

# The Pregnant Citizen, from Suffrage to the Present

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*This Article examines how courts have responded to the equal protection claims of pregnant citizens over the century women were enfranchised. The lost history it recovers shows how equal protection changed—initially allowing government to enforce traditional family roles by exempting laws regulating pregnancy from close review, then over time subjecting laws regulating pregnancy to heightened equal protection scrutiny.*

*It is generally assumed that the Supreme Court’s 1974 decision in *Geduldig v. Aiello* insulates the regulation of pregnancy from equal protection scrutiny. The Article documents the traditional sex-role understandings *Geduldig* preserved and then demonstrates how the Supreme Court itself has limited the decision’s authority.*

*In particular, I show that the Rehnquist Court integrated laws regulating pregnancy into the equal protection sex-discrimination framework. In *United States v. Virginia*, the Supreme Court analyzed a law mandating the accommodation of pregnancy as classifying on the basis of sex and subject to heightened scrutiny; Virginia directs judges to look to history in enforcing the Equal Protection Clause to ensure that laws regulating pregnancy are not “used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.” In *Nevada Department of Human Resources v. Hibbs*, the Court then applied the antistereotyping principle to laws regulating pregnancy, as a growing number of commentators and courts have observed.*

*I conclude the Article by considering how courts and Congress might enforce the rights in *Virginia* and *Hibbs* in cases involving pregnancy under both the Fourteenth and the Nineteenth Amendments. To remedy law-driven sex-role stereotyping that has shaped the workplace, the household, and politics, the Article proposes that Congress adopt legislation mandating the reasonable accommodation of pregnant employees, such as the *Pregnant Workers Fairness Act*. These sex-role stereotypes*

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I dedicate this Article to mothers and to life-giving everywhere; to my mother Eve who passed away during its writing—she placed in national and international fencing competitions while she carried me and her work as a fencing coach made possible my college education—to my daughter-in-law Jen and granddaughter Willa just born, as well as to the generations of advocates who fought for their equal citizenship stature.

*affect all workers, but exact the greatest toll on low-wage workers and workers of color who are subject to rigid managerial supervision.*

*When we locate equal protection cases in history, we can see how an appeal to biology can enforce traditional sex roles as it did in *Geduldig*—and see why a court invoking *Geduldig* today to insulate the regulation of pregnancy from scrutiny under *Virginia* and *Hibbs* would not respect *stare decisis*, but instead retreat from core principles of the equal protection sex-discrimination case law.*

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#### INTRODUCTION

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>1</sup>

Few notice that the Constitution addresses reproduction when its preamble announces that “We the People” establish the Constitution to “secure the Blessings of Liberty to ourselves and our Posterity.”<sup>2</sup> For centuries Americans have read the preamble without hearing those who are capable of bearing “our Posterity” speak as part of “We the People.” The assumption that those who bear children are less than full citizens persists long after women’s enfranchisement and into the present day.

As the Nineteenth Amendment turns 100, this Article considers equal protection claims of pregnant citizens and shows how the increasing authority of women in the American constitutional order—as voters, consumers, employees, employers, lawyers, judges, professors, candidates for office, and government officials—has changed how constitutional law regards claims involving “mothers or mothers-to-be.”<sup>3</sup> Judgments about pregnancy—like judgments about race—

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1. U.S. CONST. pmbl.

2. *Id.*

3. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the Subcomm. on Labor–Mgmt. Relations & the Subcomm. on Labor Standards of the H. Comm. on Educ. & Labor*, 99th Cong. 100 (1986) (statement of Women’s Legal Defense Fund) [hereinafter *Joint Hearing on the Parental and Medical Leave Act of 1986*]). Many of the claims discussed in the Article can be asserted by persons protected by the Fifth and Fourteenth Amendments, while others belong to citizen-voters. For a discussion of Due Process and Equal Protection Clause coverage of noncitizens, see Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1731–36 (2010).

rest on understandings about social roles.<sup>4</sup> At the founding, the law gave male heads of household authority over women and the ability to represent them in voting and the market; this understanding of women as dependent citizens, defined through family relations to men, continued to shape the law even after women's enfranchisement, despite women's efforts to democratize family structure in order to secure equal citizenship.<sup>5</sup> Locating equal protection law in this constitutional history, we can ask: What gender-based understandings of citizenship has the Court preserved, modernized, repudiated, or remedied as it has enforced the Constitution?

For a century after ratification of the Reconstruction Amendments, the Court denied Fourteenth Amendment challenges to laws that discriminated on the basis of sex, and repeatedly justified gender-differentiated citizenship by invoking women's family role and childbearing function.<sup>6</sup> In the 1970s, the Burger Court responded to claims of the women's movement by declaring for the first time that sex-based state action imposing traditional family roles on men and women was suspect under the Equal Protection Clause; but even as it did so, in *Geduldig v. Aiello*, the Court declared that pregnancy is a real sexual difference and insulated laws regulating pregnancy from similar scrutiny.<sup>7</sup> The women's movement opposed the Court's decision in *Geduldig* and helped enact legislation prohibiting pregnancy discrimination that federal judges were called upon to enforce.<sup>8</sup> Within several decades, the Rehnquist Court had come to recognize that pregnant citizens are subject to traditional forms of sex-role stereotyping<sup>9</sup> and decided

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4. For a social-roles analysis of pregnancy discrimination, see generally Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 58 WM. & MARY L. REV. 969 (2018).

5. See, e.g., Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. F. 450 (2020) [hereinafter Siegel, *The Nineteenth Amendment*] (tracing the family-related equal citizenship claims that connect the Reconstruction Amendments and the Nineteenth Amendment and continue into our own day); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) [hereinafter Siegel, *She the People*] (showing how Americans adopting the Nineteenth Amendment were breaking with traditional conceptions of the family rooted in coverture, as well as with understandings of federalism that placed family relations beyond the reach of the national government—and demonstrating that Americans recapitulated these same debates in the century after the Nineteenth Amendment's ratification).

