weeks of absences due to any disability – including vasectomies, circumcisions, hair transplants, skiing injuries, or attempted suicides – with the sole exclusion of disabilities related to pregnancy. Nine employees who had been denied disability benefits under this plan while absent from work as a result of pregnancy sued G.E. under Section 703 of the Civil Rights Act.¹²²

The *Gilbert* statutory challenge to pregnancy discrimination was the product of years of coordination by legal advocates in the women’s movement and other supportive organizations. As a lawyer for the International Union of Electrical, Radio, and Machine Workers (I.U.E.) and the lead attorney in *Gilbert*, Ruth Weyand explained that “the union’s interest in pregnancy ran way before that case We suggested that attention focus on G.E. because (1) they are our largest employer, and (2) we could probably have a test case from G.E.”¹²³ With 40% of the I.U.E.’s membership

¹²¹ Wendy Williams, Interview with author, October 20, 2004 (characterizing December 7, 1976, the date on which the *Gilbert* decision was delivered).

¹²² Section 703(a) provides:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

¹²³ Ruth Weyand, Interview with Dr. Anne Costain, April 13, 1977 (on file with author) (emphasis added).

composed of women workers,¹²⁴ the pregnancy-based exclusions posed an unmistakable threat for these women’s careers and more fundamentally for their often-indispensable income. Additionally, union leaders leveraged democratic legitimacy in their bargaining. The I.U.E. gained early, unanimous support from its plumbers, carpenters, sheet metal workers, and steel workers for broad race and sex antidiscrimination demands, *including* disability coverage for pregnant women.¹²⁵ Consequently, Weyand noted, “Beginning in 1950, every time we entered into collective bargaining with G.E. we asked for pregnancy coverage – in 1950, 1955, 1960, 1966”¹²⁶ Subscribing to stereotypes about women that persisted in the Court’s decisions and later animated testimony before Congress, G.E. had first rejected these requests by arguing the majority of pregnant workers did not return to their jobs. When that claim was refuted the company then said pregnancy was not a disability, even changing its contract so pregnancy *was* treated as an illness for all coverage including pension credits, seniority, or eligibility for sick leave—but not disability benefits.¹²⁷

The I.U.E.’s strategy reflected the determination among social movements to launch the process of securing social change by mobilizing judicial campaigns as both a signaling event and especially for normative endorsement. The I.U.E.’s determination to develop a test case against G.E.’s discriminatory policies came to a head in 1971 after years of failure to win concessions in the collective bargaining process. In order to launch the litigation challenges in federal court,

We told our members to start filing disability forms to exhaust the contract procedure. G.E. refused to give out the forms and we got a court order to make the forms available. . . . The judge commented, “you are certainly making progress—at least you have the claim forms.”¹²⁸

¹²⁴ Letter from David J. Fitzmaurice, I.U.E. President, to Senator James Abourezk, July 28, 1977 (on file with author); *see also Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 282 (1977) (statement of Boris H. Block, General Secretary-Treasurer, United Electrical Radio & Machine Workers of America).

¹²⁵ Ruth Weyand, Interview with Dr. Anne Costain, April 13, 1977 (on file with author).

¹²⁶ Brief of Petitioner, *Gilbert*, 429 U.S. 125 (1976); *see also* Ruth Weyand, Interview with Dr. Anne Costain, April 13, 1977 (on file with author).

¹²⁷ Ruth Weyand, Interview with Dr. Anne Costain, April 13, 1977 (on file with author).

¹²⁸ *Id.*

After exhausting the G.E. claim and grievance procedure, women finally began filing charges against General Electric in December 1971. Several months later, the EEOC issued its Reasonable Cause decision: “[W]e conclude that [G.E.]’s plan discriminates against the Charging Parties and females as a class because of their sex within the meaning of Section 703(a) of Title VII.”¹²⁹

1. *Staking Out Normative Ground*

The arguments mobilized in *Gilbert* reflected the parties’ focus on setting the normative baseline for the Court’s interpretation of sex discrimination. In contrast to the Court’s extremely limited elaboration of the sex equality norm in *Geduldig*, both sides in *Gilbert* anchored all of their arguments in competing frameworks for conceiving of sex discrimination. As Justice Brennan later described: “This case is unusual in that it presents a question the resolution of which at first glance turns largely upon the conceptual framework chosen to identify and describe the operational features of the challenged disability program.”¹³⁰ From petitions for certiorari to supplemental briefs, each party struggled to define its equality norm as the Court’s baseline. This Sub-Section examines the competing sources and legal arguments constructed by the parties in the ongoing debate over the legal relationship between pregnancy discrimination and sex discrimination.

The clashing normative frameworks proposed by the parties were evident at several levels. First and most fundamentally, G.E. elevated what was a footnote in *Geduldig* into the foundation of its entire argument, contending that the constitutional holding in *Geduldig* “cannot be blotted out”¹³¹ and was “dispositive of the question now before the Court.”¹³² Reprinting footnote 20 in its entirety, G.E. excoriated the federal courts of appeal – for their Title VII holdings – because they “did not come to grips with the proposition, made clear in *Geduldig*, that there is a lack of identity between

¹²⁹ EEOC Decision Case No. YDC3-093 (May 18, 1973), in Joint Petition of All Parties at 47a, *Gilbert*.

¹³⁰ *General Electric v. Gilbert*, 429 U.S. 125, 147 (1976).

¹³¹ Brief of Petitioner at 30, *Gilbert*, 429 U.S. 125 (1976).

¹³² *Id.* at 26; *see also* Amicus Curiae Brief of The Chamber of Commerce at 6, *Gilbert*, 429 U.S. 125 (1976).

gender and the exclusion of pregnancy from disability coverage.”¹³³ Supporting G.E., the Chamber of Commerce sought not simply to persuade the Court that the constitutional holding bore key implications for Title VII but, instead, that the phrase “sex discrimination” in Title VII “can have only one meaning: the meaning that is compelled by the Constitution.”¹³⁴ Regardless of whether the Court accepted a dichotomy between the constitutional and statutory norm of sex equality, G.E. argued, in any event its conceptual framework rested on the baseline principle that pregnancy could not be evaluated as a basis of sex discrimination. “[I]t is irrelevant whether or not Title VII has a broader sweep than does the equal protection clause” because, according to *Geduldig*, at stake was a risk-based – not a sex-based – distinction. In fact, expressing the very argument liberal feminists had sought to avoid by emphasizing an equal-treatment standard, one amicus party for G.E. contended that coverage of pregnancy-related disabilities would mean “pregnant women would be improperly afforded preferential treatment.”¹³⁵

Strikingly, several G.E. amici invoked the Equal Rights Amendment (ERA)¹³⁶ to validate a differential-treatment model of sex discrimination that would allow exclusions where real differences exist. In the absence of legislative history for Title VII,¹³⁷ they turned to the ERA legislative history to argue that Congress must have intended its legislation to sanction “special treatment” – that is, exclusionary treatment – on the basis of sex when real differences are evident because the ERA would have done so. To be sure, this portrait of the ERA was vigorously contested by legal feminists in several important ways considered below. Nonetheless, as a coalition of airline companies told the Court, during the 1970 and 1971 hearings on the ERA Congress explicitly debated the “concept of

¹³³ Brief of Petitioner at 30, *Gilbert*, 429 U.S. 125 (1976).

¹³⁴ Amicus Curiae Brief of The Chamber of Commerce at 4, *Gilbert*, 429 U.S. 125 (1976).

¹³⁵ Motion of Celanese Corporation For Leave to File A Brief as Amicus Curiae at 3, *Gilbert*, 429 U.S. 125 (1976).

¹³⁶ The proposed ERA required that: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”

¹³⁷ *See supra* note 11.

sex discrimination in a situation where members of the two sex were *not similarly situated*.¹³⁸ As proof that Congress had surely embraced the conception of equality sanctioning special treatment for real differences, the airline coalition pointed to a statement signed by fourteen members of the Senate Judiciary Committee:

The original resolution does not require that women must be treated in all respects the same as men. “Equality” does not mean “same.” As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, law providing for payment of the medical costs of child-bearing could only apply to women.¹³⁹

Similarly, leading ERA advocate and Yale Law School Professor Thomas Emerson had assured the Senate that “there is one type of situation where the law may focus on a sexual characteristic . . . where the legal system deals directly with a physical characteristic that is unique to one sex.”¹⁴⁰ Thus, G.E. amici sought to undermine the arguments of equalitarian legal feminists by suggesting the ERA meant “that laws concerning . . . *child-bearing* . . . are not laws which discriminate on the basis of sex.”¹⁴¹

Finally, nearly every party supporting G.E.’s differential treatment asserted that the EEOC Guidelines should be repudiated by the Court as “the product of naked administrative fiat.”¹⁴² The Commission’s earlier Reasonable Cause decision in this case had concluded decisively that G.E.’s treatment of pregnant workers constituted unlawful sex discrimination.¹⁴³ Consequently, fourteen out of the fifteen briefs filed in support of G.E. attacked the EEOC guidelines as entitled to no deference because: (1) the guidelines were neither contemporaneous with enactment Title VII nor a consistent construction of the statute; and (2) the Commission had “suddenly” changed its position without

¹³⁸ Amicus Curiae Brief of Alaska Airlines et al. at 21, *Gilbert*, 429 U.S. 125 (1976).

¹³⁹ *Id.* at 22, quoting from H.R. REP. NO. 92-359, 92d. CONG., 1st Sess. 7 (1971).

¹⁴⁰ Statement of Thomas Emerson, Hearings on S.J. RES. 61 and S.J. RES. 231 for the Sen. Comm. on the Judiciary, 91st CONG, 2d SESS. 298-99 (1970), quoted in Amicus Curiae Brief of Westinghouse Electric, at 23-24, .

¹⁴¹ Amicus Curiae Brief of Alaska Airlines et al. at 22, *Gilbert*, 429 U.S. 125 (1976); *see also* Amicus Curiae Brief of Westinghouse Electric at 19-26, *Gilbert*, 429 U.S. 125 (1976).

¹⁴² Amicus Curiae Brief of Alaska Airlines et al. at 23, *Gilbert*, 429 U.S. 125 (1976).

¹⁴³ EEOC Decision Case No. YDC3-093 (May 18, 1973), in Joint Petition of All Parties at 47a, *Gilbert*, 429 U.S. 125 (1976).

“thoroughly or objectively considered” public debate.¹⁴⁴ These attacks on the EEOC guidelines were embraced by the Court as important grounds for the conclusions in *Gilbert*. Yet in the next Sub-Section examining the *Gilbert* opinion, I identify the misleading and in some instances false assertions made by these briefs on which the Court relied in vindicating G.E.’s pregnancy discrimination.

Appellee I.U.E. (on behalf of the class of women suing G.E.) joined with a host of other women’s rights and labor union organizations to persuade the Court to endorse the equal-treatment approach to sex discrimination in this case articulated by the EEOC. The parties opposing G.E. enjoyed the benefit of a factual record and district court finding of discriminatory motives in G.E.’s exclusion of pregnancy from fringe benefits, as well as the Court of Appeals conclusion that Congress intended to include pregnancy within the sex discrimination prohibition. Nevertheless, the I.U.E. went beyond relying on the favorable lower court findings, constructing an affirmative case in support of an equal-treatment norm to define the scope and application of facial “discrimination because of . . . sex.”

To undermine G.E.’s normative dependence on the Constitution to sanction pregnancy-based classifications according to *Geduldig*, the I.U.E. and other organizations stressed the judicially articulated distinction evident in the meaning of equality under the Constitution versus the Civil Rights Act. In *Washington v. Davis* the Court ruled that the Constitution could impose a standard for showing Title VII discrimination that differs from the constitutional standards of equal protection.¹⁴⁵ *Davis* furnished the I.U.E. with a constitutional precedent which could rebuff the *Geduldig*-based reasoning animating all of the pro-G.E. arguments. Indeed, the I.U.E. emphasized that *Davis* could

¹⁴⁴ See, e.g., Amicus Curiae Brief of Westinghouse Electric, 26-35. Other grounds included the claim that the EEOC had exceeded its institutional authority by issuing guidelines bearing far more substantive import than merely periodic, procedural regulations.

¹⁴⁵ *Washington v. Davis*, 426 U.S. 229, 239 (1976).

actually preclude *Geduldig*'s applicability. Just as the Court could rely on conceptions of racial discrimination in the constitutional arena that differ from the statutory context, so, too, would this distinction animate different conceptions of sex discrimination in the equal protection and Title VII settings. The decision underscored the lack of identity between equality in the judicially articulated constitutional arena and in the legislatively constructed civil rights setting.¹⁴⁶

Additionally, several women's organizations vehemently rejected invocation of the ERA to justify the exclusion of pregnant women from disability coverage. With authors including Ruth Bader Ginsburg and Professor Thomas Emerson of Yale Law School, an amicus curiae brief from the Women's Law Project and the ACLU directly challenged the reasoning and isolated testimonial evidence cited in support of G.E.:

No area of the law is exempt; no defenses for an explicit gender-based classification are provided; no exceptions to the scope of dimensions of equality are permitted. . . .

. . . Among the aspects of discrimination against working women upon which Congress focused attention was penalization of childbearing. It was acknowledged that such discrimination had no place in the bias-free system Congress envisioned.¹⁴⁷

The group further insisted that, under the proposed ERA, pregnancy classifications were unquestionably conceived to be included within the sex discrimination ban. But instead of the rational-basis test used in *Geduldig*, the ERA would demand "strict scrutiny in constitutional adjudication".¹⁴⁸

If G.E. were a state employer subject to the ERA, its treatment of disabilities related to pregnancy and childbirth would not survive the scrutiny appropriate under the amendment.... In the context of employment, disabilities related to pregnancy and childbearing are not different from other temporary

¹⁴⁶ It also ensured the continuing validity of the disparate impact standard for statutory discrimination violations even as *Davis* foreclosed this measure under the Equal Protection Clause. The import of this standard as an alternative to the disparate treatment measure is considered below. See *infra* notes 166-170 and accompanying text.

¹⁴⁷ Amicus Curiae Brief of the Women's Law Project and the American Civil Liberties Union at 10-11, *Gilbert*, 429 U.S. 125 (1976).

¹⁴⁸ *Id.* at 15 (citing Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971)).

disabilities. Both involve temporary inability to work. ...They exist whether the disabling condition is childbirth or a broken leg.¹⁴⁹

Thus, to inform the Court's understanding of the robust equality mandate Congress envisioned, the Women's Law Project and ACLU sought to use the ERA as a platform on which to reconceive the constitutional normative baseline for sex discrimination away from the narrow vision of sex discrimination and the rational-basis scrutiny used in *Geduldig*.

Finally, the I.U.E. anchored its competing equality framework firmly in the foundational guidelines issued by the EEOC. Citing a host of outside medical studies considered by the EEOC, the I.U.E. argued the EEOC had carefully considered extensive evidence illustrating the whipsaw of pregnancy discrimination, specifically showing that pregnant women were capable of working long past the time of their forced leave and of returning to work earlier than perceived by employers.¹⁵⁰ They also cited the "expertise of the EEOC" upon which Congress expressly relied in passing the 1972 amendments to Title VII, noting that the patterns or systems of discriminatory practices could be identified best by the Commission:

It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful.¹⁵¹

The I.U.E. explicated each of the five forms of pregnancy-related discrimination targeted by the EEOC to demonstrate how they constitute facial sex discrimination, and also scrutinized employer policies to show how the intentional "invidiousness of [pregnancy] discrimination becomes apparent."¹⁵² As a result, the EEOC's expertise – relied upon by Congress – provided institutional vindication of the principle of sex discrimination that condoned no place for employer burdens on pregnant workers.

¹⁴⁹ Amicus Curiae Brief of the Women's Law Project and the American Civil Liberties Union at 19-20, *Gilbert*, 429 U.S. 125 (1976).

¹⁵⁰ Brief for Appellees at 106-112, *Gilbert*, 429 U.S. 125 (1976).

¹⁵¹ H. REP. NO. 92-238, 92d CONG., 2d, SESS., U.S. Cong. & Adm. News at 2144 (quoted in Brief for Appellees at 116-117).

¹⁵² Brief of Appellees at 117, *Gilbert*, 429 U.S. 125 (1976).

2. *Distinguishing Pregnancy and Sex Discrimination*

Gilbert, a 6-3 majority decision authored by Justice Rehnquist, held that General Electric's sole exclusion of disabilities arising from pregnancy does not constitute unlawful sex discrimination. The men of the Supreme Court embraced a construction of Title VII precisely according to the narrow conception of sex discrimination articulated in *Geduldig*, with far-reaching implications for a range of discriminatory practices against pregnant workers specifically and for the broader meaning of sex discrimination for all women beyond their unique childbearing capacity.