6. See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding a wife's conviction for murdering her husband despite the absence of women on the jury and reasoning that the state could exempt women on the ground that "woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State . . . to conclude that a woman should be relieved from the civic duty of jury service."), *overruled by Taylor v. Louisiana*, 419 U.S. 522 (1975); *Breedlove v. Suttles*, 302 U.S. 277, 282 (1937) ("In view of burdens necessarily borne by [women] for the preservation of the race, the State reasonably may exempt them from poll taxes." (citing *Muller v. Oregon*, 208 U.S. 412 (1908))); *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradwell, J., concurring) (reasoning that a state could deny a woman a license to practice law because "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.").

7. 417 U.S. 484, 494, 496 n.20 (1974); see discussion *infra* Section II.B.

8. See discussion *infra* Section II.C.

9. In sex-role stereotyping, persons are assumed to have traits conventionally associated with one sex. The onset of pregnancy triggers scripts associated with motherhood. A pregnant woman's role as a mother is assumed to unfit her for other social roles, or to compromise her ability to perform other social

equal protection cases holding that laws regulating pregnancy are part of the equal protection heightened-scrutiny framework.<sup>10</sup> After tracing the evolution of equal protection cases on pregnancy in constitutional law and in constitutional history, this Article shows how courts and Congress can entrench these changes under the Fourteenth Amendment and Nineteenth Amendment, including by enacting statutes that deter and remedy sex-role stereotyping by mandating the reasonable accommodation of pregnant employees.<sup>11</sup>

The stakes of this Article are practical as well as theoretical. The Article shows how gender-status law has changed over time, from the standpoint of constitutional doctrine and of constitutional history. For this reason, it may be helpful separately to introduce its doctrinal and historical lines of argument, even if in the end they are deeply interconnected.

In the simplest terms, this Article shows that equal protection sex-discrimination case law has evolved over the decades, not simply from the 1920s to the 1970s, but as importantly from the Burger Court to the Rehnquist and Roberts Courts. Supreme Court decisions no longer exempt laws regulating pregnant citizens from heightened equal protection scrutiny as they once did. Too few have noticed these doctrinal developments. The dominant view is that *Geduldig v. Aiello*<sup>12</sup> insulates the regulation of pregnancy from equal protection oversight; leading scholars discuss the 1974 case as if it were the Court's last equal protection decision addressing pregnancy.<sup>13</sup> But a growing number of scholars disagree and demonstrate that equal protection law has evolved in its approach to pregnancy<sup>14</sup>—as I argued over fifteen years ago when I first pointed out that the

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roles. For sociological and psychological studies documenting explicit and implicit biases of this kind, see *infra* notes 121, 191–202. The exclusionary animus directed at pregnant women in the workplace and other settings often expresses race- and class-based judgments of many kinds. See, e.g., *infra* notes 238, 322.

10. See discussion *infra* Section II.D.

11. See discussion *infra* Section III.

12. 417 U.S. at 494–97.

13. See William N. Eskridge, Jr., *America's Statutory "constitution,"* 41 U.C. DAVIS L. REV. 1, 4 (2007) ("The Supreme Court has never overruled or even softened its *Geduldig* holdings."); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 599 (2010) ("This ruling [in *Geduldig*] put an end to the claim that pregnancy discrimination, barring proof of pretext, is a form of unconstitutional sex discrimination."); Mary Ziegler, *Choice at Work: Young v. United Parcel Service, Pregnancy Discrimination, and Reproductive Liberty*, 93 DENV. L. REV. 219, 225 (2015) ("*Geduldig* ratified sex stereotypes surrounding pregnancy and undermined any challenge to them.");

14. See Deborah Dinner, *Sex Equality and the U.S. Welfare Regime: The Story of Geduldig v. Aiello*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 77, 94 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019) ("[*Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003)] stands for the proposition that states violate the Equal Protection Clause when they regulate pregnancy and parenting in ways that reinforce gender stereotypes."); David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309, 354–58 (2019); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 153–54 (2009) [hereinafter Franklin, *The Anti-Stereotyping Principle*] ("Although *Hibbs* does not explicitly overrule *Geduldig*, it casts that decision in a decidedly new light . . . *Hibbs* teaches that pregnancy discrimination can constitute sex discrimination in instances in which it reflects and reinforces traditional conceptions of women's sex and family roles." (footnote omitted)); Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 794–96 (2010),

Rehnquist Court had moved beyond the premises of the *Geduldig* opinion and had applied the antistereotyping principle to laws regulating pregnancy, on the understanding that government can no more enforce separate-spheres reasoning in regulating pregnancy than it can in any other context.<sup>15</sup>

This Article clarifies and consolidates these understandings as a matter of constitutional law and constitutional history. Reasoning within the conventions of doctrine, I show that the Supreme Court has not cited *Geduldig* in an equal protection decision since the 1970s;<sup>16</sup> even more importantly, I show that in *United States v. Virginia*,<sup>17</sup> the Supreme Court addressed laws regulating pregnancy as sex classifications subject to skeptical scrutiny and that in *Nevada Department of Human Resources v. Hibbs*,<sup>18</sup> the Court ruled that laws concerning pregnancy based on sex-role stereotypes violate equal protection.<sup>19</sup> I further show that scholars and some lower courts have begun to follow these decisions.<sup>20</sup> I suggest ways that courts and Congress could enforce the Constitution's equal-citizenship guarantees that would entrench and encourage these developments and remedy, in some small measure, the centuries of structural bias against caregivers in so many domains of our shared life.<sup>21</sup>

The critical constitutional history this Article contributes to the Nineteenth Amendment's centennial has a role to play both outside and inside of doctrine. It helps us see changes in the law over time, and with this understanding, it can play a role in guiding enforcement of the Constitution's equality guarantees. This history illustrates that sex-role stereotypes are not only expressed through claims about the family, but can also be expressed through seemingly objective claims about the body, particularly through claims about childbearing, a dynamic I term "physiological naturalism."<sup>22</sup> When we locate equal protection cases in the history of restrictions on women's citizenship, we can see how an appeal to biology can enforce traditional sex roles<sup>23</sup> as it did in *Geduldig*<sup>24</sup>—and see why a court

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reprinted in THE LEGACY OF RUTH BADER GINSBURG (Scott Dodson ed., 2015); cf. Cary Franklin, *Biological Warfare: Constitutional Conflict over "Inherent Differences" Between the Sexes*, in 2017 THE SUPREME COURT REVIEW 169, 180–181 (Dennis J. Hutchinson et al. eds., 2018) [hereinafter Franklin, *Biological Warfare*].