First, *Gilbert* marked a dangerous threat to the scope of federal antidiscrimination laws passed by Congress by constraining the meaning of Title VII according to the Court's *constitutional* precedent. While disclaiming that Congress might not have intended to incorporate into Title VII the Court's constitutional vision of discrimination, Justice Rehnquist nonetheless ruled:

The similarities between the congressional language and some of those [Equal Protection Clause] decisions surely indicate that the latter are a useful starting point in interpreting the former. Particularly in the case of defining the term "discrimination," which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII.¹⁵³

Since *Geduldig* and *Gilbert* both involved a disability plan from which pregnancy-related disabilities were excluded, the Court concluded *Geduldig*'s rejection of an equal protection challenge "is quite relevant."¹⁵⁴ In fact, the Court's reasoning extended further. Justice Rehnquist held that not only do the conceptual similarities between the challenges and the discrimination at stake make *Geduldig* quite relevant, but the Court was justified to presume that Congress *intended* its Title VII sex discrimination provision to reflect an equality norm that was "*traditionally meant*" under the Court's "long history of judicial construction" of discrimination under the Fourteenth Amendment.¹⁵⁵

The concept of "discrimination," of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a

¹⁵³ *General Electric v. Gilbert*, 429 U.S. 125, 133 (1976).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 145 (emphasis added).

long history of judicial construction. When Congress makes it unlawful for an employer to “discriminate . . . because of . . . sex,” without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant.¹⁵⁶

Gilbert’s unbridled endorsement of what the Court has traditionally conceived to be sex discrimination in its long history of judicial construction marked a drastic presumption that threatened to reverse many gains secured by women in the 1970s. The Court depended on the negative argument, that Congress did not provide legislative history to support its more vigorous enforcement of women’s rights, in order to fill that “void” with a hostile history of narrow judicial construction. As late as 1970, this judicial history sanctioned the constitutional exclusion of women from countless areas of economic, political, and social life, including barriers to participation in certain professions with equal pay because of “natural” differences. The *Gilbert* Court quoted *Geduldig* directly to make clear that the more rigorous judicial scrutiny deployed in early 1970s cases would not inform the judicial construction for all sex discrimination challenges: “This case is a far cry from cases like *Reed v. Reed*, and *Frontiero v. Richardson*, involving discrimination based upon gender as such. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics.”¹⁵⁷ Instead, the threat posed in *Gilbert*’s reasoning was apparent from the earlier judicial construction of equality’s “traditional meaning” in light of unique characteristics, as the Court stated in one such holding:

History discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, *she has been looked upon in the courts as needing especial care that her rights may be preserved.*¹⁵⁸

Thus, the reasoning of *Gilbert* threatened no less than an extension of this hostile normative conception of equality under the Constitution into the statutory sphere, where this “especial care”

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 134 (quoting *Geduldig*, 417 U.S. at 496-97 n.20).

¹⁵⁸ *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (emphasis added).

would present an obstacle to more robust legislative enforcement of civil rights.

Notably, this opinion marked the second appearance of *Gilbert* on the Supreme Court docket, as it had been heard in the previous Term. The Justices had deadlocked in a 4-4 vote¹⁵⁹ but determined to call for rehearings since Justice Blackmun had sat out the argument in the 1975 Term. The change in the 1976 Term providing the 6-3 majority was Justice Powell's vote shift and Justice Blackmun's decision to join the majority despite several pointed reservations, one of which prompted his concurring opinion.¹⁶⁰ Despite his reservations, however, Justice Blackmun pointedly presumed the importance of *Geduldig* for the *Gilbert* resolution to avoid "an anomaly" which would be "almost unanswerable" in equality doctrine.¹⁶¹ As he noted in considering *Gilbert*, "If the *Geduldig* plan imposed by California is not discriminatory, the precedent is a powerful one."¹⁶²

Gilbert thus rejected the legal feminists' consensus about the whipsaw of exclusionary pregnancy policies, specifically foreclosing Title VII from reaching such classifications as *prima facie* forms of sex discrimination because "gender-based discrimination had not been shown to exist."¹⁶³ Again, while disclaiming that *Geduldig* was only a "starting point" for its statutory construction of sex discrimination, the *Gilbert* Court cited the lack of *constitutional* identity between pregnancy discrimination and sex discrimination to foreclose such identity in Title VII: "The quoted language from *Geduldig* leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy . . . was not in itself discrimination based on

¹⁵⁹ Notes of Justice Blackmun on *General Electric v. Gilbert*, at 2 (on file with the Library of Congress in the Papers of Harry A. Blackmun, Box 238, Folder No. 8).

¹⁶⁰ See *infra* note 170 and accompanying text.

¹⁶¹ Notes of Justice Blackmun on *General Electric v. Gilbert*, at 2 (on file with the Library of Congress in the Papers of Harry A. Blackmun, Box 238, Folder No. 8).

¹⁶² *Id.* at 4. It is noteworthy that even as Justice Blackmun decided to abide by this "powerful" constitutional precedent in the statutory arena, he privately found consolation in Congress's ability, if necessary, to exercise its democratically legitimate corrective measure in response. See *infra* note 179.

¹⁶³ *Gilbert*, 429 U.S. at 135.

sex.”¹⁶⁴ Remarkably, *Gilbert* even explicitly invoked *Geduldig* to reverse the district and appellate courts’ determination that General Electric’s pregnancy-based classification *was*, in this particular case, a pretext for sex discrimination:

The Court of Appeals was therefore wrong in concluding that the reasoning of *Geduldig* was not applicable to an action under Title VII. Since it is a finding of sex-based discrimination that must trigger . . . the finding of an unlawful employment practice under § 703(a)(1), *Geduldig* is precisely in point in holding that an exclusion of pregnancy . . . is not a gender-based discrimination at all.

Pregnancy is of course confined to women, but it is in other ways significantly different from the typical covered disease or disability . . . The contrary arguments adopted by the lower courts . . . were largely rejected in *Geduldig*.¹⁶⁵

Thus, the *Gilbert* Court applied its constitutional vision to erect a dispositive boundary around the scope of sex discrimination banned by Congress through Title VII.

The final normative challenge to Congress’s authority for legal norm entrepreneurship was evident in the Court’s analysis of the *disparate impact* of G.E.’s pregnancy-based exclusions. Justice Rehnquist recognized that *Washington v. Davis* sanctioned different standards of proof for a *prima facie* violation of Title VII compared to the Equal Protection Clause, citing the discriminatory effects test of *Griggs*. Yet the following analysis shows how the Court’s rejection of any disparate impact in G.E.’s sole exclusion of pregnancy from coverage betrayed reasoning that threatened to undermine the disparate impact standard altogether and to consolidate further the restrictions of the Constitution on the normative equality framework of Title VII.

To begin, Justice Rehnquist embarked on the *Griggs* analysis only after noting he was “[e]ven assuming that it is not necessary in this case to prove intent to establish a *prima facie* violation of § 703(a)(1), but cf. *McDonnell Douglas Corp. v. Green* . . .”¹⁶⁶ Some debate among the Justices composing the majority had surfaced because the *Griggs* Court had validated the disparate impact test in a case that happened to allege a violation of Section 703(a)(2) of the Civil Rights Act

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 136.

¹⁶⁶ *Id.* at 137.

while the *Gilbert* plaintiffs had alleged a violation of Section 703(a)(1). But the Court had already also applied the *Griggs* test to the very provision at stake in *Gilbert*, Section 703(a)(1).¹⁶⁷ Nonetheless referencing *McDonnell Douglas*'s conclusion that *Griggs* “dealt with standardized testing . . . which overstates what is necessary for competent performance,”¹⁶⁸ Justice Rehnquist implied that G.E.'s classification on the basis of disabilities attributable to pregnancy might be different from the overstated importance of “testing devices” at stake in the racial discrimination context. But this resembled the *Washington v. Davis* reasoning in the constitutional setting at odds with the *Griggs* statutory model in which disparate effects could be controlling. Justice Rehnquist explicitly acknowledged in a personal note to Justice Blackmun that, even as his majority opinion rejected the claim that G.E.'s policies bore a disparate impact, he intentionally left ambiguous the scope of *Griggs*'s application to 703(a)(1). Justice Rehnquist refused to make changes to the language examined below because it would “run more of a risk than I want . . . of deciding *sub silentio* that effect alone is sufficient under all of the various provisions of Title VII.”¹⁶⁹ Thus, the threat posed in the majority's disparate impact analysis even prompted Justice Blackmun to write a concurrence in the *Gilbert* holding specifying: “I do not join any inference or suggestion in the Court's opinion—if any such inference or suggestion is there—that effect may never be a controlling factor in a Title VII case, or that *Griggs v. Duke Power Co.*, is no longer good law.”¹⁷⁰

The Court's application of *Griggs* to G.E.'s pregnancy classification severely undermined the purpose of the effects test. While the Court had not recognized the possibility of an effects-based violation in *Geduldig*, the *Gilbert* Court nevertheless examined the exclusion of pregnancy-related disabilities by G.E. in precisely the same framework as *Geduldig*:

¹⁶⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S.792 (1973) (Powell, J., for a unanimous Court).

¹⁶⁸ *Gilbert*, 429 U.S. at 137 n.14.

¹⁶⁹ Letter from Justice William H. Rehnquist to Justice Harry A. Blackmun, at 1 (on file with the Library of Congress in the Papers of Harry A. Blackmun, Box 238, Folder No. 7).

¹⁷⁰ *Id.* at 146 (Blackmun, J., concurring).

As in *Geduldig*, we start from the indisputable baseline that “[t]he fiscal and actuarial benefits of the program accrue to members of both sexes,” 417 U.S. at 497 n.20. . . . The Plan, in effect (and for all that appears), is nothing more than an insurance package, which covers some risks but excludes others . . . and is facially nondiscriminatory in the sense that “[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.” *Geduldig*, 417 U.S. at 496-497.¹⁷¹

Since the Court framed G.E.’s exclusionary pregnancy as *sex-neutral* and governing merely *additional risks* according to *Geduldig*, the Court then applied the disparate impact test to compare the distribution of benefits under the entire risk “package” of financial benefits under the G.E. Plan for men and for women. Indeed, Justice Rehnquist simply did not address the unassailable fact that even if it were facially neutral G.E.’s exclusion of pregnancy-related disability could only possibly affect women. Instead, the Court plainly stated that “as there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect.”¹⁷²

The Justices composing the majority repeatedly emphasized in their deliberations this larger amount of overall benefits that women received despite the complete exclusion of coverage due to pregnancy-related inability to work.¹⁷³ But herein rested the Court’s obfuscation, evaluating only the total effects of G.E.’s disability program as it covers disabilities affecting both men and women. Justice Rehnquist implicitly recognized that male-unique physical characteristics may be covered, but should the Court have evaluated the exclusion of female-unique risks then Justice Rehnquist feared “endanger[ing] the common-sense notion that an employer who has no disability benefits program at all does not violate Title VII even though the ‘underinclusion’ of risks impacts...more heavily upon one gender than upon the other.”¹⁷⁴

¹⁷¹ *Id.* at 137-38.

¹⁷² *Id.*

¹⁷³ Notes from Chamber Deliberations by Justice Blackmun (on file with the Library of Congress in the Papers of Harry A. Blackmun, Box 238, Folder No. 8).

¹⁷⁴ *Gilbert*, 429 U.S. at 140.

This final conclusion in the Court's *Griggs* analysis formed a critical thread in the ensuing legislative campaign to overturn the Court. Justice Rehnquist warned against the significant prospect that employers might be held in violation of Title VII for providing no disability plan if the *Griggs* test had concluded the exclusive impact of G.E.'s plan on women. Remarkably, this caution about the slippery slope of accommodation obligations that a disparate effects standard might impose on employers actually follows the majority's evisceration of this standard by claiming that G.E.'s exclusion of pregnancy is not only facially neutral but also bears no disparate effects on women. No effect was proved in this case, the majority contended, but application of the disparate impact standard at all to this provision might threaten employers with affirmative obligations. In actuality, a robust disparate impact test that is integral to Title VII did shape employers' obligations in structuring the workplace once pregnancy was amended as an explicit ground of sex discrimination. Yet this formed a point of interpretive contention and norm elaboration only in the implementation of the PDA mandate according to the broader regime of Title VII.¹⁷⁵ As Part III will show, the public campaign to reverse *Gilbert* directly addressed this perceived threat to more vigorous Title VII enforcement by directly and repeatedly emphasizing the PDA as a baseline demanding equal treatment in the intentional decision-making of employers.

Lastly, *Gilbert* marked a severe challenge to the normative and institutional authority of the EEOC as the primary institution charged with enforcement of Title VII's equality promise. The Court recognized that "great deference" should be accorded interpretations that reflect an agency's "body of experience and informed judgment to which courts and litigants may properly resort for guidance depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning,

¹⁷⁵ See, e.g., *California Federal Savings & Loan Assoc. v. Guerra*, 479 U.S. 272 (1987). For a doctrinal justification for the very application of Title VII after the PDA which Justice Rehnquist claimed to avoid through his *Gilbert* holding overturned by Congress, see Reva B. Siegel, Note, *Employment Equality Under The Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985); Andrew Weissman, Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690, 693-699 (1983).

[and] its consistency with earlier and later pronouncements....”¹⁷⁶ Nonetheless, the Court held that “[t]he EEOC guideline in question does not fare well under these standards.”¹⁷⁷ Along with citations to competing interpretations of Title VII by other agencies, Justice Rehnquist primarily anchors his dismissal of the EEOC guideline on two grounds: “It is not a contemporaneous interpretation of Title VII” and “the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date.”¹⁷⁸

The critique of the guideline for not being a contemporaneous interpretation of Title VII is undermined by the very standards cited above by Justice Rehnquist to determine deference – “a body of experience” and “thoroughness evident in its consideration.” As Part I demonstrated, the EEOC developed its conception of the relationship between pregnancy and sex discrimination in a case-by-case approach, accruing that very experience and extensive consideration not possible when Title VII was enacted because that marked the formation of the agency as well. Indeed, the descriptions by Commissioners Graham and Hernandez, along with several of the first staff members from across the EEOC offices, all made clear the lack of institutional preparedness to confront even the overwhelming number of complaints filed properly in race discrimination charges and certain categories of sex discrimination that had gained their attention. Pregnancy-based exclusions were not yet among them.

Additionally, to show that the 1972 guideline “flatly contradicts” the agency’s earlier interpretation, Justice Rehnquist provides citations to just two opinion letters issued by the General Counsel in 1966. As Part I showed, a more extensive examination of the EEOC findings during the first five years of operation confirms that the Commission had not developed a comprehensive policy for treating pregnancy with respect to sex discrimination. Rather, during this period attorneys within

¹⁷⁶ *Gilbert*, 429 U.S. at 142

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

the EEOC evaluated competing normative frameworks for conceptualizing pregnancy classifications while also taking account of a host of medical studies to inform their judgment about the capacity of women to work during pregnancy. Indeed, the first conclusive interpretive position taken by the EEOC reflected years of experience and informed judgment, culminating in the 1972 Guidelines. It was this normative deliberation in the agency charged with enforcement of Title VII that the *Gilbert* Court undermined.

Thus, *Gilbert* affected the meaning of pregnancy classifications not merely in this specific context of disability benefits evaluated in *Geduldig*. Rather, the decision bore expansive implications for the relationship between the constitutional and statutory equality regimes, as well as the meaning of sex discrimination generally and its relationship to classifications in a wide range of employment practices including medical leave, seniority, disability coverage, pensions, and post-pregnancy wages. The powerful repudiation of the EEOC Guidelines added additional force to *Gilbert*'s normative threat, revealing to civil rights groups the precariousness of the institutional authority available outside the courts to preserve their progress towards inclusion and nondiscrimination. Against this jurisprudential backdrop of *Geduldig* and *Gilbert*, a campaign emerged to construct a new normative baseline that would extinguish legal discrimination on the basis of pregnancy by entities in the public and private spheres.

III. GENERATING PUBLIC LAW

*There is one comfort, and that is that Congress may cure the situation if our guess is not in accord with their desire.*¹⁷⁹

- Justice Harry A. Blackmun, Personal Papers, August 31, 1976

On the day the Supreme Court announced *Gilbert*, ACLU attorney Susan Deller Ross expressed the thoughts of many women’s rights advocates: “The Supreme Court today legalized sex discrimination.”¹⁸⁰ On that same day, Ross and I.U.E. Associate General Counsel Ruth Weyand began to form a coalition of organizations determined to shift their focus to Congress as a new federal forum in which to vindicate their legal rights. Twenty-two months later, a diverse coalition of more than 200 organizations persuaded Congress to override the Supreme Court’s ruling in *Gilbert* by enshrining into law the foundational principle that discrimination on the basis of pregnancy constitutes unlawful sex discrimination. Part III investigates how this coalition successfully waged its normative campaign to override the Supreme Court’s conception of fundamental equality.

A. *Forging the Coalition*

The movement to overturn *Gilbert* brought together an array of disparate organizations, some that had never before worked together and others that had long pursued agendas antithetical to one another. This was most clearly illustrated in the coalition’s union of pro-life and pro-choice organizations. Despite the speed with which the coalition formed, the range of organizations’ specific interests necessitated a critical period of *internal norm generation and deliberation* that defined the movement’s strategic goals and its normative vision of equality that together would drive the Campaign to End Discrimination Against Pregnant Workers. The coalition deployed a remarkably

¹⁷⁹ Notes of Justice Blackmun on *General Electric v. Gilbert*, at 6 (on file with the Library of Congress in the Papers of Harry A. Blackmun, Box 238, Folder No. 8).

¹⁸⁰ Lesley Oelsner, *Supreme Court Rules Employers May Refuse Pregnancy Sick Pay*, THE N.Y. TIMES, Dec. 8, 1976, at p. 1.

sophisticated strategy that included coordinating internal committees, conducting private legal and political debates, and deliberately targeting key partnerships with Members of Congress. This Section explores the structural and normative foundation of the coalition. To gain insight into the formation of the coalition and its mobilization of various entry points in Congress, I reviewed previously unexamined and unpublished contemporaneous interviews conducted with the chief congressional staff members and with members of the coalition leading the bill's consideration throughout 1977.

Sub-Section 1 examines how legal feminists and advocates in the constitutional and statutory litigation described in Part II now processed the implications of *Gilbert* in setting the initial response. Sub-Section 2 then identifies how a diverse group of women's organizations, labor unions, civil rights groups, and health organizations came together in support of a robust democratic response to the Court's pronouncement of the meaning of sex discrimination. Finally, Sub-Section 3 explicates how this coalition constructed the legal equality norm that would form the core of the Pregnancy Discrimination Act.