15. See Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1892 (2006) ("We might read *Hibbs* as limiting *Geduldig* sub silentio, but it seems as reasonable to read *Hibbs* as answering the question *Geduldig* reserved. Where regulation of pregnant women rests on sex-role stereotypes, it is sex-based state action within the meaning of the Equal Protection Clause." (footnote omitted)).

16. See *infra* note 229 and accompanying text.

17. 518 U.S. 515 (1996).

18. 538 U.S. 721 (2003).

19. See discussion *infra* Section II.D.1–2.

20. See discussion *infra* Section II.D.3.

21. See discussion *infra* Section III.B.

22. See discussion *infra* Section II.C.

23. The critical point, in matters of gender no less than race, is to recognize the many and evolving forms of status inequality that simple appeal to the body can enforce. See *Muller v. Oregon*, 208 U.S. 412, 422–23 (1908) (appealing to woman's "physical structure and a proper discharge of her maternal functions" to justify law restricting the hours a woman can work); *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896) ("Legislation is powerless to eradicate racial instincts or to abolish distinctions based

invoking *Geduldig* today to insulate the regulation of pregnancy from scrutiny under *Virginia* and *Hibbs* would not respect *stare decisis*, but instead retreat from core principles of the equal protection sex-discrimination case law, which now call for applying heightened scrutiny to laws regulating pregnancy.

This Article's critical constitutional history helps us see how modern equal protection law concerning pregnancy has evolved—from a body of law that exempted pregnancy from skeptical scrutiny to a body of law that requires skeptical scrutiny of laws regulating pregnancy. But history can do more than highlight and explain these changes in the law; it can guide courts and Congress in enforcing the Fourteenth and Nineteenth Amendments. For centuries, American law has addressed citizens as gendered members of households, making assumptions about independence and dependence that unequally distribute power—voice, authority, opportunity, and resources—in ways that have fundamentally shaped our political, economic, and intimate lives. It matters for those enforcing the Constitution's equality guarantees to understand how seemingly benign appeals to family roles and seemingly objective references to childbearing functions have long justified laws depriving some citizens of voice, authority, opportunity, and resources to which others are assumed entitled.

As Part III of the Article argues, these patterns are of *internal* significance to our law. *United States v. Virginia* directs judges to look to history in enforcing the Equal Protection Clause to ensure that laws regulating pregnancy are not “used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.”<sup>25</sup> Laws regulating pregnancy are subject to the anti-stereotyping principle that governs all other forms of sex-based state action.<sup>26</sup> To deter and remedy law-driven sex-role stereotyping that has shaped the workplace, the household, politics, and many other domains, this Article proposes that Congress adopt legislation mandating the reasonable accommodation of pregnant employees, such as through the Pregnant Workers Fairness Act (PWFA). Congress is now considering,<sup>27</sup> legislation premised on the modern understanding of citizenship that pregnant wage-earners can stay in the workforce, and have the same interest, need, capacity, and right to keep working as all other parents. In recent years, over half the states have enacted laws of this kind.<sup>28</sup> The proposed legislation mandates pregnancy-specific accommodations; yet the proposed pregnancy accommodation statute is itself couched in gender-neutral, not sex-specific,

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upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”)

24. 417 U.S. 484 (1974).

25. 518 U.S. 515, 534 (1996) (citation omitted).

26. See discussion *infra* Section III.A.

27. Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019); see *infra* Section III.B.

28. See *infra* note 317 and accompanying text.

terms and so could accommodate transgender men who are pregnant as well as cisgender women.<sup>29</sup>

The PWFA's requirement of reasonable accommodation is designed to deter and remedy exclusions rooted in sex-role assumptions about workers and the gendered family structures in which workers are embedded that law has enforced for centuries. These sex-role stereotypes affect all workers, but are commonly enforced against low-wage workers and workers of color who are subject to rigid managerial supervision.<sup>30</sup> As I show, under existing case law, Congress has ample power to combat stereotyping by enacting a PWFA using its power to enforce the Fourteenth Amendment.<sup>31</sup> Yet especially in this centennial year, it is appropriate that Congress draw upon its legislative power to enforce the Nineteenth Amendment as well.<sup>32</sup>

Could the Roberts Court repudiate the case law of the Rehnquist Court, change course, and claim that *Geduldig* is still “good law”? Of course that is possible. I write at a time when it is unclear whether the Roberts Court will adhere to prevailing understandings of sex-role stereotyping doctrine under federal employment discrimination law,<sup>33</sup> and when advocates urge ratification of the Equal Rights Amendment out of concern that federal judges may not keep faith with the body of equal protection doctrine that has developed under the Fourteenth Amendment since the 1970s.<sup>34</sup> By showing how equal protection law has evolved

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29. The language of the pregnancy accommodation mandates varies. In some cases the laws refer to women and in others they do not. See *infra* note 318; Jessica Clarke, *Pregnant People?*, 119 COLUM. L. REV. F. 173, 179 (2019) (observing that “not just women, but also transgender men and nonbinary people, become pregnant. While some transgender men and nonbinary people may seek surgical treatments that leave them incapable of pregnancy, not all do”); Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 226 (2016) (“pos[ing] the question of whether reproductive trans bodies can exist in the law” and seeking to foster “collaborative engagement” across movements by “examining both reproductive and trans rights discourse”).