1. *Grappling with Gilbert*

In the wake of *Gilbert*, legal feminists initially reacted with a short-lived effort to identify some limiting construction of the decision that could preserve the federal judiciary as a viable forum in which pregnant workers could seek discrimination relief. As ACLU lobbyist Kathleen Miller described, "It seemed that the whole town was humming. We got the slip opinion from the Supreme Court and read it over the phone to Ruth Ginsburg."¹⁸¹ Yet as lawyers assessed the scope of *Gilbert*, few options for a narrow construction appeared. One letter to the Women's Legal Defense Fund on December 8, 1976, the day after *Gilbert* was announced, revealed the limit for any narrowing legal

¹⁸¹ Kathleen Miller, ACLU Lobbyist Coordinator, Interview with Dr. Anne Costain, April 29, 1977, p. 2 (on file with author).

construction based on the precise statutory language reviewed by the Court.¹⁸² An AFL-CIO attorney wrote:

Here is a copy of the disaster.

There is one (very faint) ray of hope re the long-range future. The GE complaint was based only on 703(a)(1). The language of 703(a)(2) is much more appropriate and was relied upon by several amici – yours included. Read literally the majority opinion is only a decision re (a)(1). I don't think Cts. of Appeals will be satisfied with this, but some (very?) future Supreme Court determined to dispense with Gilbert could really do so rather easily.¹⁸³

Instead of waiting for that “future Supreme Court” to dispense with *Gilbert*, however, legal feminists soon agreed they could not rely on the judiciary. After examining the implications of the Court's conceptual framework in *Gilbert*, they concluded: “We believe . . . it would be unduly optimistic to predict that the court would reach a different conclusion under [703(a)(2)] than it did under 703(a)(1).”¹⁸⁴ The Justice Department also concluded *Gilbert* would bear broad ramifications:

The implications of a determination that pregnancy is not sex based go far beyond the factual context of *Gilbert*. As Justice Stevens pointed out in his dissent, “the analysis is the same whether the rule relates to hiring, promotion, the acceptability of an excuse for absence, or an exclusion from a disability plan.”¹⁸⁵

Gilbert's far-reaching constitutional and statutory implications fueled the urgency and changed focus of legal feminists from the courts to Congress. Within three days of *Gilbert*, Equal Rights Advocates attorney Mary Dunlap had drafted a twenty-page memorandum specifying the

¹⁸² Only Section 703(a)(1) was reviewed in *Gilbert*, not Section 703(a)(2). The provisions mandate:

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

¹⁸³ Letter from the AFL-CIO to Judy Lichtman, Women's Legal Defense Fund, December 8, 1976 (on file with author).

¹⁸⁴ Memorandum in Support of a General Definition Statute Overruling *General Electric v. Gilbert*, at A-2 (on file with author).

¹⁸⁵ J. Stanley Pottinger, Assistant Attorney General, Civil Rights Divisions, *Memorandum for the Attorney General*, February 9, 1977, at p. 2 (on file with author).

sweeping implications of the Court's reasoning.¹⁸⁶ She underscored the threats it posed to statutory challenges under Title VII and the EEOC Guidelines, and she detailed *Gilbert's* constitutional impact. Dunlap concluded from the rare victories in cases like *Reed* and *Frontiero* that the Court would only recognize sex discrimination when the solution required small economic outlays or when a classification contained facially explicit sex-based discrimination. By extending this jurisprudence into the Title VII realm, Dunlap argued, *Gilbert* could be the start of an “iceberg effect . . . upon the constitutional status of women”:

It is not an overstatement of the serious damage done to equal protection litigation on behalf of women, by *G.E.*, to say that there is virtually no hope of sustaining any major constitutional challenges to sex discrimination by government (absent passage and enforcement of the Equal Rights Amendment), unless the claimed right involved is trivial . . . and the cost of change to government is very low and is deemed worthwhile by the Court.¹⁸⁷

As a result, while *Geduldig* was widely limited by lower courts and the EEOC from affecting the more expansive Title VII basis for challenges to pregnancy discrimination, the essential links between the constitutional and statutory frameworks in *Gilbert* discussed in Part II injected constitutional implications to the response options faced by the women's movement.

Lastly, legal activists identified the *Gilbert* Court's fundamental rejection of the normative conception of sex equality espoused by the EEOC, the movement, and Congress, as the decision was guided by stereotypical biases about pregnant workers and allowed these biases to define the overt decisionmaking of employers. The National Organization for Women (NOW) recognized with deep frustration the sanctioned stereotypes driving the majority's legal reasoning and its refusal to acknowledge the whipsaw of pregnancy discrimination, as one NOW memorandum examining *Gilbert* revealed:

¹⁸⁶ Mary C. Dunlap, *Memorandum Re: Implications of General Electric Co. v. Gilbert*, 45 U.S.L.W. 4031 (12/7/76) *For Title VII and Other Sex Discrimination Litigation*, December 10, 1976, at 3 (on file with author).

¹⁸⁷ *Id.*

Inequities in the treatment of pregnancy for the purposes of leave, benefit, and employment serve to elucidate the overwhelming views of a patriarchal society: Women are not an integral part of the work force; women are dependents, provided for by men. Only when the treatment of pregnancy . . . is understood to be integrally related . . . to the issue of sex discrimination will equal treatment of the sexes under the law be possible.¹⁸⁸

Thus, *Gilbert* forced legal feminists to realize that the judiciary had refused to accept the fundamental principle that the whipsaw of pregnancy discrimination undermined the very goal of removing stereotypical bars to women's equality of opportunity in the workplace. Together, these sweeping implications for the practical content of a sex-discrimination ban in any setting fueled advocates' change in focus from the judiciary to the legislative arena.

2. *Coalitional Contours*

Gilbert's enormous symbolic and practical impact on legal feminists is apparent in the speed of the response. Activists formed a coalition to overturn *Gilbert* within one week of the decision. On December 14, 1976, Susan Ross joined with the director of the Pennsylvania Commission for Women to organize a meeting on the University of Pennsylvania campus, a location chosen for the convenience of bringing together organizations from both New York and D.C. The Philadelphia conference captured the debate sparked by *Gilbert* among organizations about how they should construct a legal framework for pregnancy discrimination in the different forum of Congress, especially in light of potentially competing normative imperatives to preserve earlier civil rights gains and generate a sex equality mandate even for real differences that could endure.¹⁸⁹ In the "Proposed Agenda for Meeting of Those Concerned About the Decision of the Supreme Court in *G.E. v. Gilbert*," the groups outlined a range of topics to be debated by conferees, including "possible

¹⁸⁸ Carolyn D. Karp, National Organization for Women, *The Pregnancy Disability Issue: General Electric Company v. Martha Gilbert, et. al.*, January 31, 1977, at 7 (on file with author).

¹⁸⁹ See, e.g., *Hearings Before the Subcomm. on Labor of the Sen. Comm. on Human Resources*, 95th Cong. 110 (1977) (statement of Clarence Mitchell, Director of Washington Bureau of the NAACP and Chairman of the LCCR) ("As members of this subcommittee know, there are other plans for amending title VII of the 1964 Civil Rights Act. However, we are strongly opposed to mi[x]ing any other revisions of the law with [the PDA].")

remedial legislation,” “specific proposals for legislation,” the “EEOC Guidelines,” and “proposals for strategy for introduction and management of legislation in Congress.”¹⁹⁰ For this first organizational meeting, Ross was even able to secure the participation of Barbara Dixon, a key aide to Senator Birch Bayh, to help structure their discussions and shape their vision in light of the realities of the “Congressional climate.”¹⁹¹ As Dixon described:

I got a phone call as soon as the *Gilbert* decision came down. We were very surprised. I wrote a memo about *Gilbert* for the Senator. He said to go ahead and see what could be done about it. . . . Then we heard that the ACLU – Susan Ross – had planned a meeting in Philadelphia among feminist lawyers. They were thinking about taking the EEOC [Guidelines] and inserting them into Title VII.¹⁹²

The initial discussions continued the following day in a broader meeting in Washington, D.C., as the coalition committed to expand its membership beyond those groups that had led the *Gilbert* litigation. Unpublished notes from this first meeting in D.C. reveal that advocates initially considered – and defeated by vote – a motion to form only a “temporary ad hoc coalition without being final”¹⁹³ that would be publicly led by activists *and* legislative aides. Instead, however, participants voted for an “open-ended coalition”¹⁹⁴ of activist organizations by electing ACLU attorney Susan Ross and I.U.E. Associate General Counsel Ruth Weyand as Co-Chairs,¹⁹⁵ endorsing a legislative response, and codifying the new coalition for women’s rights as the *Campaign to End Discrimination Against Pregnant Workers* (the “Campaign”).

The coalition’s organizational breadth fueled its central role in the legislative response to *Gilbert*. Campaign initiatives were primarily driven by participating organizations with roots in four areas of law reform. First, *women’s legal advocacy groups*, which had blossomed through

¹⁹⁰ Campaign to End Discrimination Against Pregnant Workers (CEDAPW), *Agenda*, Dec. 14, 1976 (on file with author).

¹⁹¹ *Id.*

¹⁹² Barbara Dixon, Interview with Dr. Anne Costain, March 20, 1977 (on file with author).

¹⁹³ Personal notes of Judith Lichtman, Meeting of the Campaign to End Discrimination Against Pregnant Workers, December 15, 1976 (on file with author).

¹⁹⁴ *Id.*

¹⁹⁵ Kathleen Miller, ACLU Lobbyist Coordinator, Interview with Dr. Anne Costain, April 29, 1977 (on file with author).

constitutional and statutory litigation efforts in the first half of the 1970s, provided a base of extensive experience in conceptualizing the whipsaw of pregnancy-based exclusions and its relationship to discrimination law. Organizations that had filed amicus briefs in *Gilbert*, including the Women’s Legal Defense Fund, the ACLU Women’s Rights Project, NOW, the Women’s Equity Action League, and the National Education Association, all immediately dedicated their resources to leading the various strategic efforts of the coalition.

Second, *labor union lawyers and activists* provided critical experience in litigation and in private-sector negotiations for the equal treatment of pregnancy. From the outset, Ruth Weyand explained, the I.U.E. viewed the legislative response as an essential extension of its *Gilbert* litigation:

Calls began coming in the morning that the Supreme Court decision was announced. Before taking any of them, I asked the president of the Union if we would be devoting *all* our resources to securing legislation. He gave me authorization to do this. . . .

The legislative effort in a sense is a continuation of the effort in [] G.E. . . . So many court decisions were directly linked to the *Gilbert* outcome that I felt terrible about losing it. . . . The Executive Board of the I.U.E. directed all resources necessary to put an end to discrimination.¹⁹⁶

Under Weyand’s leadership, the I.U.E. responded by assigning its Legal, Social Action, and Legislative Departments all to integrate their work with the initiatives of the Campaign.¹⁹⁷ Similarly, *Gilbert* amici such as the Communication Workers of America (A.F.L.-C.I.O.) and the U.A.W. promptly denounced the “severe blow by this outrageous and misguided decision”¹⁹⁸ against female and male workers, endorsing the Campaign coalition and “urg[ing] Congress to nullify the Supreme Court’s decision” as “essential to the ultimate equality of women in the workplace.”¹⁹⁹

¹⁹⁶ Ruth Weyand, Interview with Dr. Anne Costain, April 13, 1977 (on file with author).

¹⁹⁷ Winn Newman and Judy Bonderman, *Memorandum to All I.U.E. Local Unions*, February 1, 1978, at p.1 (on file with author).

¹⁹⁸ Press Release, *U.A.W. Denounces Supreme Court Ruling That Employers May Refuse Pregnancy Sick Pay*, Dec. 9, 1976 (on file with author).

¹⁹⁹ *AFL-CIO Seeks Reversal of Pregnancy Decision*, BUREAU OF NATIONAL AFFAIRS (Daily Labor Reports No. 39), Feb. 25, 1977 at p. 1.

Additionally, legislative strategists in women's rights groups and on the Hill agreed that active support from the *broader civil rights community* was essential. Since most legislative responses to *Gilbert* that were under consideration involved some form of amendment to Title VII,²⁰⁰ Barbara Dixon from Senator Bayh's office warned in the first meetings that "*you can't do anything that would open Title VII without consulting the civil rights groups.*"²⁰¹ By 1976, the established rights groups had already formed an umbrella organization, the Leadership Conference on Civil Rights (LCCR). Consequently, the LCCR's participation in the Campaign to End Discrimination Against Pregnant Workers offered both a potent symbolic expression of the fundamental equality norm at stake and a widely endorsed condemnation of *Gilbert* for rejecting the EEOC's normative authority in favor of a constrained understanding of discrimination. In its first meeting, the anti-*Gilbert* Campaign identified the top priority of "reach[ing] out to traditional civil rights groups" like the LCCR as well as the Lawyer's Committee for Civil Rights, leading legal feminists to agree to "move narrowly on [the] pregnancy issue" alone and not on any other amendments to Title VII.²⁰² In the ensuing weeks, Judith Lichtman from the Women's Legal Defense Fund communicated with the LCCR chief and others to secure their assessment of strategies and draft legislation.²⁰³ The endorsement and active participation of the LCCR injected a powerful valence quality to the Campaign's civil rights initiative in articulating an equality principle conceived by all rights organizations to be fundamental.²⁰⁴

Finally, a critical feature of the Campaign was the remarkable cooperation of *pro-life and pro-choice organizations* that came together in support of what one congressional aide described as

²⁰⁰ *But see infra* Sub-Section III.A.3.

²⁰¹ Barbara Dixon, Interview with Dr. Anne Costain, March 20, 1977 (on file with author).

²⁰² Personal notes of Judith Lichtman, Meeting of the Campaign to End Discrimination Against Pregnant Workers, December 15, 1976 (on file with author).

²⁰³ *See, e.g.*, Letter from Judith Lichtman to Clarence Mitchell, Jan. 6, 1977 (on file with author).

²⁰⁴ *See, e.g., Memorandum: Pregnancy Benefits, Minimum Wage, Food Stamps – New Bills Start Moving Through Congress*, March 22, 1977 (on file with author).

“a decent motherhood bill.”²⁰⁵ It is, of course, striking to find pro-life and pro-choice organizations publicly working together on the strategy and legal construction of an antidiscrimination framework for pregnant workers. This feature of this coalition certainly was exploited at several points in the legislative process, as I discuss below.²⁰⁶ At the same time, however, this coalition can be viewed as less surprising in light of the ACLU Women Rights Project’s earlier question posed soon after the ruling in *Roe v. Wade*: “But what about women who want to have children?”²⁰⁷ Indeed, joining the Campaign to help to answer this question with a comprehensive equality norm banning pregnancy classifications as sex discrimination were the National Conference of Catholic Bishops as well as the American Citizens Concerned for Life (ACCL), a national pro-life organization with over two million members formed in response to *Roe v. Wade*.²⁰⁸

“Women – especially low income women – will be discouraged from carrying their pregnancy to term.”²⁰⁹ This clear warning in the earliest post-*Gilbert* “Fact Sheet,” drafted by legal feminists about “what will happen if the law is not changed,” underscored the imperative of securing pro-life groups’ endorsement. On the pro-choice side, organizations like NARAL and NOW conceived of the coalition against pregnancy discrimination as protecting a woman’s right to privacy and to be free from discrimination based on her reproductive choices. Testimony examined in the next section will show how pro-choice groups secured pro-life support by pointedly framing pregnancy discrimination as forcing women to look to abortion as a solution when they cannot afford

²⁰⁵ Maria Landolpho, Associate Counsel to Senate Labor Subcommittee, Interview with Dr. Anne Costain, May 20, 1977, at p.4 (on file with author).

²⁰⁶ See *infra* III.B.2.d.

²⁰⁷ Trudy Hayden, *Punishing Pregnancy: Discrimination in Education, Employment, and Credit*, American Civil Liberties Union, Women’s Rights Project (October 1973), at p. 1.

²⁰⁸ This organization is also known as the National Right to Life Committee.

²⁰⁹ Campaign to End Discrimination Against Pregnant Workers, *Fact Sheet*, Dec. 23, 1976 (on file with author).

to lose their jobs. Pro-choice activists acknowledged that “this is a pro-life bill”²¹⁰ that met the interests of groups opposed to a woman’s right to choose. Section B demonstrates the conceptual convergence of these organizations in support of a core nondiscrimination principle as well as the strategic implications of this alliance for the ultimate shape of the Pregnancy Discrimination Act. At this point it bears observation that participants were well aware of the extraordinary nature of this coalition. As NOW’s chief lobbyist described in 1977, pregnancy nondiscrimination and the right to choose an abortion are priorities for women’s rights, but pregnancy nondiscrimination was “The piece of civil rights legislation this year”:

It has been such a diverse coalition from the beginning. Even the Citizens for Life are active on this. NOW will probably not ally itself with the Citizens for Life again ever!

But this solidifies our position at NOW. The purpose of everything we do at NOW is pro-choice. This bill is “pro-motherhood”—we are very much in favor of letting the woman choose. . . . Company policies often force women to have an abortion.²¹¹

Thus, along with women’s health groups like the American Nurses’ Association,²¹² organizations were able to bypass their deep disagreement over the issue of abortion to fight together on behalf of a woman’s right to be free from discrimination on the basis of pregnancy.

While one legislative aide observed that, with certain exceptions, “all the women lawyers were politically unsophisticated,”²¹³ the Campaign displayed remarkable sophistication in structuring itself to channel the resources and competencies of the many disparate groups composing the coalition. Representatives from organizations participating in the Campaign were assigned to one of three different committees: *grassroots organizing*, *lobbying*, and *legislative drafting*.²¹⁴ In addition to

²¹⁰ Nina Hegsted, Acting Head of the NOW Legislative Office, Interview with Dr. Anne Costain, May 6, 1977, at p.4 (on file with author).

²¹¹ *Id.* Atop this disparate coalition, Co-Chair Ruth Weyand affirmed the Campaign’s “strong support” from the American Citizens Concerned for Life. Ruth Weyand, Interview with Dr. Anne Costain, April 13, 1977, at p. 5 (on file with author).

²¹² American Nurses’ Association, *Resolution to End Discrimination Against Pregnant Employees*, Dec. 21, 1976 (on file with author).

²¹³ Barbara Dixon, Interview with Dr. Anne Costain, March 20, 1977, at p.1 (on file with author).

²¹⁴ Judith Lichtman, Interview with Dr. Anne Costain, April 28, 1977 (on file with author).

the imperatives of organizing activities across disparate groups, the Campaign leadership carefully leveraged over time the wide-ranging endorsements by organizations at different points in the legislative process. With more than 200 organizations signing Campaign fact sheets and public mailings, the Campaign Co-Chairs ensured that committee sizes remained manageable and ready to deploy a broad base of groups for targeted efforts. As a result, the legislative drafting committee was limited to eight individuals drawn from legal feminists, labor unions, the EEOC, the ACLU, and the Center for Law and Social Policy.²¹⁵ The lobbying committee included legal feminists but was composed primarily of labor union representatives to reflect their larger staff and membership deployable for lobbying.²¹⁶

Within one week of its formation, the Campaign immediately “launch[ed] a drive to reach all persons who wish to negate the impact of . . . *Gilbert*,” requesting information about what each organization could contribute to a range of activities, including goals to:

- Contact all Senators and Representatives when they are in their home districts for the holidays. . . .
- Start a letter writing campaign to Congress. . . .
- Send the campaign specific stories about discrimination against pregnant workers
- Contact local media and get the facts before the public.
- Send representatives to Washington to lobby for the bill. . . .²¹⁷

With all of this outreach to coalition members in coordinating resources and initial strategies for approaching the legislative arena, along with the normative debate about the proper legislative response discussed in the next section, it bears emphasizing that the leadership worked hard during the early planning period to *exclude* the press from excessive media coverage. As the ACLU’s chief

²¹⁵ *Id.* at p. 2.

²¹⁶ *Id.* The lobbying committee members were from the AFSCME, AFL-CIO, NOW, WLDF, and the I.U.E. The committee was formally called the “legislative history” committee to allow participation by “501(c)(3) organizations” like the Women’s Legal Defense Fund.

²¹⁷ Campaign to End Discrimination Against Pregnant Workers, Letter from Ruth Weyand and Susan Deller Ross, December 23, 1976 (on file with author).

lobbyist noted: “We wanted to keep the press out of the planning meetings so we could express ourselves freely – air our disagreements.”²¹⁸ Given the many different interests that had come together, Ruth Weyand, Susan Ross, and the other leading Campaign advocates stressed the need to identify the primary legislative and lobbying goals through internal deliberation.

Thus, a broad-based coalition of women’s rights, union, civil rights, pro-life and pro-choice groups had organized around the key goal of reversing *Gilbert* quickly after its announcement. But before launching the public campaign, the members first deliberated and debated within the coalition the legal shape of the equality norm to combat the whipsaw of exclusionary policies that would form the heart of the Campaign to End Discrimination Against Pregnant Workers.

3. Normative Deliberation

Within two weeks of *Gilbert* the coalition had explicated the decision’s meaning and identified the Campaign’s central goal: “To secure legislation assuring that prohibitions against sex discrimination in employment also prohibit discrimination because of pregnancy.”²¹⁹ However, the form and substance of this legislative response remained subject to deliberation. While an aide on the House Equal Opportunity subcommittee explained that “normally we just get our wording from the legislative counsel,”²²⁰ in this instance it was the Campaign’s legislative drafting committee that generated the text and codified the framework for a legislative response to *Gilbert*. Thus, examination of the drafting committee’s deliberations offers insight into the social construction of this legal norm within the Campaign movement. Two questions were considered by the Campaign drafting committee in generating a legal framework to repudiate *Gilbert*. First, what substantive legal

²¹⁸ Kathleen Miller, ACLU Lobbyist Coordinator, Interview with Dr. Anne Costain, April 29, 1977, p. 2 (on file with author).

²¹⁹ Campaign to End Discrimination Against Pregnant Workers, *Fact Sheet*, Dec. 23, 1976 (on file with author).

²²⁰ Carol Shanzer, House Equal Opportunity Subcommittee, Interview with Dr. Anne Costain, May 24, 1977, at p. 1 (on file with author).

changes would suffice to reject the holding and reasoning of *Gilbert*? Second, should the legislative response take the form of an amendment to Title VII?

Since the EEOC Guidelines had long served as a platform for victims of pregnancy discrimination to find vindication in the federal courts prior to their rejection by Supreme Court, one approach considered by the Campaign to overrule *Gilbert* was for Congress to enact the entire EEOC Guidelines banning pregnancy discrimination. This “*Guidelines approach*” was considered as a distinct possibility in the first coalition meetings because it would vindicate the authority of the EEOC’s interpretation for questions implicating other civil rights developments and, of course, it would ban discrimination on the basis of pregnancy. In one previously unexamined “*Proposed Act to Overrule Gilbert v. General Electric Company*,” a draft proposed that Title VII would be amended by inserting the EEOC Guidelines into the Civil Rights Act itself. Specifically, it proposed adding to Section 701 a new subsection (k) with provisions explicitly incorporating the text of the EEOC Guidelines of 1972.²²¹ Moreover, even before importing into the statute the text of the Guidelines, the draft includes a section entitled “Declaration of Purpose,” which would have specified:

- (a) The Congress hereby finds that in *Gilbert v. General Electric Company* the Supreme Court has misinterpreted the prohibition on sex discrimination in employment practices set forth in Title VII....
- (b) The Congress hereby declares that:
 - (1) employment practices which treat pregnant women employees or applicants who are able to work differently from other employees or applicants who are able to work constitutes discrimination based on sex;
 - (2) employment practices which treat women employees or applicants with pregnancy-related disabilities differently than other disabled employees or applicants constitutes discrimination based on sex; and
 - (3) the prohibitions on sex discrimination in employment practices set forth in Title VII are to be construed as strictly as all other prohibited forms of discrimination and no showing of intent to discriminate need be made to establish a prima facie violation of this title.²²²

²²¹ Campaign to End Discrimination Against Pregnant Workers, *Proposed Act to Overrule Gilbert v. General Electric Company* (on file with author).

²²² *Id.*

Evaluation of the Guidelines approach thus provided an explicit basis for the Campaign and Congress to vindicate the EEOC's legal framework for targeting discrimination while also elaborating more expansively on the robust equal-treatment principle to be deployed for future evaluations of the meaning of sex discrimination. It bears emphasizing that subsection (b)(3) in the Declaration of Purpose above conveyed the commitment of the legal activists in the Campaign to reaffirm in no uncertain terms the *Griggs* disparate impact standard as an alternative to the disparate treatment measure of sex discrimination. Ultimately, the committee made the strategic determination not to attach this explicit Declaration of Purpose to any statutory repudiation of *Gilbert*. As noted earlier in the Paper, even as this commitment to effects-based analysis did not form a prominent theme in the public campaign in Congress, that draft declaration of purpose captures legal feminists' normative commitment to Title VII's disparate impact test as an additional vehicle to combat the whipsaw of pregnancy discrimination.

In a critical decision, the Campaign rejected the Guidelines approach:

While we think that the EEOC guidelines were an excellent and wholly appropriate administrative interpretation at a time when the most appropriate treatment for the pregnancy issue[] was [] far from clear, they subtly betray some of the underlying uncertainties of the times in which the guidelines were forged. To fix into the stone of legislation the ambiguities presented by the guidelines does not seem appropriate or wise.²²³

This rejection of the Guidelines as a response to *Gilbert* marked an important moment in the normative evolution of the legal norm of pregnancy antidiscrimination, especially for the legal feminists like Susan Ross who had led the generation of those very Guidelines. In particular, the Campaign drafting committee confronted head-on the conceptual shortcomings of the detailed EEOC Guidelines based on its unintended consequences through judicial interpretation and enforcement.

First, open interpretive questions about the meaning of the Guidelines themselves held essential legal implications for the defenses available to employers. Since sub-section (a) of the

²²³ Wendy Williams et al., *Memorandum in Support of a General Definition Statute Overruling General Electric v. Gilbert*, Dec. 21, 1976, at 3 (on file with author).

Guidelines prohibited written or unwritten employment policies from pregnancy-based exclusion as “a *prima facie* violation of this Title,” enactment of the Guidelines might perpetuate the uncertainty that had arisen in judicial interpretation of the Guidelines as to whether pregnancy discrimination is a *prima facie* sex discrimination in a *per se* or *effects*-based measure.²²⁴ This distinction is quite meaningful for whether employers may deploy the defense of a bona fide occupational qualification for disparate treatment or the more deferential business necessity defense for disparate effects. Similarly, sub-section (b) of the Guidelines regulating employers’ policies for pregnancy-related disabilities also left deep uncertainty as to whether unequal treatment constituted *effects* discrimination or *per se* sex discrimination. Lastly, even though one draft of Guidelines legislation proposed a more robust attack on pregnancy discrimination by endorsing a lower disparate impact threshold that would render “no showing of intent” necessary, legal feminists discarded such a fight over the scope of *Griggs* as unnecessary and dangerous because it “may engender serious opposition.”²²⁵

Even as the Campaign did not embrace the Guidelines approach, a striking feature of the coalition’s internal deliberations in 1976 and early 1977 for responding to *Gilbert*’s sanction of intentional pregnancy-based exclusions was the widespread consensus in favor of an equal-treatment principle animating all seriously considered proposals. In fact, one quickly dismissed option noted by the committee was to draft an entirely separate special-treatment statute overturning *Gilbert* by mandating specific disability and other fringe benefits for pregnant employees. According to this proposal, “[t]he statute could provide that employers *must provide some leave*, within specified time limits, for pregnant employees, and further provide that the leave must be treated as time on the job,

²²⁴ *Id.* at 2-3 (on file with author).

²²⁵ *Id.* at 3 n.3.

with a right to return.”²²⁶ However, Susan Ross and Ruth Weyand firmly endorsed an equal-treatment approach over a special-treatment approach to equality for women:

The value of the equal-treatment approach was that insofar as you had employers who had either a fully paid sick leave or a temporary disability insurance scheme that would provide at least some of your pay when out sick . . . equal treatment [ensured] women would be getting the same. The benefit was also that it would avoid backlash because was not special treatment, it was just the same needs and rights as other workers.²²⁷

Revealing the Campaign leadership’s strong commitment to a normative baseline defined by equal treatment for pregnant workers, the special-treatment approach was rejected: “[I]t would deviate from the nondiscrimination approach in favor of a positive preference and would therefore raise questions about whether the government ought affirmatively to ‘encourage’ childbearing rather than simply requiring neutrality.”²²⁸

By endorsing an equal treatment “*Definition approach*” the Campaign established the fundamental principle that, contrary to the Court’s equality jurisprudence, pregnancy discrimination is *per se* unlawful sex discrimination. Under this approach, Congress would mandate through an amendment to Title VII or through an independent statute that the provisions “because of sex” and “on the basis of sex” are *defined to include* “the basis of pregnancy, childbirth, and related medical conditions.”²²⁹ The coalition’s validation of this Definition approach revealed legal advocates’ determination that the PDA would represent more than incremental change and that reversing *Gilbert* concerned more than resuscitation of the EEOC Guidelines alone. The legal identity of pregnancy-based exclusions and sex discrimination would “*establish a governing principle rather than a detailed set of instructions*”:

The general principle approach to legislation avoids the very real danger of failure to anticipate all possible circumstances of real life and ramifications of the legislation in advance. The general

²²⁶ Wendy Williams et al., *supra* note 223, at 7 n.5 (on file with author).

²²⁷ Susan Deller Ross, Interview with author, October 20, 2004.

²²⁸ Wendy Williams et al., *supra* note 223, at 8 n.5 (emphasis in original).

²²⁹ See, e.g., *A Bill To Amendment Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy*, Jan. 14, 1977 (on file with author).

principle approach leaves enforcement agencies free to develop interpretations as times change and new problems develop; it gives the courts the opportunity to shape doctrines in light of the general intent of the Congress rather than being limited to what the Congress at one time was able to anticipate.²³⁰

This broad effect on the law intended for the pregnancy nondiscrimination principle captures the intended reach of the PDA “beyond the four corners of the statute.”²³¹ Indeed, this was expected in both the normative impact of statutorily enshrining this fundamental equality principle and in the institutional impact on agencies beyond the EEOC charged to enforce other federal statutes banning non-employment-related classifications on the basis of sex, such as for equal credit or fair housing.²³² The Campaign pursued the Definition approach to reverse *Gilbert* as a firm construction of the equality norm against sex discrimination to be applied expansively by agencies and courts thereafter.

In addition to changing the definitional scope of sex discrimination, the drafting committee cited two beneficial implications for women’s rights through this broader norm-centered approach. First, while the Guidelines had detailed certain types of discrimination that might viewed as an exclusive list, every proposal drafted by the committee to define the sex discrimination provisions indicates that they “include, but are not limited to” pregnancy and other related medical conditions. This ultimately represented the Campaign’s core commitment to ensuring equality of opportunity in the workplace not by defining merely an exhaustive list of medical conditions for which equal treatment was required. Instead, the Campaign overruled the Court’s normative sanction of the whipsaw of pregnancy discrimination by articulating the foundational equal-treatment principle that women employees must be treated at least as well as male workers. Underscoring their concern about stereotypes associated with childbirth, committee members illustrated the Definition approach’s broader reach to other grounds of discrimination against a woman based on her child-bearing capacity that are not reached by the Guidelines:

²³⁰ Wendy Williams et al., *supra* note 223, at 1 (emphasis added).

²³¹ William Eskridge and John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

²³² Wendy Williams et al., *supra* note 223, at 4.

The guidelines do not make clear that the potential to become pregnant, or the female anatomy, cannot be grounds for treating women unfavorably; therefore, they do not plainly bar the refusal to hire women because they are “irrational” during their periods, refusal to hire younger women because they might become pregnant, or refusal to hire women because the building may harbor potential rapists.²³³

Furthermore, the committee framed the Definition approach as an outright appeal to ensure the commitment and active support of pro-life organizations because this normative principle of equality for pregnant workers also reflected an endorsement of the value of the family and childbirth in more expansive ways than the Guidelines:

The general definition approach would reverse the preference for abortions, and against carrying a pregnancy to term and childbirth, which is created by the Supreme Court’s decision in G.E. v. Gilbert. . . . [T]he guidelines approach would provide *a less clear message* about repudiation of the Supreme Court’s preference *against* carrying a pregnancy to term to those groups particularly concerned about the “right to life.”²³⁴

Thus, overall the drafting committee crafted several persuasive arguments that the Definition approach would fulfill the Campaign’s primary goal.

The prospect of amending Title VII sowed significant uncertainty among traditional civil rights groups and even some labor union organizations, fueling detailed, private debate among the leadership of the Campaign with these organizations about how the Definition Approach could best be achieved. This unease is not identifiable anywhere in the public record, but examination of private notes from several meetings in the first month after *Gilbert* reveal that these concerns were widely evident among the LCCR leadership and in the AFL-CIO.²³⁵ Legislative aides like Barbara Dixon for Senator Bayh and Susan Grayson from the House Equal Opportunity Subcommittee repeatedly warned Ross, Weyand, and others to construct as narrow a legislative response as possible.²³⁶ The LCCR leadership conveyed its “problems with opening Title VII” and the umbrella organization’s

²³³ *Id.*

²³⁴ *Id.* at 5 (first emphasis added).

²³⁵ Personal notes of Judith Lichtman, Meeting with Bill Taylor of the LCCR, Jan. 4, 1977 (on file with author). These concerns were primarily conveyed to the Campaign by LCCR chiefs Clarence Mitchell, Bill Taylor and Larry Gold.

²³⁶ Barbara Dixon, Interview with Dr. Anne Costain, March 20, 1977, at p.1 (on file with author); Susan Grayson, Interview with Dr. Anne Costain, May 24, 1977 (on file with author).

president, Clarence Mitchell, even suggested that the amendment to Title VII could occur in a less salient way, such as by an amendment inserted into “something else like a Public Works Bill.”²³⁷ The Campaign drafting committee considered the advantages of this option for a separate statute because then “Title VII is not opened up for a range of other amendments. However, we understand that the germaneness rule in the House would not preclude introduction of such amendments even to a statute which did not in its title purport to amend Title VII.”²³⁸ As a result, Mitchell assured that he and the LCCR would support the Campaign in amending Title VII “if [it is] the only appropriate way.”²³⁹

Legal feminists concluded that an amendment to Title VII was indispensable from a normative and institutional perspective. Normatively, the Campaign was committed to repelling the jurisprudential assault on sex discrimination it perceived in *Gilbert*. Since Title VII was the equal employment opportunity statute, rejection of the Supreme Court’s definition by burying the reversal in a public works bill would not have satisfied the normative frustration of many seeking to repudiate the Court’s artificial distinction between pregnancy discrimination and sex discrimination. Institutionally, Susan Ross and Ruth Bader Ginsburg argued from the outset that “if you don’t amend Title VII, the courts will ignore EEOC enforcement mechanisms.”²⁴⁰

²³⁷ Personal notes of Judith Lichtman, Meeting with Bill Taylor of the LCCR, Jan. 4, 1977 (on file with author).

²³⁸ Wendy Williams et al., *Memorandum in Support of a General Definition Statute Overruling General Electric v. Gilbert*, Dec. 21, 1976, at p. 6 (on file with author).

²³⁹ Quoted in Personal notes of Judith Lichtman, Meeting with Bill Taylor of the LCCR, Jan. 4, 1977 (on file with author).