30. See *infra* notes 238, 321–22, 338 and accompanying text.

31. See discussion *infra* Section III.B.

32. For an account of Congress's power to enforce a Pregnant Workers Fairness Act drawing on its powers under the Fourteenth and Nineteenth Amendments, see Siegel, *The Nineteenth Amendment*, *supra* note 5, at 488–89. For the first modern analysis of Congress's power to enforce the Nineteenth Amendment, see generally Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, GEO. L.J. 19TH AMEND. SPECIAL EDITION 27 (2020).

33. See Sasha Buchert, *Price Waterhouse v. Hopkins at Thirty*, ALLIANCE FOR JUST. (May 1, 2019), <https://www.afj.org/article/price-waterhouse-v-hopkins-at-thirty/> [<https://perma.cc/RK3P-E2CA>]; Ian Millhiser, *The Supreme Court Showdown over LGBTQ Discrimination, Explained*, VOX (Oct. 8, 2019, 3:19 PM), <https://www.vox.com/2019/10/2/20883827/supreme-court-lgbtq-discrimination-title-vii-civil-rights-gay-trans-queer> [<https://perma.cc/RM3R-D9ZW>] (observing that this Term, the Trump administration is urging the Supreme Court to adopt the view of Justice Kennedy's dissent in its 1989 *Price Waterhouse* case and overturn the central sex-role stereotyping precedent under federal employment discrimination law); Erin Mulvaney, *High Court LGBT Decision Could Upend Sex-Stereotyping Bias*, BLOOMBERG L. (Oct. 8, 2019, 3:23 PM), <https://news.bloomberglaw.com/daily-labor-report/high-court-lgbt-decision-could-upend-sex-stereotyping-bias>.

34. See Gerard N. Magliocca, *Buried Alive: The Reboot of the Equal Rights Amendment*, 71 RUTGERS U. L. REV. 633, 662 (2019); Robin Bleiweis, *The Equal Rights Amendment: What You Need to Know*, CTR. FOR AM. PROGRESS (Jan. 29, 2020, 4:05 PM), <https://www.americanprogress.org/issues/women/reports/2020/01/29/479917/equal-rights-amendment-need-know/> [<https://perma.cc/3Y22-8UVJ>]; Max Fisher, *Scalia Says Constitution Doesn't Protect Women from Gender Discrimination*, ATLANTIC



since the ratification of the Nineteenth Amendment, I hope to clarify the principled commitments driving the law's historical development and future growth, while at the same time making clear the normative stakes of any retreat led by those who would elevate original understanding, tradition, or biology as the foundation of our constitutional law.<sup>35</sup>

Part I begins this Article's account of equal protection law with three stories of women asserting claims of pregnancy discrimination over the course of the last century: the first story dates from the Progressive Era, just before ratification of the Nineteenth Amendment; the second occurs in the 1970s, at the Amendment's half-century anniversary; and the third occurs in the present, in the era of the Amendment's centennial. These stories tie equal protection doctrine itself to the longer history of law enforcing family roles, illustrating how laws constraining women's participation in public life evolve in form and in justification—shifting from a focus on marriage to pregnancy and motherhood—as women acquire authority in the American constitutional order. These stories offer a framework in which to understand how equal protection doctrine on sex discrimination and pregnancy evolved in the late twentieth century, and in which it might yet grow.

Part II of this Article reads the equal protection decisions of the Burger and Rehnquist Courts addressing sex discrimination and pregnancy in this framework. Locating the case law in a historical framework focuses attention on the ways that reasoning inside of the Supreme Court's decisions evolved. Initially, the Court's decision in *Geduldig v. Aiello*<sup>36</sup> segregated pregnancy cases from other equal protection, sex-stereotyping cases of the 1970s, but after decades of litigation under statutes prohibiting pregnancy discrimination in the workplace, the Rehnquist Court began to integrate pregnancy into the framework of its equal protection sex-discrimination cases. In this part of the Article, I provide the most detailed account to date of the Court's decisions integrating laws regulating pregnancy into the equal protection framework: I demonstrate that *United States v. Virginia*, the Court's leading decision on heightened scrutiny of sex classifications,<sup>37</sup> applies to pregnancy, and that *Nevada Department of Human Resources v. Hibbs*, its key decision on Congress's power to enforce equal protection

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(Jan. 4, 2011), <https://www.theatlantic.com/politics/archive/2011/01/scalia-says-constitution-doesn-t-protect-women-from-gender-discrimination/342789/> (reporting that Justice Scalia said: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. . . . Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws").

35. See, e.g., Carolyn Moynihan, *Why 30,000 Health Professionals Applaud the White House Gender Policy*, MERCATORNET (Jan. 16, 2019), <https://www.mercatornet.com/why-30000-professionals-are-congratulating-the-white-house-on-its-gender-po> [<https://perma.cc/A7MQ-2UKF>] (citing Letter from Michelle Cretella, Exec. Dir., Am. Coll. of Pediatricians, to Matthew Whitaker, Acting Att'y Gen., U.S. Dep't of Justice, Alex Azar, Sec'y, U.S. Dep't of Health & Human Servs., & Betsy DeVos, Sec'y, U.S. Dep't of Educ. (Dec. 4, 2018) (discussing "the Trump Administration's intention to uphold the scientific definition of sex in federal law and policy"))).

36. 417 U.S. 484 (1974).

37. 518 U.S. 515, 555–56 (1996).

through the Family and Medical Leave Act,<sup>38</sup> applies the antistereotyping principle to laws regulating pregnancy. These shifts in the Supreme Court case law have been recognized by some scholars<sup>39</sup> and lower courts.<sup>40</sup>

I conclude the Article in Part III by considering how, in the era of the suffrage centennial, courts and Congress might enforce the equal protection right to be free of sex-role stereotyping in cases involving pregnancy. Drawing on recent work proposing a synthetic reading of the Fourteenth and Nineteenth Amendments that courts could enforce through the *Virginia* framework,<sup>41</sup> I show how courts could build upon the inquiry that *Virginia* now mandates in cases of sex-based state action by incorporating into the constitutional inquiry the history of sex-stereotyping pregnant citizens have faced, including history this Article recounts. As importantly, Congress can enforce guarantees of equal citizenship by enacting legislation that would remedy and deter sex-role stereotyping directed at pregnant and potentially pregnant employees by mandating the reasonable accommodation of pregnant workers. As I show, under existing case law, Congress has ample power to enact such a law using its power to enforce the Fourteenth Amendment. As the stories opening this Article suggest, a law mandating the reasonable accommodation of pregnancy in the workplace would destabilize—and remedy in some small part—generations of law-imposed, sex-role stereotyping that continues to limit the participation of pregnant and potentially pregnant citizens active in politics, the market, and other critical domains of social life.