²⁴⁰ Quoted in Personal notes of Judith Lichtman, Meeting with Senator Bayh, Dec. 15, 1976 (on file with author).

B. Campaign Mobilization and Public Debate

The passage of the Pregnancy Discrimination Act marked the culmination of extensive congressional deliberation and public evaluation of competing frameworks for conceptualizing the equality norm banning sex discrimination. Three features of the campaign to pass the PDA bear important implications for the meaning of the equality norm endorsed by Congress. First, I examine how coalition supporters stressed the whipsaw effect of pregnancy discrimination to inject a valence quality into the Campaign's normative framework for reconceiving equality in the setting of real differences. This critical phase allowed advocates to work with supportive Members of Congress to shape the baseline of reform in ways decisive for the PDA's final form. The next Sub-Section identifies the key questions and arguments raised by both sides in the intense, public debate over the meaning of sex discrimination for pregnancy. This Part concludes by considering how the Campaign found mixed success in confronting two key obstacles to the passage of the PDA.

1. Setting the Terms of Debate

The coalition worked closely with members of Congress to develop a sophisticated campaign for the passage of the PDA, but the initial priming of the legislative arena was essential to mobilize the valence quality of the pregnancy nondiscrimination norm. Early on, coalition leaders considered whether congressional hearings would even be necessary for a legislative response or instead whether a less public lobbying campaign would fare better.²⁴¹ Despite the accompanying risk of arousing greater opposition through public deliberation, the Campaign leadership agreed that hearings were necessary to vindicate the public support for and give greater content to the equal-treatment norm barring pregnancy discrimination. As legislative staff members put it, the key function of these

²⁴¹ Kathy Miller, Interview with Dr. Anne Costain, April 29, 1977, at p. 3 (on file with author).

hearings was to have “a large public education process”²⁴² to generate widespread support for this “decent motherhood bill.”²⁴³

The bipartisan introduction of the Campaign-endorsed legislation to overturn *Gilbert* critically fueled its early momentum in the House and Senate. After months of deliberation within the Campaign and with supportive Members of Congress, the introduction of the bill was coordinated to mobilize a valence quality in the legislation that could repudiate the normative framework advanced by the Supreme Court. The Campaign launched its public effort by changing the person who would introduce the legislation to the public and Congress. Although Senator Birch Bayh and his staff had provided the earliest and strongest encouragement for a legislative response to *Gilbert*, Bayh and the Campaign agreed that his perception as “the women’s senator”²⁴⁴ might limit the co-sponsorship and other committee support they could secure for an issue framed broadly to concern family and civil rights instead of a women’s rights campaign alone. As a result, Senator Bayh asked the Chairman of the Senate Human Resources Committee, Harrison Williams, to serve as the public face of the PDA: “The coalition felt that it would have a better shot at passage if Williams carried the ball rather than Bayh. . . . Williams agreed as long as Bayh would continue to do most of the work on it.”²⁴⁵ To ensure this introductory momentum, the Campaign spent weeks contacting a target list of members who could co-sponsor the legislation, winning immediate bipartisan co-sponsorship from six senators and eighty-six representatives. Thus, the coalition’s targeted lobbying in the wake of *Gilbert* ensured the legislation began with extensive support and the leadership of Chairman Williams of the Senate Committee on Human Resources, Chairman Bayh of the Senate Subcommittee on Constitutional

²⁴² Barbara Dixon, Interview with Dr. Anne Costain, March 20, 1977 at p. 3 (on file with author).

²⁴³ Maria Landolpho, Associate Counsel to Senate Labor Subcommittee, Interview with Dr. Anne Costain, May 20, 1977, at p.4 (on file with author).

²⁴⁴ Barbara Dixon, Interview with Dr. Anne Costain, March 20, 1977 at p. 3 (on file with author).

²⁴⁵ *Id.*; see also Maria Landolpho, Interview with Dr. Anne Costain, May 20, 1977 at p. 1 (on file with author).

Law, and Chairman Augustus Hawkins of the House Subcommittee on Employment Opportunities.²⁴⁶

The first joint press conference – billed as a “bipartisan effort to outlaw pregnancy discrimination”²⁴⁷ – conveyed the urgency of a legislative response and exemplified the norm elaboration that would define the subsequent days of hearings. As Senator Williams declared:

The [*Gilbert*] Court ignored the intent of Congress in enacting Title VII – that intent was to protect all individuals from unjust employment discrimination, including pregnant women.

. . . I am afraid that lurking between the lines of the *Gilbert* decision is the outdated notion that women are only supplemental or temporary workers – earning “pin money” or waiting to return home to raise children full time.

. . . The loss of a mother’s salary will have a serious effect on the family unit – making it difficult for parents to provide their children with proper nutrition and health care. For some women and their families, it will mean dissipating family savings and security, or being forced to go on welfare. For others – especially low-income women – the loss of income will encourage abortions.²⁴⁸

These comments reflect precisely the coalition’s goals: to repudiate the Supreme Court’s specific holding sanctioning intentional pregnancy discrimination, to reject its biased reasoning relegating women to second-class status in the workplace, and to couch the legislative response in terms of the family unit’s economic and health security. Congressman Hawkins stressed these same themes, with special attention both to the threat of health problems that might stem from mothers stripped of their own job security and to the broader economic pressures of pregnancy discrimination that “account[] for a substantial portion of the more than a million abortions which occur in the United States each year.”²⁴⁹ Importantly, this legislation – the “Hawkins-Williams bill” – also secured support from fourteen of the eighteen women members of the House, with three congresswomen joining to

²⁴⁶ Campaign to End Discrimination Against Pregnant Workers, *Report to Campaign Supporters*, March 10, 1977 (on file with author).

²⁴⁷ Press Release, *Williams, Bayh, Hawkins Lead Bipartisan Effort to Outlaw Pregnancy Discrimination*, March 15, 1977 (on file with author).

²⁴⁸ Remarks of Senator Harrison A. Williams, Jr., Joint Press Conference Regarding Introduction of a Bill to Amend Title VII of the Civil Rights Act of 1964 to Prohibit Sex Discrimination on the Basis of Pregnancy, Childbirth and Related Medical Conditions, March 15, 1977 (on file with author).

²⁴⁹ Draft of Speech for Congressman Hawkins For Use on Introduction of Bill To Prevent Discrimination In Employment Because of Pregnancy, at p. 3 (on file with author).

spotlight the Court's lack of institutional credibility through diversity. Congresswoman Elizabeth Holtzman underscored the illegitimacy she perceived in the six-man majority's reasoning in *Gilbert*: "I was surprised and disturbed by the Supreme Court's ruling *I do not think a Supreme Court made up of nine women could have reached a decision so oblivious to biological reality.*"²⁵⁰ To combat this illegitimacy the women's movement joined with coalition members to articulate through public education and debate their own representative vision for securing meaningful equality of opportunity in the workplace through the foundational requirement that pregnant workers must least be treated as well as men.

Favorable public reception of the proposed bill also fueled Members' recognition that some form of legislative response against pregnancy discrimination was necessary. In the House Equal Employment Opportunities Subcommittee, for instance, outside mail received in the initial weeks after the introduction of the Hawkins-Williams bill reflected a public response of between eight to one and ten to one in favor of the legislation.²⁵¹ One staff member noted that the subcommittee received inquiries in the wake of the bill's introduction from Members' offices actually requesting assistance with responses to their constituent mail.²⁵² Significantly, this favorable response was driven by the mobilized coalition organizations that had targeted members on jurisdiction subcommittees and committees in both chambers. With legislative coordinators in every state, organizations like NOW offered an experienced lobbying apparatus that included grassroots lobbying, petition distribution, and several national mailings to members.²⁵³ The contrast evident between the democratic, grassroots strategy of NOW and the illegitimate, norm pronouncement by

²⁵⁰ Press Release from Congresswomen Margaret Heckler (R-Mass.), Elizabeth Holtzman (D-N.Y.), and Patricia Schoreder (D-Colo.), March 15, 1977 (on file with author) (emphasis added).

²⁵¹ Carol Shanzer, Equal Opportunity Subcommittee, Interview with Dr. Anne Costain, May 24, 1977, at p. 2 (on file with author).

²⁵² *Id.*

²⁵³ Kathleen Miller, ACLU Lobbyist Coordinator, Interview with Dr. Anne Costain, April 29, 1977, at p. 2 (on file with author).

the Supreme Court was deliberate, as NOW's National Legislative Coordinator noted after the bill was announced:

We are in touch with our chapters in every state[;] they are letting their Representatives in Congress know that this is a number one priority. We plan to send a message to the Supreme Court that women are a strong political force. *And if they continue to ignore reality in future sex discrimination cases we will move quickly for redress in the Congress.* Women are 51% of the population and Congress knows that. If the Supreme Court hasn't learned this basic fact of life yet, I am confident they soon will.²⁵⁴

Labor unions also provided essential rank-and-file support to fill the districts of targeted Members of Congress. This captured the indispensable link between the legal feminists and labor unions in the Campaign. Despite her own grassroots base, NOW's chief lobbyist noted the importance of labor's larger organizations, its greater numbers of lobbyists and staff, and the deep sense of investment among women workers in these unions whose status in the workplace was at stake in *Gilbert* and now the PDA campaign.²⁵⁵

Finally, along with the mobilized public support for some form of a legislative response and the bipartisan introduction of the Hawkins-Williams bill, the normative endorsement of the Campaign's equal-treatment principle to combat intentional discrimination at the state level – even in the wake of *Gilbert* – provided a counterbalance to the conceptual framework apparently legitimized with constitutional reasoning in *Gilbert*. Before *Gilbert*, legislatures in eight states and high courts in four additional states had explicitly embraced pregnancy as a prohibited ground of sex discrimination in state constitutions, statutes, and regulations. Even after *Gilbert*, as the testimony in Senate and House hearings noted repeatedly, the equality norm banning pregnancy discrimination had been endorsed by twenty-five states in crafting or interpreting their own employment civil rights laws.²⁵⁶

²⁵⁴ Melissa Thompson, Quoted in Campaign to End Discrimination Against Pregnant Workers, *Campaign Hails Legislation Introduced To End Discrimination Against Pregnancy Workers*, March 15, 1977 (emphasis added).

²⁵⁵ Kathleen Miller, ACLU Lobbyist Coordinator, Interview with Dr. Anne Costain, April 29, 1977, at p. 2 (on file with author).

²⁵⁶ See, e.g., S. REP. NO. 95-331, at 3 (1977).

In fact, exactly one week after *Gilbert* was announced the New York Court of Appeals rejected its reasoning in an extremely similar fact pattern implicating disability benefits for pregnant workers. The court interpreted its Human Rights Law banning sex discrimination to include, as a *per se* violation, policies which single out pregnancy and childbirth for treatment different from that accorded other instances of physical or medical impairment or disability, even emphasizing its formal and normative rejection of the Supreme Court ruling by its contrary ruling:

We are aware, of course, that the United States Supreme Court has recently reached a contrary result in construing § 703(a)(1) of Title VII of the federal Civil Rights Act of 1964. . . . The pertinent provisions of the statute are substantially identical to those of section 206 of the Executive Law of the State of New York. The determination of the Supreme Court, while instructive, is not binding on our Court as we now confront the contention of private employers²⁵⁷

In Pennsylvania, as well, the Human Relations Commission won a victory in state court as its order of compensation for pregnancy discrimination was upheld in early May 1977 despite the contrary reasoning deployed in *Gilbert*. Upholding the Human Rights Commission’s ban on pregnancy discrimination, the Pennsylvania court held: “We believe that since pregnancy is unique to women, a disability plan which expressly denies benefits for disability arising out of pregnancy is one which discriminates against women employees because of their sex.”²⁵⁸ Thus, as a portion of the States continued to bar pregnancy discrimination under their state-level statutes, judicial orders, and regulations, and as state courts after *Gilbert* also rejected its reasoning, the terms of the normative debate for the PDA came into sharp focus by Spring 1977.

Importantly, the severity of *Gilbert*’s reasoning in prompting legislative response was further fueled when the Supreme Court extended the holding later that year in *Nashville Gas Co. v. Satty*²⁵⁹ to validate employers’ denial of sick leave benefits to pregnant workers. While the Court held this denial of sick leave does not constitute sex discrimination, a more vigorous disparate impact analysis

²⁵⁷ Brooklyn Union Gas Co. v. N.Y. State Human Rights Appeal Board, 41 N. Y. 2d 84, 359 N. E. 2d 393 (1976).

²⁵⁸ Anderson v. Upper Bucks County Vocational Technical School, 30 Pa. Cmwlth. 103, 373 A.2d 126 (1977).

²⁵⁹ 434 U.S. 136 (1977).

did lead the *Satty* Court to hold that employers may not deny accumulated seniority to workers returning from maternity leave. Nevertheless, the artificial *benefits-burden* distinction the Court used to claim compatibility between *Satty*'s dual holdings and with *Gilbert* served only to underscore the Campaign's mobilization to affirmatively reject the Court's vision of sex discrimination. As the Campaign declared on the day of the holding: "THE SATTY DECISION ILLUSTRATES THE URGENT NEED FOR PASSAGE OF H.R. 6075."²⁶⁰

2. *Activating Debate*

Against the backdrop of *Gilbert*'s six-man majority asserting that workplace discrimination on the basis of women's childbearing capacity is not sex-based, the legislative hearings that led to the PDA demonstrate how Congress provided a more democratically legitimate and institutionally competent forum for deliberation over the meaning of Title VII's fundamental sex equality norm. In May 1977, the Senate aide responsible for organizing the chamber's hearings captured this point particularly well:

I see lining up hearings as somewhat analogous to being a trial lawyer and setting up a case – you want to be sure that your case is well presented. But, of course, you have to give time for the arguments on the other side. No groups opposed to the bill were turned down for testimony. We tried to get representatives from every side.²⁶¹

The legislative hearings were designed to collect information from the extremely broad range of interests in the private sector, to evaluate the competing frameworks for conceiving of sex discrimination and pregnancy, and finally to engage in public debate over detailed norm elaboration, all in stark contrast to the limited fact-finding capacity of the retrospective institution of the courts. This Sub-Section demonstrates that the generation of the Pregnancy Discrimination Act reflected

²⁶⁰ Campaign to End Discrimination Against Pregnant Workers, Internal Memorandum, at p. 1 (December 7, 1977) (on file with author).

²⁶¹ Maria Landolpho, Interview with Dr. Anne Costain, May 20, 1977 at p. 2 (on file with author).

Congress's intense and public deliberation that led to a fundamental commitment to an equality norm in which pregnancy discrimination is a *prima facie* ground of unlawful sex discrimination.

The testimony provided by dozens of parties in the Senate and House committee hearings captured the competing conceptual frameworks at stake in the passage of the PDA. The Hawkins-Williams Bill – S. 995 and H.R. 6075²⁶² – proposed “To Amend Title VII of the Civil Rights Act of 1964 to Prohibit Sex Discrimination on the Basis of Pregnancy” in direct response to *Gilbert*. But the impassioned arguments and evidence provided in the legislative hearings revealed Congress's consideration of normative questions extending far beyond the coverage of pregnancy merely in income protection programs. The resolution of several distinctly important issues together informed the nature of the equality norm endorsed by Congress, including key questions about the place of women in the workforce, the debate between an equal-treatment and special-treatment approach as a baseline norm for equality of employment opportunities, and the broader stereotypes about women that continued to drive employers' narrow conception of sex equality. I also identify the important constitutional overtones to these public deliberations, as many key moments of debate implicated the broader constitutional vision of sex equality vindicated by Congress and the Campaign in the birth of this super-statute.

a. *Debating Legal Equality*

A primary point of contention between supporters and opponents of the Hawkins-Williams bill was the threat posed by exclusionary pregnancy policies to the vitality of women's equal employment opportunities altogether. Campaign advocates challenged Congress to reject the Supreme Court's continued reliance on stereotypes that perpetuated the marginal status of women in

²⁶² The bill was originally H.R. 5055.

the workplace, while opponents to the PDA expressly advanced an even more constrained view of women as workers than that embraced by the Supreme Court.

By situating *Gilbert*'s sanction of pregnancy discrimination in the context of the many other issues of sex discrimination challenged by the women's movement in earlier decades, the Campaign raised the stakes of the legislative response to one about the nation's fundamental commitment to equality for women. Citing expansive evidence of the "man-made laws and regulations"²⁶³ that subordinate women in the workplace on the basis of their capacity to become pregnant, Wendy Williams explained that a central theme across the testimony offered by Campaign members was that employers' bias against women as workers has always been fueled by their potential to become pregnant, thus rendering the Court's normative framework deeply threatening to any prospect for women to secure meaningful equality in the workplace. Williams told the House and Senate:

The common thread of justification through most policies and practices that have discriminated against all women in the labor force rested ultimately on the capacity of women to become pregnant.... Some of these assumptions that women would and in fact, should get married and have children and leave the work force have led to *the view that women are marginal workers not deserving of the emoluments of the "real" workers in the work force.*²⁶⁴

This stereotypical presumption continued to pervade the workplace for years after Title VII mandated equality of employment opportunities, with reproductive difference as the primary justification for this bias about women workers. Testimony emphasized biased assumptions about pregnancy that included "both its medical characteristics and physical effects, and more broadly, assumptions about its implications for the role of women in society and in the labor force."²⁶⁵ Early in both hearings, the testimony from the Chairwoman of the EEOC captured the very real pregnancy exclusion evident in the workplace and the personal impact of *Gilbert* on members of the Commission: "There can be no question that the wide range of employment policies direct at pregnant women—or at all women

²⁶³ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 130 (1977) (statement of Wendy W. Williams).

²⁶⁴ *Id.* at 113.