#### I. THE PREGNANT CITIZEN, FROM 1914 TO THE PRESENT

As women have acquired increasing political authority, they have challenged a dizzying array of sex-, class-, and race-linked barriers to employment. I recount three efforts to challenge pregnancy discrimination spanning the last century, from the era before women's enfranchisement to the present—and explore the themes of change and continuity they present.

On one reading, these three stories tell a hopeful story of change in which women are increasingly empowered to act in the American constitutional order and we can see the traditional sex-role associations of pregnancy slowly diminishing. But there is a more skeptical reading of the three stories: as women exercise new forms of authority in the American constitutional order, we see law's role in enforcing gender stratification evolve. In this tale of preservation through transformation,<sup>42</sup> as law abandons other status-markers of women's differential

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38. 538 U.S. 721, 737–40 (2003).

39. See sources cited *supra* note 14.

40. See discussion *infra* Section II.D.3.

41. See Siegel, *The Nineteenth Amendment*, *supra* note 5, at 485–89.

42. Conflict over a status regime can prompt its modernization, a dynamic I have termed “preservation-through-transformation.” See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2178–80 (1996); Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111, 1113 (1997) (“The ways in which the legal system enforces social stratification are various and evolve over

status (in the domain of suffrage or marriage), law begins to focus on pregnancy and motherhood as a new status-marker of women's differential status. When the law can no longer appeal to marriage, or "the law of the Creator" to justify women's exclusion from the privileges men hold, as *Bradwell v. Illinois* did,<sup>43</sup> law begins to reason from the body.<sup>44</sup> As women are increasingly endowed with forms of civil and political equality, pregnancy and motherhood take on new importance in law—as reasons why those newly endowed with civil and political equality are still not equal.

A. HENRIETTA RODMAN AND THE FEMINIST ALLIANCE'S "TEACHER-MOTHER" CAMPAIGN OF 1914

In the years before women gained the right to vote, high school English teacher and labor organizer Henrietta Rodman advocated for the rights of teachers to keep their jobs when they married and when they became mothers, and may have been the first to challenge the firing of a pregnant woman as "discrimination."<sup>45</sup> Rodman was a feminist pioneer. She founded and led the Feminist Alliance, which at its inaugural meeting in 1914 announced, "Feminism is a movement which demands the removal of all social, political, economic, and other discriminations which are based upon sex, and the award of all rights and duties in all fields on the basis of individual capacity alone," and began pursuit of a new constitutional amendment in support of these principles.<sup>46</sup> Allied with Charlotte

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time. Efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric—a dynamic I have elsewhere called 'preservation-through-transformation.' In short, status-enforcing state action evolves in form as it is contested." (footnote omitted).

43. 83 U.S. 130, 141 (1873) (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.").

44. Today, the most famous expression of reasoning from the body in the Court's case law is *Muller v. Oregon*:

Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted . . . that her physical structure and a proper discharge of her maternal functions . . . justify legislation. . . . Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each . . . . This difference justifies a difference in legislation. . . .

208 U.S. 412, 422–23 (1908).

In fact, the practice of appealing to women's physiology to make arguments about their roles began in the late nineteenth century in the physicians' campaign to criminalize abortion. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 319–23 (1992).

45. On Rodman's labor activism, see Patricia Carter, *Guiding the Working-Class Girl: Henrietta Rodman's Curriculum for the New Woman, 1913*, 38 FRONTIERS: J. WOMEN STUD. 124, 128–29 (2017). On Rodman's discrimination claims, see, for example, *infra* notes 46, 56, and accompanying text.

46. *Feminists Design a New Type Home*, N.Y. TIMES, Apr. 5, 1914, at C4. On the emergence of a "feminist" movement within the left wing of the suffrage movement, arguing for the need to emancipate women in all dimensions of life, economic, social, political, and even sexual, see generally NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* (1987). For an illustrative handbill from 1914 calling for a mass meeting in the Village in which Rodman participated, see *Handbill for Feminist Mass Meeting*, N.Y. HIST. SOC'Y (1914), <https://wams.nyhistory.org/modernizing-america/fighting-for-social-reform/what-is-feminism/> [https://perma.cc/A2XK-93GV].

Perkins Gilman, Crystal Eastman, and others in the Greenwich Village group Heterodoxy, Rodman worked for cultural, institutional, and constitutional change.<sup>47</sup> She acted conscientiously to dispense birth control advice to young women at a time when it was unlawful,<sup>48</sup> challenged exclusionary university admissions policies, fought for women's suffrage, and with Gilman, designed a communal feminist apartment house to free working women from the bulk of housework and childcare.<sup>49</sup> As a member of the New York Civic Club with W.E.B. Du Bois, Mary White Ovington, and Ida Tarbell, she spoke out against lynching.<sup>50</sup>

Rodman's most famous crusade was the "teacher-mother campaign." At the time, New York City, like most other cities, required women teachers who married to quit their jobs; Rodman organized the teachers in New York City to campaign against the practice.<sup>51</sup> When the New York City Board of Education acceded to Rodman's campaign and allowed married women to keep their teaching jobs, the Board then announced that it would require the resignation of

47. See Siegel, *The Nineteenth Amendment*, *supra* note 5, at 466–67.

48. On the birth control advocacy of the suffragists, see Siegel, *The Nineteenth Amendment*, *supra* note 5, at 469 n.79. See also ERIC B. EASTON, DEFENDING THE MASSES: A PROGRESSIVE LAWYER'S BATTLES FOR FREE SPEECH 93 (2018) ("In the spring of 1916, Rodman asked Roe to help recruit prominent physicians in support of an amendment to the penal code to allow physicians to prescribe contraception methods.").