²⁶⁵ *Id.* at 123.

because they *might* become pregnant—constitutes one of the most significant hindrances to women’s equal participation in the labor market.”²⁶⁶ Acting Chair Ethel Bent Walsh reported to senators that the EEOC had begun responding one case at a time as the whipsaw of pregnancy discrimination became evident:

Too often, women were totally excluded from employment because they might become or were pregnant. Even if hired, a double standard prevailed...Often women were fired as soon as they became pregnant and were not rehired or, if rehired, not given credit for their past years of work.

...

As a woman, as a working mother and as Acting Chairman of the Equal Employment Opportunity Commission, I consider this unconscionable.²⁶⁷

In addition to the symbolic impact of *Gilbert*, Walsh described to both chambers the constraints the Supreme Court had imposed on the EEOC’s ability to ensure equal employment opportunities for women: “As a result of the December 7 [*Gilbert*] decision,...our Commission has been forced to take steps to dismiss pregnancy benefits allegations in Commission lawsuits....[T]here are 89 suits in which we are compelled to seek dismissal of all or some of the allegations.”²⁶⁸ Speaker after speaker presented such information to both chambers conveying the message and practice of exclusion that pregnancy discrimination imposes on women and the deep impact of *Gilbert*. Nonetheless, the hearings also displayed public challenges to this portrait of women as workers.

Opponents to the Hawkins-Williams proposal reframed the question of women as workers into a debate about employers’ general medical and health care obligations:

*What we are talking about here is the medical benefit program, not necessarily an amendment to title VII or a discrimination issue. This is really, as we see it, a question of dealing with a particular and peculiar medical problem that is unique to female employees.*²⁶⁹

²⁶⁶ *Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong. 123 (1977) (statement of Ethel Bent Walsh, Vice Chairman, Equal Employment Opportunity Commission) (emphasis added).

²⁶⁷ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 32 (1977) (statement of Ethel Bent Walsh, Vice Chairman, Equal Employment Opportunity Commission).

²⁶⁸ *Id.*

²⁶⁹ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 84-85 (1977) (statement of Francis Coleman, Attorney for the National Association of Manufacturers) (emphasis added).

Two contentions underpinned this effort to reframe the legislative response to *Gilbert*: first, opponents *challenged the Campaign's core premise* that pregnancy-based classifications constitute sex discrimination; and second, opponents demanded that any legislative response must include specific limitations on the time period of income coverage in a *special-treatment path to equality that protects employers against abuse by pregnant workers*.

The Chamber of Commerce in the House and the National Association of Manufacturers (NAM) in the Senate argued that employer pregnancy policies in benefits plans do not amount to similar disabilities being treated differently on account of sex-based classifications. Instead, they contended, pregnancy was an indisputably *unique, real difference in women and a voluntary medical matter* that should be left to collective bargaining at best, or at worst to legislative amendments to the OSHA and other such laws related to the health of workers. Representing over 13,000 member companies and the majority of manufacturing business in the United States, NAM contended in the Senate hearings:

Pregnancy is a unique physiological experience. It [is] *sui generis*. . . . In short, we would urge Congress to reject this simplistic solution to the many complex medical, psychological and sociological problems posed by the question of treatment of pregnant employees.²⁷⁰

This position advanced by NAM and the Chamber of Commerce reflects the conception of pregnancy classifications privileged by the Court in *Geduldig* and *Gilbert* over the equality framework constructed by the EEOC and the Campaign.

Opponents even challenged whether the issue of pregnant women's rights in the workplace implicated any equality of employment opportunity concerns whatsoever, instead advocating for a solution to *Gilbert* through *amendments to other health-related employment laws*. Asked by Senator Hatch whether legislation addressing employers' pregnancy-related disability plans concerned a nondiscrimination norm relevant to the Civil Rights Act at all, the NAM representative told senators:

²⁷⁰ *Id.*

I think this should properly be treated as a medical disability benefit program and shouldn't be complicated by putting it under title VII. Title VII already addresses itself to many of the problems of discrimination connected with pregnancy.

. . . .

This could conceivably be amended to ERISA or some of the other legislation in the employment benefits area, the workmen's comp area, or some other area. I don't think it properly belongs under a discrimination bill.²⁷¹

This captures the repeated effort by NAM and the Chamber to rebut the Campaign's pre-legislative momentum by reframing the response to *Gilbert* as merely concerned with medical issues unrelated to equality in employment opportunities. But displaying the fierce conceptual commitment at stake in these hearings, Campaign supporters refused to compromise on the foundational reversal of *Gilbert* through a discrimination-based response that emphasizes the decision's biased and wrong equality jurisprudence. On behalf of the Campaign, Co-Chair Susan Ross noted: "Contrary to what the NAM said earlier today, the bill does affect a woman's right to work. It says employers cannot hire and fire on the basis of pregnancy. It does *not* deal solely with medical and disability insurance, which is something I think Senator Hatch had misunderstood." Moreover, directly responding to the NAM testimony questioning the propriety of a discrimination framework to reverse the *Gilbert* Court, Assistant Attorney General Drew Days III argued:

It belongs in title VII, Senator Hatch. . . . Because that piece of legislation represented, in my estimation, a determination by Congress to open opportunities up to minorities and women who had been discriminated against over many generations. It seems to me that pregnancy disability is a most modern example of that type of undue restriction upon the opportunities for women in employment.²⁷²

Thus, Campaign supporters refused to cede ground in their demand that pregnancy be treated equally with any other physical condition according to the sex equality prescriptions of Title VII.

The second aforementioned method invoked by PDA opponents to slow the bill's momentum was to invoke stereotypes about pregnant workers as abusive of maternity leave, shifting the hearings to the special-treatment versus equal-treatment debate that had defined the earlier periods of norm

²⁷¹ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 90 (1977) (statement of the Senator Orin Hatch).

²⁷² *See, e.g., Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 44 (1977) (statement of Drew S. Days III, Assistant Attorney General of the United States).

generation in the EEOC, the judicial campaigns, and the formation of the coalition. Although the Campaign to reverse *Gilbert* had already enjoyed sufficient momentum to ensure some type of legislative response, opponents like the Chamber of Commerce sought to ensure these changes remained within the Court’s limited normative framework, as one representative argued: “I think a bill designed to cure the problems involved in the *Gilbert* case should address itself to the problem of pregnancy. . . [I]t cannot be equated to a broken toe or pneumonia”²⁷³ Notably, Senator Hatch embraced this concern, telling colleagues:

I think you can see the dilemma that exists in the minds of many people in America, and presently exists in my mind. I don’t like to see discrimination toward women and I want to work to end it. But my question is, and I think the question of many people who take the other side . . . is that most people really don’t consider pregnancy a disability or an illness or something that is not voluntarily undertaken²⁷⁴

Encouraged by Senator Hatch, the NAM and the Chamber of Commerce argued against the Hawkins-Williams proposal by claiming the equal-treatment standard of comparability ignored the *sweeping abuses that pregnant workers would perpetrate against employers*. Early in the hearings Senator Hatch provided a counterweight to the normative support surrounding the Hawkins-Williams bill by attacking the equal-treatment approach. Since pregnancy is “a voluntary natural occurrence,” Hatch called for his colleagues to amend the legislation by replacing the equal-treatment standard with a *special-treatment standard as a limitation for coverage*: “Shouldn’t there be some sort of limitation on how much time should be taken for [pregnancy] disability?”²⁷⁵

I tend to favor a limit because of the abuses that occur and having spent so much time in the courts, there are a lot of abuses in or outside of the medical profession. . . . [N]o good doctor with the malpractice suits hanging over their head is going to ignore the subjective complaints of the patient

²⁷³ See also *Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong. 86 (1977) (statement of G. Brockwel Heylin, Labor Relations Attorney for the Chamber of Commerce).

²⁷⁴ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 42 (1977) (statement of the Senator Orin Hatch).

²⁷⁵ *Id.* at 41.

and say you are not sick. . . . [This] is a very serious area and very costly to business, to America and maybe to the woman herself who gets away with it.²⁷⁶

Driven by this expectation that pregnant workers would persuade their sympathetic family doctors to authorize abusive extensions of covered maternity leave, Senator Hatch even suggested that – for pregnancy-based disabilities alone – only employer-specified doctors should enjoy the final determination of fitness for work.²⁷⁷

The NAM and Chamber of Commerce joined in this strong criticism of the equal-treatment approach by also mobilizing the very stereotypes about female workers that women had hoped to eradicate as sex discrimination. Repeatedly stressing the need for a special limitation for pregnancy disabilities, the Chamber of Commerce warned that without a statutorily-mandated limit on pregnancy coverage “the bill would [] offer substantial opportunities for abuse.... The most obvious abuse would be the fact that leave and payments for pregnancy might amount to severance pay, rather than disability pay, in many cases.”²⁷⁸ Driving this argument was the belief that women would abuse their coverage by never returning to work or by only doing so after an abusive period of insured leave. The testimony from NAM was unequivocal in this effort to rebut the Campaign’s core contention:

The AFL-CIO told the House Subcommittee on Employment Opportunities that “[m]uch of the disparate treatment of women in employment has come from unfounded assumptions about their lack of interest in continuing careers because at some time they are likely to become pregnant and have children.” *The truth is that women who bear children have not consistently indicated such an interest in a continuing career.*²⁷⁹

Claiming that forty to fifty percent of women who take pregnancy leave do not return to work, NAM argued nearly half of the disability payments would constitute severance pay. Concluding its

²⁷⁶ *Id.*

²⁷⁷ See, e.g., *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 39 (1977) (statement of Drew S. Days III, Assistant Attorney General of the United States).

²⁷⁸ See also *Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong. 84-85 (1977) (G. Brockwel Heylin, Labor Relations Attorney for the Chamber of Commerce).

²⁷⁹ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 98 (1977) (statement of the National Association of Manufacturers).

subversion of the Campaign's equal-treatment approach, NAM told Congress that the Hawkins-Williams *pregnancy discrimination bill would itself perpetrate discrimination against non-pregnant workers*: "Such a situation would result in a special termination benefit for a single class of employee (pregnant women) which is denied other employees."²⁸⁰

The Campaign publicly exposed the false, stereotypical assumptions about women as workers that animated the NAM and Chamber of Commerce testimony, with particular force delivered in testimony from supportive members of executive offices. As Assistant Attorney General, Drew Days III provided extensive evidence to the House and the Senate demonstrating the need for the pregnancy legislation but also challenging the biases of the Members of Congress mobilizing the NAM and Chamber arguments, about abuse by women workers:

The discussion about potential for abuse flows from a biased perception of the female work force that in some way women are more prone to abuse these types of benefits than men are. . . . I once worked for General Motors and I can assure you that men are quite competent in abusing a health and welfare plan and I think it is probably unrelated to the sex of the person involved. I think all of this discussion is the result of perceiving woman workers as somehow less serious about their jobs and less concern with developing careers than men are.²⁸¹

Expressing the solidarity of the NAACP and the broader LCCR with legal feminists attacking these stereotypes about women's role in the workplace, Clarence Mitchell similarly told the Senate: "[I]t looks like everything suddenly comes into focus as saying you can't trust these mothers, they're going to chisel and not come back to work. They're going to hang around the house . . ."²⁸² Even the Bureau of Women, a section of the Labor Department previously dominated by protectionist feminists, unambiguously rejected the special limitations advocated by opponents, exposing their underlying biases against women: "Despite some thoughts to the contrary, working mothers are

²⁸⁰ *Id.* at 101.

²⁸¹ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 39 (1977) (statement of Drew S. Days III, Assistant Attorney General of the United States).

²⁸² *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 108 (1977) (statement of the Clarence Mitchell, Director, Washington Bureau of the National Association for the Advancement of Colored People, and Chairman of the Leadership Conference on Civil Rights).

seriously attached to the labor force, and in many instances they are the breadwinners of their families. . . . They are not in the labor force to have a casual flirtation with the market, but to earn income.”²⁸³

Campaign Co-Chair Susan Ross complemented this testimony exposing the stereotypes of the opposition by pointedly constructing an affirmative argument for why the equal-treatment standard for this nondiscrimination norm was essential. As the author of the EEOC Guidelines, Ross’s testimony to the House and Senate marked another significant symbolic and substantive moment for the equalitarian legal feminists’ long campaign to establish the nation’s fundamental commitment to equal treatment. While the Campaign had chosen not to simply insert the EEOC Guidelines into Title VII, Ross explained the core equality norm at stake in Congress’s deliberation:

We would oppose strongly any limitation of x numbers of weeks on pregnancy-related disability coverage, for the reason it goes against the whole theory of the bill and is not needed. The employer can use the same protections to prevent abuse for pregnancy-related disability as it can use for any other disability. That is what is meant by the standard of equal treatment who are similar in their inability to work.

By passing this bill Congress would be affirming that the EEOC pro[perly] interpreted Title VII. The Campaign believes, moreover, that the EEOC exhibited great leadership and an-indepth understanding of how best to eradicate sex discrimination from the marketplace when it enacted the pregnancy guidelines in 1972.²⁸⁴

Thus, the core equality principle at stake and the normative legacy of the EEOC Guidelines was unmistakable in the hearings before Congress. The choice between a limitation through special-treatment legislation and equal-treatment comparability standard was again posed by legal feminists seeking to establish a core commitment to equality for women. Senator Hatch ultimately did propose to amend the PDA to include a specific time limitation on women’s coverage for pregnancy-related leave even as this marked the sole exclusion from unlimited coverage. However, the Senate

²⁸³ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 34 (1977) (statement of Alexis Herman, Director Women’s Bureau, Department of Labor).

²⁸⁴ *Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor* (1977) (statement of Susan Deller Ross, Co-Chair, Campaign to End Discrimination Against Pregnant Workers).

committee and full chamber defeated this proposal and preserved the equal-treatment standard in the foundational first section defining sex discrimination to include pregnancy discrimination.

In a dramatic moment, Sherry O’Steen also testified to the House committee to convey fully the enormous devastation that the forced loss of income could have on a woman worker quite contrary to the biased presumptions of women as marginal workers. As a complainant in *Gilbert* whose experience was repeatedly cited in testimony by the Campaign, O’Steen’s testimony spoke directly to the questions posed for Members’ about the place of women as workers and citizens. She described the result of being forced into unpaid leave, revealing all too clearly that pregnant workers were far from supplemental incomes in many families; indeed, their income could be indispensable:

At the time me and my husband were having troubles. He got so upset with me, thinking I quit work and us struggling, that he left. . . . I was just devastated. I had one young child already at home and I was pregnant with another one, knowing that now I’d be without no income whatsoever. It was just really bad at the time.²⁸⁵

For nearly one month, O’Steen could not afford electricity for refrigeration, cooking, and lighting, oil for heating, or even enough food for three meals a day—she barely survived supporting her two-year-old daughter. In this dark period, O’Steen reflected on her situation: “It was during this time that the local union convinced me that I need to fight this . . . What really started it was that there were men on our line that could be off for anything. There was one guy down from us, he was off and covered for a hair transplant!”²⁸⁶ O’Steen agreed to join the other women who had experienced this pregnancy discrimination by suing General Electric under Title VII. When her claim of sex-based discrimination was rejected by the Supreme Court, she determined to appeal once again.

The impact of this public, normative clash on the final form of the PDA was captured in committee reports in the House and Senate, which specifically and repeatedly cited the testimony of

²⁸⁵ Sherry O’Steen, Interview with author, April 8, 2005.

²⁸⁶ *Id.*

the Campaign members in articulating their fundamental repudiation of the Court's holding and reasoning in *Gilbert*:

As testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs.²⁸⁷

Statements in both chambers upon the passage of the bill underscored the key themes that defined the Campaign agenda early in its planning and in its breadth of membership united behind the goal to reverse *Gilbert*. As Senator Jeffords described,

We seldom see legislation which enjoys such broad-based support throughout the country. It is a pro-life, pro-family bill designed to take discriminatory pressure off the millions of families in this country who want to have children, but need two incomes to survive.²⁸⁸

Additionally notable was the transformative impact of the testimony. In an especially marked shift Congressman Ronald Sarasin, an early opponent of the proposed pregnancy discrimination legislation, testified to his change of view and vote after confronting the testimony from such different sources throughout the hearings:

The pregnancy disability legislation has been the subject of great controversy. When my Subcommittee on Employment Opportunities first begin to consider the legislation, I must admit that I had serious reservations. However, as we probed the issue, as we learned of the many instances of discrimination against pregnant workers, *as we learned of the hardships this discrimination brought to the women and their families, I became a convert.*²⁸⁹

Further, the committees emphasized their rejection of the *Gilbert* majority's normative framework in favor of the principled approach articulated by the dissent. The Senate Committee noted:

In the committee's view, the following passages from the two dissenting opinions in the case correctly express both the principle and the meaning of title VII. As Mr. Justice Brennan stated: "Surely it offends commonsense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'" Likewise, Mr. Justice Stevens stated that, "(b)y definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."²⁹⁰

Ultimately, the Pregnancy Discrimination Act began with the explicit definition of sex discrimination to include pregnancy, childbirth or related medical conditions, and proceeded to specify the equal-

²⁸⁷ H. REP. NO. 95-948 at 3 (1978).

²⁸⁸ CONG. REC. 38574 (Oct. 14, 1978) (statement of Senator James Jeffords).

²⁸⁹ CONG. REC. 38574 (October 14, 1978) (emphasis added).