49. See Patricia A. Carter, *Henrietta Rodman and the Fight to Further Women's Economic Autonomy*, in WOMEN EDUCATORS, LEADERS AND ACTIVISTS: EDUCATIONAL LIVES AND NETWORKS 1900–1960, at 152, 157 (Tanya Fitzgerald & Elizabeth M. Smyth eds., 2014); ROSS WETZSTEON, REPUBLIC OF DREAMS: GREENWICH VILLAGE: THE AMERICAN BOHEMIA, 1910–1960, at 166 (2002) (stating that Henrietta Rodman "argued against prejudicial college admissions policies"); Siegel, *The Nineteenth Amendment*, *supra* note 5, at 466–68; June Sochen, "Now Let Us Begin": Feminism in Greenwich Village: 1910–1920, at 50–54 (June 1967) (unpublished Ph.D. dissertation, Northwestern University) (on file with ProQuest Dissertations and Theses). On women's suffrage, see *Mr. Clews's Disclaimer*, N.Y. TRIB., June 28, 1912, at 9, which states that Henrietta Rodman "frequently" spoke at suffrage meetings and was "strong for the cause." On the apartment house, see DOLORES HAYDEN, THE GRAND DOMESTIC REVOLUTION: A HISTORY OF FEMINIST DESIGNS FOR AMERICAN HOMES, NEIGHBORHOODS, AND CITIES 197–200 (1981), which describes the "Feminist Apartment House."

50. On the New York Civic Club, see 2 THE CORRESPONDENCE OF W.E.B. DU BOIS 269 n.1 (Herbert Aptheker ed., 1976). On lynching, see Mary Jane Brown, "Eradicating this Evil": Women in the American Anti-Lynching Movement, 1892–1940, at 176 & n.105 (1998) (unpublished Ph.D. dissertation, Ohio State University), [https://etd.ohiolink.edu/etd.send\\_file?accession=osu1487949836205526&disposition=inline](https://etd.ohiolink.edu/etd.send_file?accession=osu1487949836205526&disposition=inline) [<https://perma.cc/J2HZ-PGWZ>], and MARY JANE BROWN, ERADICATING THIS EVIL: WOMEN IN THE AMERICAN ANTI-LYNCHING MOVEMENT, 1892–1940, at 149 & 165 n.104 (2000). See also *Cristal Eastman and Gurley Flynn Seeking Freedom: Also Henrietta Rodman and Anna Stransky Walling Join Feminist Movement in Annual Convention*, N.Y. TRIB., Mar. 2, 1919, at 14 [hereinafter *Cristal Eastman and Gurley Flynn Seeking Freedom*] (detailing Eastman and Rodman's participation in feminist convention supporting suffrage, and opposing discrimination against African-American women in the South).

51. Patricia Anne Carter, *A Coalition Between Women Teachers and the Feminist Movement in New York City, 1900–1920*, at 107–203 (Feb. 1985) (unpublished Ed.D. dissertation, University of Cincinnati) (on file with ProQuest Dissertation and Theses). These policies were widespread beyond New York City. *Id.* at 142–43 ("In a 1914 survey of 48 cities in the U.S. with populations over 100,000, thirty-seven cities had regulations which prevented the employment of women teachers after marriage.").

women with newborn children teaching in the public schools.<sup>52</sup> The Board's chair invoked the language of separate spheres to justify excluding pregnant teachers and new mothers from the classroom:

A married woman's sphere is the home, if she has a family. A woman who has infant children to rear has no business trying to take care of these and at the same time teach school. On the birth of a child a woman teacher must be absent from school for a period ranging from two months to a year. . . . A mother places her children first, just as the Board of Education places first the children it provides for.<sup>53</sup>

Two years later, the New York Board of Education reaffirmed its policy against retaining new mothers in a report that elaborated its reasoning as rooted in the belief that the mother's place was in the home.<sup>54</sup> The Board's escalating affirmations of the separate-spheres tradition were plainly expressions of resistance to claims about women's work that Rodman and the teachers were asserting. An editorial dryly observed: "our public school system is a victim of that comparatively new and distressing malady called feminism."<sup>55</sup>

In a campaign culminating in the 1914–1915 school year, Rodman took up the case of the "teacher–mothers" and challenged the Board's discrimination before the Board, in the courts, and in the court of public opinion.<sup>56</sup> She rallied supporters at public demonstrations—an audience of 800 people attended one meeting at Cooper Union<sup>57</sup>—and secured the support of a group of notable individuals John Dewey, Anna Howard Shaw, Fola La Follette, and Rabbi Stephen Wise to support the teacher–mothers in their quest for leave with job security.<sup>58</sup> Rodman's statement to rally support called the school's policy of bringing criminal charges for neglect of duty against women taking maternity leave "a crime against women who are forced to choose between two activities, both of which are necessary for

52. On the New York City Board of Education's policy, see *id.* at 140–41, which documents the Board's "intention to begin barring women with small children from teaching in public schools." The chairperson of the Board, Abraham Stern, sent a clear message so that the new mother would understand that "if she did not leave immediately on her own volition, the Board would be forced to dismiss her from her job." *Id.* at 141; see also *id.* at 142–43 (discussing several other cities with similar policies on new mothers).

53. *Bar Out Teachers with Small Babies*, N.Y. TIMES, Nov. 30, 1911, at 13.

54. See Carter, *supra* note 51, at 150–51 (quoting the Board's conclusion that "[w]e still believe that there is 'no home without a mother,' and that the old-fashioned mother who considers it her primary function to rear and maintain a pure and proper home is doing yeoman service to the State. The home can never fulfill its true function when its head is an 'absent mother.' What will become of the children who are brought up at home where there is an absentee mother and who are taught in school by an absentee mother?").