²⁹⁰ S. REP. NO. 95-331, at 2-3 (1978); *see also* H. REP. NO. 95-948 at 2 (1978).

treatment standard for women as employees. As the following Sub-Section shows, the constitutional implications of this normative endorsement were apparent throughout the campaign.

b. *Shaping Constitutional Norms*

The coalition activism and hearings on the Hawkins-Williams bill repeatedly cited *Gilbert* as the focal point prompting a needed legislative response, but driving the hearings and testimony were clear constitutional overtones in Congress's rejection of the *reasoning* in *Geduldig* and *Gilbert* that classified pregnancy discrimination as outside the equality framework. The previous Sub-Section explicated the substantive contours of the equality norm extensively evaluated in the legislative hearings, presenting Congress with the opportunity to embrace one of two competing foundational visions of sex equality. The constitutional vision animating the *Gilbert* Court's statutory holding identified in Part II prompted Congress to respond by articulating its fundamental principle of nondiscrimination. This Sub-Section shows the expression of constitutional implications from the Campaign to reverse *Gilbert* and endorse the equal-treatment principle of the EEOC.

First, even though *Geduldig*'s constitutional holding enjoyed binding force on state actors, Congress had passed the Equal Employment Opportunity Act of 1972 (EEOA) to extend Title VII of the Civil Rights Act to bind the States, subject to damage suits, under its Section 5 power to enforce the Fourteenth Amendment.²⁹¹ Indeed, just several months before extending the reasoning from *Geduldig* to Title VII in *Gilbert*, the Supreme Court had actually validated the EEOA as valid Section 5 legislation constitutionally binding the States under *Fitzpatrick v. Bitzer*.²⁹² As Robert Post and Reva Siegel have noted, "The PDA, insofar as it was applied to the states, was also an exercise

291. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 1972 U.S.C.C.A.N. (86 Stat. 103) 122 (codified in scattered sections of 5 and 42 U.S.C.).

²⁹² 427 U.S. 445 (1976).

of Section 5 power.”²⁹³ Consequently, by considering amendments to Title VII, Congress’s response to *Gilbert* necessarily held constitutional implications that would bind with the force of the equalitarian sex discrimination framework not only the private sector but even the States.

Moreover, as the testimony above from Campaign representatives and supportive Members of Congress demonstrated, the debate over a legislative response to *Gilbert* implicated the fundamental question of women’s equality as citizens at the intersection between the statutory and constitutional arenas. In identifying the nexus between pregnancy-based classifications and sex discrimination, Campaign advocates successfully located this real-differences question within the overarching struggle to expunge stereotypes that have long relegated women to second-class citizenship in the workplace and in society – whether pregnant or not – because of their childbearing potential. Wendy Williams testified about how pregnancy formed the basis of sex discrimination not only in the workplace but in all areas of society:

The common thread of justification running through most of the policies and practices that have discriminated against women in the labor force rested ultimately on the capacity of women to become pregnant and the roles and behavior patterns of women that were assumed to surround that fact of pregnancy.²⁹⁴

Similarly, Campaign Co-Chair Susan Deller Ross specifically emphasized in her Senate and House testimony that “[f]ar more is at stake than the fate of women workers”:

The Supreme Court announced that it would examine and rely upon “court decisions” construing the equal protection clause of the 14th amendment,” to determine what Congress intended in title VII’s prohibition on discrimination.

*This idea is patently ridiculous as to the sex discrimination provision of title VII, for if Congress meant to incorporate equal protection doctrine into title VII in 1964, it meant to do absolutely nothing as to sex discrimination. In 1964, the Supreme Court had an unbroken record of upholding the most blatantly sex discriminatory practices under the 14th amendment....*²⁹⁵

²⁹³ Robert Post and Reva Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2012-13 (2003).

²⁹⁴ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 113 (1977) (statement of Wendy W. Williams).

²⁹⁵ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 120 (1977) (statement of Susan Deller Ross, Co-Chair, Campaign to End Discrimination Against Pregnant Workers).

Further, Ross excoriated the Court for its refusal to follow EEOC Guidelines on the ground that they were not contemporaneous. As Ross, explained, that reasoning would afford “the agency no time to develop an understanding of how discrimination operates.”²⁹⁶ Therefore, *Gilbert* rejected the identity between pregnancy and sex discrimination through conclusory reasoning that mirrored *Geduldig*, whereas the EEOC and now Congress extensively evaluated the competing normative frameworks of sex equality in the workplace.

Advocates within Congress, too, invoked the broader constitutional vision of sex equality animating the determination to decisively reverse the reasoning in *Geduldig* and *Gilbert*. Just as Part II showed how litigant parties in *Geduldig* and *Gilbert* sought to use the Equal Rights Amendment as a basis to support their competing conceptual frameworks for equal and special treatment, in the legislative hearings that led to the PDA Members of Congress did so as well. As leading co-sponsor Senator Bayh told his colleagues:

The *Gilbert* decision is the kind of decision that prompts some of us to say, this is why we need the equal rights amendment, so that part of our citizenry is not treated differently than others. But this has not happened yet, . . . [U]ntil that happens, and even afterwards, I think *it is important for Congress to legislate in those areas that are necessary to implement the equal rights amendment.*²⁹⁷

Like Senator Bayh, Senator Jacob Javits framed the Hawkins-Williams bill for his colleagues as a clear an important way “to make up for the fact that we have not ratified the ERA.”²⁹⁸ Further, Senator Javits repeatedly emphasized the fundamental principle of citizenship for women at stake in acceptability of their exclusion from any policies or employment opportunities on the basis of their childbearing capacity. “I think this is another major step in the enfranchisement of women,” Senator

²⁹⁶ *Id.*

²⁹⁷ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 6 (1977) (statement of Senator Birch Bayh).

²⁹⁸ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 5 (1977) (statement of Senator Javits).

Javits noted. “I think that this is what the issue is all about, since pregnancy is the one major disability to which women are subject which other parts of the population are not.”²⁹⁹

Finally, it is noteworthy that while the Court gave no recognition to legal feminists’ conception of sex equality based on the history of women’s struggle for equality in the workplace and as citizens, Congress’s endorsement of the PDA provided a crucial foundation for future sex discrimination doctrine. As one scholar has observed, “During the 1970s the Supreme Court developed the law of sex discrimination by means of an analogy between sex and race discrimination.”³⁰⁰ Critically, the ahistorical manner in which the Court applied this race/gender analogy to constitutional adjudication assured a constrained norm against sex discrimination. This insight into the limits of the Court’s constitutional equality jurisprudence applies with equal force in real-differences question presented by pregnancy discrimination in both the constitutional and statutory arenas in *Geduldig* and *Gilbert*. While the *Geduldig* and *Gilbert* Courts conservatively applied the “similarly situated” measure of race equality jurisprudence to the real-differences setting, Congress vindicated a democratically legitimate equal-treatment remedy after giving recognition to women’s historical experience of exclusion through the whipsaw of pregnancy discrimination. Indeed, in sharp contrast to the retrospective institution of the Court,³⁰¹ the legislative and administrative arenas shaped and were themselves informed by the women’s movement in successive waves of norm elaboration over time. Consequently the legislative reversal of *Gilbert* succeeded as a foundational moment, but it also marked the first of several increasingly informed efforts to craft a normative framework of workplace equality that took account of women’s childbearing capacity as a natural condition of employment and ultimately that has begun to shatter stereotypes at the

²⁹⁹ *Id.*

³⁰⁰ Siegel, *supra* note 108, at 949.

³⁰¹ See also Jed Rubenfeld, *The Anti-Anti-Discrimination Agenda*, 111 YALE L.J. 1140, 1143 (2002).

childrearing level as well.³⁰² Thus, the dialogic process that shaped the foundational equality principle instantiated in the PDA stood in sharp contrast to the constitutional norm elaboration of the Court that emphasized the race/gender analogy at the expense of any recognition of the actual historical experience of women in the workplace. The constitutional importance of this contrast was captured in no uncertain terms in later changes in the Court's own *constitutional* equality jurisprudence.³⁰³

c. *Costs*

Business associations opposing the pregnancy nondiscrimination mandate complemented their competing normative analysis with threats that exorbitant costs would be imposed unfairly on employers providing generous coverage. Yet corporate leaders facing the possibility of greater costs in both benefits programs and an assortment of rights claims nevertheless did not provide the sweeping resistance that might have been mobilized. Why was this the case? In part, the failure of opponents to mobilize widespread concerns about a pregnancy nondiscrimination mandate was due to the quite diverse array of organizations composing the Campaign to End Discrimination Against Pregnant Workers. Further, some of the resistance one might have expected from businesses was muted by the combination of the strong legislative introduction of the bill on terms chosen by the Campaign and States' resistance to the normative reasoning of the Supreme Court. But the NAM, the Chamber of Commerce, and several health insurance associations all did actively oppose the Hawkins-Williams bill. This sub-section shows that the opposition's failure to exploit the cost threats was due primarily to the Campaign's use of the equal-treatment standard to expose stereotypes underpinning incredible cost projections. The final sub-section shows that, instead of cost concerns,

³⁰² See *infra* notes 337-338 and accompanying text.

³⁰³ See *infra* note 338 and accompanying text.

ultimately it was the issue of abortion that nearly derailed the forceful congressional rejection of *Gilbert*, as the Campaign only enjoyed mixed success in rebuffing this amendment effort.

Repeatedly warning of estimated *annual* cost increases to employers of \$1.3- \$1.7 billion, the American Council of Life Insurance, the Health Insurance Association, the Chamber of Commerce, and the National Association of Manufacturers all cited exorbitant costs to halt the momentum of the Hawkins-Williams bill.³⁰⁴ The Chamber of Commerce also presented the same actuary whose lower court testimony had persuaded Justice Rehnquist and his majority in *Gilbert* that the “total package” analysis of benefits coverage shows women’s packages cost between 250 and 300 percent more than male costs.³⁰⁵ In the final element of this cost-based argument, the opposition business and health insurance associations claimed that the Campaign’s proposed equal-treatment standard would ensure that the most generous employers are actually discriminatorily penalized. As the NAM told the Senate:

S. 995 impose[s] a drastically disparate burden on employers throughout the country. The burden falls much more heavily on those employers who in the past have provided liberal disability coverage. . . .

. . . An employer that had a liberal disability policy but excluded pregnancy and related conditions would now be required to provide this liberal coverage for pregnancy as well, thereby clearly increasing its overall fringe benefit cost vis a vis the employer who provided no disability coverage whatsoever. Such a result, in our estimation, is patently inequitable.³⁰⁶

Thus, business opposition pointedly reframed the Campaign’s equal-treatment standard to claim it exerts a punitive impact on the most generous employers who would face exorbitant costs of more than \$1 billion per year.

³⁰⁴ See, e.g., *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 83 (1977) (statement of NAM).

³⁰⁵ See also *Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong. 92-93 (1977) (Paul Jackson, Actuary, Wyatt Company on behalf of the U.S. Chamber of Commerce).

³⁰⁶ See also *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 82 (1977) (statement of Francis Coleman, Attorney, National Association of Manufacturers).

The Campaign effectively rebuffed these cost-based threats by ensuring that one component of this proposed legislation's valence quality was its support among businesses with experience in voluntary pregnancy nondiscrimination. Well before any legislation was introduced, movement leaders had identified which businesses – such as Xerox and IBM – they would invite to testify at these hearings about their support for the PDA based on positive, cost-effective experiences with policies ensuring equal treatment of pregnancy.³⁰⁷ As a result, an essential element of the coalition's platform in support of the PDA was the experience and support of the majority of American businesses with disability plans which already provided coverage of pregnancy. As Senator Bayh pointed out in his testimony to the Labor Subcommittee that was repeated throughout the hearings:

Plans such as General Electric's represent only 40 percent of all disability plans offered in the United States. 60 percent of the disability plans in this nation voluntarily cover pregnancy and childbirth. Among the companies offering the more comprehensive, nondiscriminatory coverage are IBM, Firestone, Xerox Cummins Engine, Martin Marietta, and Polaroid.³⁰⁸

The Campaign drew on this database of actual experience among employers to rebuff speculation about increased costs imposed by an equal-treatment framework, and it also invoked several actuarial rejections of NAM, Chamber, and health insurance industry estimations. In one such finding reflecting the experience of nondiscriminatory employers, an actuary from the U.S. Civil Service Commission and the American Academy of Actuaries provided a sharp alternative annual cost projection of \$320 million, a figure nearly matched by the Department of Labor as well.³⁰⁹ As a result, while businesses did not actively campaign with the coalition's public supporters, in the event the Campaign ensured it was experienced businesses whose testimony was prominently featured. The

³⁰⁷ See, e.g., Personal notes of Judith Lichtman, Meeting of the Campaign to End Discrimination Against Pregnant Workers with Susan Greyson, February 16, 1977 (on file with author).

³⁰⁸ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 3 (1977) (statement of Sen. Birch Bayh, Member, Sen. Subcomm. on Labor).

³⁰⁹ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 443 (1977) (statement of Ethel Rubin, Actuary).

experience of Xerox and other companies was critical to rebutting claims of exorbitant, bankrupting costs that would follow the mandate of equality for pregnant workers.

Moreover, the affirmative testimony from supportive companies like Xerox was matched by an accompanying dearth of countervailing specific evidence supporting oppositional cost estimates. In fact, in his position as Chairman of the subcommittee following Senator Hatch's skeptical testimony, Senator Williams noted:

There is almost a basic assumption here that we are moving into an uncharted area of coverage ...which is not the case at all.... [A]t least 40 percent of industry presently provides coverage for temporary disabilities which are not work related, and at least 60 percent of those employers provide in terms of disability coverage for pregnancy. *We have been searching for those who will give us the horrible examples to come here and tell us, but we can't find them.*

As a matter of fact, I don't believe we have any witnesses that will give us the horror story that is described here.³¹⁰

A colloquy following Chairman William's exchange with NAM underscored the resonance of this ineffective response to the experience of businesses who were supporting the Campaign:

The CHAIRMAN: I would like to have some of your member companies tell us what problems they faced in the coverage they have. We had a dragnet out to get people to come in here to tell us any problems they have. We thought you were the one group that would give us some specifics. . . . We have been searching for those who will give us the abuses that we hear about and we would like to know about it specifically."

Senator HATCH: Has GE ever come in and testified?

The CHAIRMAN: They have been invited; certainly. They don't want to.

Senator HATCH: We ought to call GE since they did all the work in this case, have them come in and testify on what they think of the bill. The door is open. The chairman is being as fair as I have ever seen any chairman be.

....

The CHAIRMAN: I will tell you, we have done our level best, more in this situation than we have in a lot of other bills. We have been on a constant search for months now.³¹¹

This colloquy marked the culmination of several exchanges in which suggestions by the opposition of exorbitant costs were met with competing evidence from the Campaign and, most importantly,

³¹⁰ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 72 (1977) (statement of Senator Harrison William).

³¹¹ *Id.* at 92-93.

testimony from business with the experience of nondiscriminatory pregnancy coverage that undermined the opposition testimony.

Finally, Campaign advocates revealed that General Electric's nearly \$1.5 billion cost estimate actually depended entirely on the assumption that women would remain absent from work for an average of *thirty weeks*, even though ninety-five percent of women were disabled only an average of *six weeks*.³¹² Given the blatant use of biased assumptions, the Campaign lobbying committee immediately set out to undermine the inflated cost projections in light of its exploitation in *Gilbert* to overcome the disparate impact test in excluding pregnancy from the sex discrimination principle. From its first Fact Sheet mailed to all prospective Campaign groups and Members of Congress, the coalition assured that "the size of this expense to employers has been vastly overblown."³¹³ In fact, the Campaign's own actuary estimated the annual cost of the Hawkins-Williams bill at between \$145 million³¹⁴ and \$300 million,³¹⁵ far from the billion-dollar figures cited by the opposition. The inflated costs could only be supported by the built-in cost assumption that women would only return to work after thirty weeks, and as a result the testimony of the trade associations revealed how pervasively employers claimed that women's purported "tendency to malingering" was a sex-related characteristic indicating their status as temporary – indeed, *dispensable* – members of the workplace. In hearings, witnesses called out these biases by providing contrasting experiential data from businesses that had provided pregnancy coverage and by identifying the stereotypical assumption underpinning each of the actuarial estimates provided for General Electric in *Gilbert* and before Congress: "The differences between the [actuarial] figures indicate how

³¹² See, e.g., Laurie R. Ferber, *The Aftermath of Gilbert*, 24 (on file with author).

³¹³ Campaign to End Discrimination Against Pregnant Workers, *Fact Sheet*, Dec. 23, 1976 (on file with author).

³¹⁴ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 282 (1977) (statement of Boris H. Block, General Secretary-Treasurer, United Electrical Radio & Machine Workers of America).

³¹⁵ Kathleen Miller, ACLU Lobbyist Coordinator, Interview with Dr. Anne Costain, April 29, 1977, p. 2 (on file with author).

conjectural all these figures are and that no one has any sound basis for assuming women will average more than 6 weeks absence.”³¹⁶ Witnesses also withheld none of their resentment at hearing the opposition’s cost testimony, as one female steelworker told Congress:

There has been a lot of talk about women not returning back to work after having their babies. Most of us who are working cannot afford to stay home after we are able to return to work, because we are middle-class. *We have to be able to pay to keep that child living.*³¹⁷

Thus, the combination of employers’ favorable experiences and personal testimony exposing the bias in the opposition’s cost predictions together helped to deflate this attack on the PDA.

d. Abortion

While debates over cost and the shape of the sex equality norm provided Congress a clear choice among competing frameworks, the issue of abortion threatened to derail the Pregnancy Discrimination Act and exposed deep potential rifts in the Campaign. In the five years since *Roe v. Wade*, the countermovement opposing abortion rights had gained sufficient prominence to secure the “Hyde Amendment” to the Health, Education and Welfare Budget in 1976 as the first ban on federal funding for abortions. Particularly as the amendment took effect the following August 1977, the Senate and later the House committee meetings both eventually became embroiled in the issue of abortion. Yet as Section A showed, the Campaign to End Discrimination Against Pregnancy Women was launched by pro-choice and pro-life organizations that set aside their differences on abortion to focus on the pro-women and pro-family features of their common goal to override *Gilbert*. This conclusion to Part III explores how the coalition found mixed success in rebuffing the creep of the abortion issue into the pregnancy discrimination debate and the meaning of this development in the final text of the statute for the fundamental equality norm in the PDA.

³¹⁶ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 242 (1977) (statement of the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC).

³¹⁷ *Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong. 294 (1977) (statement of Toni Sterling, Member, Local 65, United Steelworkers of America).

Although several forms were offered, all proposed amendments threatened to constrict the core equality norm of sex discrimination that was the focus of the Campaign. Antiabortion amendments embraced the Definition approach to ensure that unlawful sex discrimination includes the grounds of “pregnancy, childbirth and other related medical conditions,” but they *proposed specifically excluding abortion from the definition of sex discrimination*. Such exclusion could have left employers free to discriminate against workers on the purportedly non-gender-based grounds of a woman’s choice to have an abortion, the possibility of having an abortion, any related complications from an abortion, or even her views on abortion. As the Campaign realized, “If it does exclude abortion from the definition of sex, it would permit employers to discharge or refuse to hire a woman because of an abortion, as well as to refuse to pay benefits.”³¹⁸ Despite the Senate defeat in committee (9-4) and on the floor (44-41) of the Eagleton amendment proposing such an exclusion from the definition of sex discrimination,³¹⁹ it was in the House of Representatives that the abortion battle over pregnancy discrimination gained steam.

The responsibility of the Campaign’s own membership for driving the House struggle over the relationship between abortion and pregnancy discrimination illustrates the destabilizing effect of abortion on the diverse membership of the coalition. Sparked by a proposal from one of the Campaign’s own members, the antiabortion amendment gained prominence when one part of the National Conference of Catholic Bishops moved the issue to the fore of the House hearings. Seeking to “protect Church agencies from being forced . . . to support or provide abortions evinces in violation of our religious tenets and conscience convictions,” the organization’s Bishops’ Committee for Pro-Life Activities requested the explicit exclusion of abortion, arguing that otherwise the PDA

³¹⁸ Campaign to End Discrimination Against Pregnant Workers, Internal Memorandum, *The Abortion Issue*, at 1 (on file with author).

³¹⁹ Senator Thomas Eagleton (D-MO) repeatedly proposed excluding abortions from the sex discrimination framework in the Hawkins-Williams bill, but these were defeated. *See, e.g.*, ACLU, “Senate Passes Pregnancy Discrimination Bill,” in 1 CIVIL LIBERTIES ALERT No. 4, at 1 (October 1977) (on file with author).

would “implicitly provide[] the same disability benefits for elective abortion as for pregnancy care and birth. There is no principle of social justice or human rights that justifies elective abortion.”³²⁰ As a result, while accepting the broader sex discrimination principle that included pregnancy and related conditions, the Conference proposed adding one further sentence to the definition clause of Title VII: “Neither ‘pregnancy’ nor ‘related medical conditions’ as used in this section may be construed to include abortion.”³²¹ Congressman Beard proposed such an amendment in nearly identical terms, but he inserted an exception to the exclusion “where the life of the mother would be endangered if the fetus were carried to term.”³²²

A review of unpublished communications among members within the Campaign during this episode sheds light on their need to accept a compromise resolution. The amendment had been rejected in committee and was even resuscitated as a “corporate conscience” exemption in an attempt to leverage the claimed First Amendment rights of employers who personally object to abortions.³²³ Nonetheless, the persistence of antiabortion amendments threatened a severe toll on the coalition’s normative unity. In one memorandum from the National Abortion Rights Action League (NARAL), the legislative director implored allied members of the Campaign to write, telephone, or send mailgrams to Congress to defeat the Beard amendment because: “The Campaign is unanimous in its opposition to the Beard amendment.”³²⁴ Upon receipt, the Campaign leadership dismissed further

³²⁰ *Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong. 272-73 (1977) (Letter from James T. McHugh, Director of Bishops’ Committee for Pro-Life Activities, to Congressman Augustus Hawkins, Chairman).

³²¹ *Id.*

³²² H.R. 6075.

³²³ See, e.g., Campaign to End Discrimination Against Pregnant Workers, *Pregnancy Disability Legislation and an Anti-Abortion Rights Amendment* (1978) (on file with author). Although there is almost no record of the corporate conscience amendment gaining traction, this may be due to the very shortcomings documented in the Campaign’s extensive legal memorandum severely attacking the corporate law assumptions underpinning such an approach. See also Women’s Legal Defense Fund, *Memorandum: Legal and Policy Objections to a “Corporate Conscience” Exemption from Required Coverage for Abortion Health Benefits Under the Gilbert Bill* (on file with author).

³²⁴ Carol Werner, Legislative Director NARAL, *Memorandum Re: Pregnancy Disability Bill (H.R. 6075)* (on file with author).

such claims of unanimous opposition because they were “too politically controversial” within the Campaign. The sustained pressure of the Bishops’ Committee enabled pro-life factions to adopt a position of the silenced opposition: Unless amended, a New York cardinal warned, the PDA would require all employers including churches and church organizations to provide medical payments and paid leave time for abortions, “a requirement with which we cannot comply.”³²⁵

Campaign leaders acknowledged the widening coalition fissure over this issue early in consideration of the Senate amendment and later of the same amendment before the House:

While the Campaign agrees on its support of S.995, the group does not agree on a position pro-choice or anti-abortion. The result of passage of the amendment could be withdrawal of support for S.995 (e.g. by N.O.W.) if an anti-abortion clause is added, and/or a weakening of support . . . generally, among those who would be ambivalently torn between their pro-pregnant workers position and their pro-choice position. The addition . . . could thereby lead to the defeat of S.995.³²⁶

It is particularly notable that the Campaign cited the potentially severe reaction from NOW because it was that group’s chief lobbyist who had explained how carefully she protected her alliance with pro-life advocates by balancing her opposition to the antiabortion amendment with her larger effort to combat pregnancy discrimination:

I have concentrated on members of the committee. I have visited everyone. I have been contacting members of Congress on this and the [] amendment on abortion. *I have been very careful not to lobby for these two issues at the same time. They are not linked at all.*³²⁷

Even the broader civil rights community refrained from wading into the abortion rift emerging within the Campaign. After the Leadership Conference on Civil Rights issued a memorandum to its own member organizations declaring that the “anti-abortion amendment is totally unnecessary” and encouraging members to “[u]rge [House members] to oppose all further amendment,” as an LCCR

³²⁵ Cardinal Terence Cooke, Quoted in *Will Church Institutions Be Forced to Make Medical Payments for Abortions?*, 7 ORIGINS No. 37 (March 2, 1978).

³²⁶ Campaign to End Discrimination Against Pregnant Workers, *Proposed Eagleton Amendment to S.995 To Exclude Non-Therapeutic Abortion From Title VII Protection Against Sex Discrimination Based On Pregnancy*, at p. 1 (on file with author).

³²⁷ Nina Hegsted, Acting Head of the NOW Legislative Office, Interview with Dr. Anne Costain, May 6, 1977, at p. 2 (on file with author).

Board member the Bishops' Committee for Pro-Life Activities severely criticized this misleading suggestion of consensus:

I have no desire to force my assessment of the Beard amendment on the other participating organizations. But by the same token I cannot and will not permit . . . the name of my organization to be associated with a resolution with which I disagree as a matter of principle.³²⁸

Thus, just as the Campaign was impeded by internal dissension, so, too, were whole sectors of the membership limited in their ability to exercise decisive, democratic leverage.

A return to the terms of the legislation's introduction was essential to the resolution. In light of the divisiveness of the abortion amendments within the coalition, Campaign leaders emphasized the valence feature of the pregnancy equality norm that fueled the legislation's momentum in both chambers, reminding member organizations: "*This legislation is essential to stop coerced abortions.*"³²⁹ The Campaign found a compromise solution that preserved the normative focus of the new sex discrimination definition on extinguishing pregnancy-based exclusions from the workplace.

Ultimately coalition leaders avoided forcing the Campaign itself to take a united position on the antiabortion amendment and instead individual organizations insisted that preservation of the definition portion of the legislative amendments was nonnegotiable. The Campaign resolved:

The Campaign to End Discrimination Against Pregnant Workers supports final passage of H.R. 6075; however, individual organizations may take differing positions on final passage.

There is substantial support within the Campaign for a motion to strike the Beard anti-abortion amendment.³³⁰

As a result, a group of seven women's and health organizations emphatically threatened their unwillingness to accept what they viewed as a principle of sex discrimination that implicitly sanctions facial discrimination on the basis of abortion and related grounds. After endorsing the Senate bill passed without any antiabortion amendment, this group of organizations underscored the

³²⁸ Letter from Rev. Msrg. George G. Higgins, United States Catholic Conference, to Clarence Mitchell, LCCR Chairman (March 23, 1978) (on file with author).

³²⁹ Campaign to End Discrimination Against Pregnant Workers, Internal Memorandum, *The Abortion Issue*, at p.1 (on file with author).

³³⁰ Susan Ross et al., *Action Statement* (April 11, 1978) (on file with author).

threat of undermining the broader definition of sex discrimination if the House bill with the Beard antiabortion amendment should pass:

We will urge members of the House, in the strongest possible terms, to strike the Beard amendment when H.R. 6075 comes to the House floor. In addition, regretfully but just as strongly, we will urge them to vote *against* H.R. 6075 should the Beard amendment not be stricken.

. . .

We are saddened by the fact that we have been forced to take this position and understand its implications. Minus the Beard amendment, we strongly and wholeheartedly support H.R. 6075. But we cannot stand idly by while a fundamental principle as discriminatory and as dangerous as the one embodied in the Beard amendment is enacted into law.³³¹

In the final result, the women's movement succeeded in preserving the statute's core normative focus on amending the definition of sex discrimination to include prohibition of pregnancy discrimination. At the same time, the compromise to preserve the statute itself included a specific abortion clause that only excluded employers from the responsibility to pay the actual medical expenses for an abortion. After the definition and equal-treatment clauses, the statute reads:

This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion.³³²

This provision thus assured that employers would not be required – even under an equal-treatment principle – from paying the actual health insurance costs for an abortion. At the same time, the equality principle still protects women from any discrimination in employee benefits, seniority, hiring and firing for their choice to have or complications arising from an abortion. As a staff attorney at the Women's Legal Defense Fund involved in the negotiations for this compromise, Donna Lenhoff explained the organizations' belief that this outcome was as narrow as the amendment could be while preserving the support needed to vindicate the equality rights of pregnant workers: "It was heart-rending to have to make this exception. . . . This was a compromise. It made it

³³¹ Memorandum to the Campaign to End Discrimination Against Pregnant Workers, from ACLU, the American Public Health Association, NARAL, NOW, the Planned Parenthood Federation of America, the Religious Coalition for Abortion Rights, and the Women's Equity Action League, at p. 2(April 5, 1978) (on file with author).

³³² 42 U.S.C. § 2000e-2(a)(1).

clear that a corporation doesn't have to provide health insurance to cover simple, uncomplicated abortions. That's what we gave up."³³³

The additional testimony among conferees on the final legislation captures most clearly the relief in both wings of the coalition that compromise was reached. A former opponent of the PDA, Congressman Sarasin's statement in Conference underscored the importance of this compromise:

The antiabortion language adopted by the House [] threatened the passage of this important legislation. In fact, it was really down to the wire before we knew whether we would be able to secure an agreement with the Senate on the anti-abortion language. . . . It does not totally answer the needs of the pro-choice advocates. Neither does it meet the requirements of the pro-life advocates. However, it does provide a balance between the two positions.³³⁴

Appealing to the pro-choice organizations Senator Jeffords similarly emphasized that this "best possible compromise" ensures that any disabling condition as a result of abortions are still protected from discrimination under the final statute and only the actual medical costs for abortion are exempt: "I personally could not countenance the death of this legislation only because of the abortion question."³³⁵ In the end, movement leaders rebuffed the repeated submissions of definitional antiabortion amendments by securing a compromise that preserved the core meaning of the equality norm defining sex discrimination to prohibit exclusions based on pregnancy, childbirth, or related medical conditions without reference to abortion.

³³³ Donna Lenhoff, Interview with author, 7 February 2005.

³³⁴ CONG. REC. 38574 (October 14, 1978).

³³⁵ *Id.*

CONCLUSION

The equality principle at the heart of the Pregnancy Discrimination Act was generated through years of deliberation by the women's movement and other outside groups in interaction with the administrative, judicial, and legislative arenas. Breaking free from a juricentric focus in studying change in public law, this Paper explicates the construction of a fundamental legal norm in the interpretive communities of a social movement and within the legislative and administrative arenas of government. Despite the Supreme Court's pronouncement of a narrow vision of sex discrimination that sanctioned overt exclusions on the basis of pregnancy, nonjudicial actors were able to generate and elaborate upon fundamental normative changes. As a result, this Paper shows how scholars can gain a greater understanding of the source and meaning of modern fundamental norms derived not in the formal Constitution but in the foundational principles of a super-statute.

The Paper explicates the penetration into American public law of a new equality baseline through two distinct debates across different institutional arenas: first, from a debate over the meaning of sex discrimination, the conception advanced by the Supreme Court was trumped by a united community of legal feminists committed to extinguishing the whipsaw of pregnancy discrimination; and second, within the legal feminist community a debate over the special-treatment versus equal-treatment conceptual frameworks for eliminating facial pregnancy-based exclusions was resolved in favor of the equal-treatment standard as the foundation for equality of opportunity in the workplace. These conceptual debates that fueled the generation of a foundational equality principle in the Pregnancy Discrimination Act subsequently reverberated in the further development of an equality of opportunity framework in the challenging setting of real differences. Three features of this legacy bear consideration.

First, the PDA's equal-treatment principle, crafted to combat the whipsaw of pregnancy discrimination in workplace hiring, firing, and benefits programs, found powerful expression in

targeting other forms of pregnancy discrimination and revealed the fundamental normative impact of the PDA. Faced with the question whether employers could justify the exclusion of women with childbearing capacity based on reproductive hazards in a workplace, the Supreme Court's vigorous rejection of such justifications for sex discrimination confirmed the normative transformation effected by the 1970s campaign in the passage of this super-statutory principle.³³⁶

Second, while the PDA vindicated the equal-treatment principle over the special-treatment proposal debated in the EEOC and Congress to combat the whipsaw of facial pregnancy discrimination in the workplace, the entrenchment of this parity baseline was far from the end of the conceptual debate within the women's movement and equality jurisprudence. Specifically, an unresolved question in the wake of the PDA was whether legislatures – state or federal – may mandate affirmative special treatment to pregnant women on top of the baseline parity obligation of employers to treat pregnant workers at least as well as men. The debate over the labor feminists' normative vision of equality thus reverberated in the 1980s and again the 1990s as legal feminists campaigned for meaningful equality of opportunity in the workplace that takes account of pregnancy as a natural condition of employment. Debates over the notion of affirmative accommodation obligations, or more explicitly special-treatment mandates, became evident in two ways. The question of accommodation duties fueled an expanded understanding of the equality principle instantiated in the PDA according to the disparate impact measure of discrimination under Title VII. Further, the judicial arena and state legislatures became sites of intense normative debate over extension of equality to include the special-treatment principle. The Court's resolution of this question by validating employers' affirmative obligations according to the special-treatment model captured the dramatic impact of the pregnancy equality campaign in the 1970s.³³⁷

³³⁶ See *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

³³⁷ See *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272 (1986).

Finally, reverberations of the special-treatment versus equal-treatment debate informed the critical statutory and constitutional balance struck in the 1990s, as social movement legal mobilization fueled an expansion of the PDA's pregnancy equality principle. Facing judicial validation of employers' affirmative obligations on top of the equal-treatment baseline, Congress grappled with the unresolved question of whether the equal-treatment principle generated in the campaign for pregnancy equality could also be extended to men as a way to achieve the legal feminist vision to bridge the divide between productive and reproductive labor. Indeed, debates in the real-differences setting of childbearing echoed through the equal-treatment standard in the legislative effort to break down the artificial gender divide in responsibilities for *childrearing*. While childrearing dramatically affects women's equality of opportunity in the workplace, this issue was deferred from consideration during the campaign against facial pregnancy discrimination in the 1970s. Consequently, the subsequent gender-neutral guarantee of family leave would mark one of many changes in the childrearing setting to begin breaking down barriers to women's equality in the workplace. From the successful movement campaign to secure sweeping reform in the Family and Medical Leave Act in the 1990s to the Supreme Court's strikingly emancipatory constitutional vision expressed in *Nevada Department of Human Resources v. Hibbs*,³³⁸ it is clear that the fundamental principles generated and developed in the 1960s and 1970s have borne fruit in subsequent campaigns to articulate constitutional principles.

I shall investigate in future research these next chapters in the story of this super-statutory principle as they are driven by questions unresolved in the fundamental norm generation in the administrative and legislative arenas by the Campaign to End Discrimination Against Pregnant Workers. The subsequent movement campaigns and institutional norm elaborations were indispensable in elevating the core equality principle to a fundamental norm of public law but also in

³³⁸ 538 U.S. 721 (2003).

applying it in expansive ways beyond the four corners of the Pregnancy Discrimination Act itself. One need only look to the most recent period of movement activism and constitutional adjudication referenced above to capture the place of the PDA's equality norm as a foundation upon which broader legal norm entrepreneurship took place to secure increasingly meaningful equality for women in the workplace. This Paper's explication of the penetration into American public law of this modern equality framework reveals the extent to which the baseline principle developed in the EEOC remained pregnant with expansive normative possibilities encapsulated in the passage of the PDA and subsequent norm elaborations. The birth of the Pregnancy Discrimination Act continues to define the meaning of equality today for women as workers and citizens in American society.