55. *Id.* at 167 (quoting *The Teacher's Right to Motherhood*, LITERARY DIG., Nov. 29, 1913, at 1051).

56. Carter, *supra* note 49, at 162–63; Carter, *supra* note 51, at 147–48 ("Rodman explained that the League [for the Civic Service of Women] intended 'to make the Board of Education and every one else in the city and the State realize that bearing a child was a civic service and that discrimination by the Board of Education or any other employer was wrong.'"); Sochen, *supra* note 49, at 103.

57. Carter, *supra* note 51, at 167.

58. *Id.* at 172.

their fullest development,” and urged New Yorkers “to come to the defence of your sisters, who are struggling to retain the most primitive rights of women—to work and bear children.”<sup>59</sup>

Escalating her media campaign, in November 1914, Rodman wrote a letter to the sports columnist of the *New York Tribune* entitled “Sporting Note” inviting him to attend a new kind of game called “mother baiting” played

at the Hall of the Board of Education, 500 Park Avenue, on Wednesday, at four o’clock. The majority of the members of the Board of Education are expected to play on one side, and on the other, two women, each with a baby a few days old. The object of the game is to kick the mothers out of their positions in the public schools. It will be played according to the rules of the Board of Education.

Mother-baiting is popular with the majority of the Board. The game is rather rough, but, like wife-beating, which used to be so popular, it is always played for the good of the women.<sup>60</sup>

For daring to speak out against the Board, Rodman was suspended for a year without pay.<sup>61</sup> After the Board refused to reinstate Rodman for the rest of the school year, Rodman accepted a position at the *New York Tribune* as an education reporter, which allowed her to continue freely criticizing the Board, only now with a guaranteed daily readership.<sup>62</sup> The Board, however, soon reinstated the seventeen teacher–mothers that school year with full pay for their time in suspension and came to recommend a two-year maternity leave for New York City teachers.<sup>63</sup>

Rodman’s case helped play a role in establishing principles of freedom of speech<sup>64</sup> and pushed New York City to become only the fourth U.S. city to allow maternity leaves of absence.<sup>65</sup> Her attorney, Jean Norris, later became the first

59. *Expectant Mother to Stay in School: Leave of Absence to Bear Child Refused, Will Fight on Board’s Own Terms*, N.Y. TRIB., Oct. 13, 1914, at 9.

60. Henrietta Rodman, *Sporting Note*, N.Y. TRIB., Nov. 10, 1914, at 8.

61. The New York City Board of Education, infuriated, responded by charging Rodman with “gross misconduct and insubordination” and suspending her for the rest of the school year without pay. Sochen, *supra* note 49, at 105.

62. See Carter, *supra* note 49, at 170.

63. See Sochen, *supra* note 49, at 108.

64. See *Free Speech for Teachers*, NEW REPUBLIC, June 26, 1915, at 193 (drawing attention to the case in an early issue of the *New Republic* out of concern that “Miss Rodman’s act in writing to the *Tribune* was not one in the course of her employment as a teacher. It was something that she did in her capacity as a citizen outside of the schoolroom,” and then observing that the Board’s sanction “raises a fundamental issue of democratic government: how far should persons be compelled to give up their rights as citizens when they enter the public service?” and urging someone to take the case to the courts to “determine whether the terms of our bill of rights have any application to these issues”).

65. However, this move did not placate Rodman, who “criticized the two year absence period as being unduly long,” Sochen, *supra* note 49, at 109, and declared that there was “no future for the woman teachers in the public schools” because of the board’s domineering control, *Cristal Eastman and Gurley Flynn Seeking Freedom*, *supra* note 50.

woman judge in the state of New York.<sup>66</sup> By the end of her campaign, Rodman had won over most of the education-focused and popular press, and reshaped the conversation about the right of married and pregnant women to work.<sup>67</sup> New Yorkers remembered Rodman for the high spirits with which she led the teacher–mother campaign, and for her advocacy on behalf of African Americans.<sup>68</sup>

#### B. THE 1970S: RUTH BADER GINSBURG, PREGNANCY, AND THE CONSTITUTION

A half century later, women had gained the right to vote and were just beginning to attend law school in increasing numbers.<sup>69</sup> They no longer needed to rely on public opinion as a tool of social change for the reasons that Henrietta Rodman did. Yet, women were still vastly underrepresented in representative government,<sup>70</sup> on the bench,<sup>71</sup> and on law faculties.<sup>72</sup> Discrimination—including pregnancy discrimination—remained rampant, as a 1973 report of the ACLU Women’s Rights Project (WRP) observed, documenting, in support of its equal-protection-litigation campaign, “the kinds of penalties that major institutions in our society routinely inflict upon pregnant women.”<sup>73</sup> WRP’s founder, Ruth

66. See Carter, *supra* note 49, at 168. For Norris’s role in supporting teachers in New York who were threatened with dismissal because of marriage and pregnancy, as well as her role in representing Henrietta Rodman, see Mae C. Quinn, *Fallen Women (Re)framed: Judge Jean Hortense Norris, New York City – 1912–1955*, 67 U. KAN. L. REV. 451, 464–71 (2019). For Norris’s appointment as the first woman judge in New York State, see *id.* at 476.

67. Carter, *supra* note 49, at 170, 172–73.

68. *Henrietta Rodman, Teachers’ Champion Dying of Paralysis*, N.Y. TRIB., Jan. 24, 1923, at 11; see Quinn, *supra* note 66, at 465 (observing Rodman’s involvement in the Heterodoxy Club, a group that included lesbians and women of color); *supra* note 50 and accompanying text (discussing Rodman’s opposition to discrimination against African-American women in the South and her activism against lynching).

69. CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 54 (2d ed. 1993) (describing the low level of female law student enrollment until the 1970s, when “New York University was one of the first to admit law classes made up of 25 percent women, in the early 1970s. Rutgers University followed after a spate of activity by women students brought the admission of enough women to comprise 40 percent of the law school. Rutgers’ faculty included Ruth Bader Ginsburg, who helped women law students there organize one of the first conferences on women in the law, in May 1970, and was one of the first advocates for women’s equality in law schools and in the courts. . . . Soon most major law schools were admitting women in far greater proportions than in the past”).

70. See *Women Representatives and Senators by Congress, 1917–Present*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Data/Women-Representatives-and-Senators-by-Congress/> [<https://perma.cc/PT4C-SW2N>] (listing only eleven women elected to the 91st Congress, which spanned the years 1969 to 1971).

71. See *Demography of Article III Judges, 1789–2017: Gender*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/gender> [<https://perma.cc/37RX-AM7Q>] (last visited Mar. 13, 2020) (reporting that in 1970, 7 of the 619 Article III judges—1.13%—were women).

72. See Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 12 (1991).

73. TRUDY HAYDEN, ACLU WOMEN’S RIGHTS PROJECT, *PUNISHING PREGNANCY: DISCRIMINATION IN EDUCATION, EMPLOYMENT, AND CREDIT* 2 (1973) (documenting laws and other practices discriminating against pregnant women in public schools and higher education; in employment, including benefits and insurance; and in credit). For a recent retrospective, see Thomas Kaplan, *Elizabeth Warren Details Her Account of Losing Teaching Job Because of Pregnancy*, N.Y. TIMES (Oct. 8, 2019), <https://www.nytimes.com/2019/10/08/us/politics/elizabeth-warren-fired-pregnant.html>. See also Abbi Matheson, *Elizabeth Warren Shares Stories of Other Women Who Experienced Pregnancy Discrimination*, BOS. GLOBE (Oct. 9, 2019, 4:48 AM), <https://www.bostonglobe.com/news/politics/2019/10/09/elizabeth-warren-shares-stories-other-women-who-experienced-pregnancy-discrimination/PnV0papcGKBvuxvAy3dQzL/>

Bader Ginsburg,<sup>74</sup> knew of these practices from personal experience. In interviews, Justice Ginsburg has recalled her own work experiences in the 1950s:

I qualified to work as a claims adjuster for the Social Security Administration at Fort Sill. . . . I told the head of the office when I started that I was 3-months pregnant. He said, "Well, we can't place you as a GS-5 because you won't be able to go to Baltimore for training. So, we will list you as a GS-2 and you'll do the work of a GS-5." It was also expected that when my child was born, I would leave. You can see why I am exhilarated by the change I have seen.<sup>75</sup>

Ginsburg's account of teaching law at Rutgers in the 1960s sounds little different from the conditions that Henrietta Rodman fought at the turn of the century. Ginsburg recalls that during her second year of teaching:

I had a year-to-year contract, and I was pretty sure that if I told them I was pregnant, I wouldn't get a contract for the next year. So I wore my mother-in-law's clothes. It was just right. She was one size larger. And I got through the spring semester. When I had the new contract in hand, I told my colleagues, when I came back in the fall, there would be one more in our family. So they stopped thinking that I was gaining a lot of weight.<sup>76</sup>

By 1970, at the half-century anniversary of the Nineteenth Amendment's ratification, feminists active in the civil rights, labor, and antiwar movements held a Strike for Equality in which they demanded recognition of the Constitution's guarantees of equal citizenship through ratification of the Equal Rights Amendment (ERA), and access to equal employment and educational opportunities, abortion rights, and universal child care.<sup>77</sup> At the time of the strike, the Supreme Court had never held that a law violated the Equal Protection Clause because it discriminated on the basis of sex.

It was in this era that Ginsburg began bringing cases before the Supreme Court in a campaign to secure the recognition of women's equal-citizenship rights under the Constitution. She challenged laws like the one in *Reed v. Reed* that

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story.html ("[Elizabeth Warren] shared a video on social media of the stories of other women who said they experienced pregnancy discrimination in their workplaces. . . . In the video, Warren read the stories of a dozen people ranging from as far back as the 1960s to the 2000s.").

74. See Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 165 (2002) ("The ACLU's Board of Directors declared women's rights to be their top legal and legislative priority in December 1971 following the victory in *Reed v. Reed*. The Board hired Professor Ruth Bader Ginsburg to found and direct the Women's Rights Project (WRP) in the spring of 1972 in recognition of her successful collaboration with ACLU attorney Mel Wulf." (footnote omitted)).

75. Brandon O'Connor, *Justice Ginsburg Visits West Point for Zengerle Family Lecture Series*, U.S. ARMY (Sept. 20, 2018), [https://www.army.mil/article/211408/justice\\_ginsburg\\_visits\\_west\\_point\\_for\\_zengerle\\_family\\_lecture\\_series](https://www.army.mil/article/211408/justice_ginsburg_visits_west_point_for_zengerle_family_lecture_series) [<https://perma.cc/NVY2-TNDR>].

76. *Ruth Bader Ginsburg: Justice for All*, WHAT IT TAKES (Sept. 26, 2016), <https://whattitakes.simplecast.com/episodes/40ca4a6b-40ca4a6b>.

77. See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1986-93 (2003).



drew sex-based distinctions between male and female candidates to administer a decedent's estate.<sup>78</sup> Her cases targeted laws that imposed sex-role stereotypes on women and men; she contested differences that law imposed on men and women without asserting that the sexes were in fact the same.<sup>79</sup>

As Ginsburg chose her early cases targeting traditional sex-role stereotyping in public and private life, she highlighted laws regulating pregnancy.<sup>80</sup> In one of her first actions at the newly founded WRP, Ginsburg appealed a Ninth Circuit decision in *Struck v. Secretary of Defense* on behalf of an Air Force officer who was subject to automatic discharge on grounds of pregnancy or new motherhood—leaving her only the option of aborting the pregnancy—while male Air Force officers who were about to become fathers were not subject to a similar requirement.<sup>81</sup> Ginsburg contested the regulation on equal protection and substantive due process grounds.<sup>82</sup> Ginsburg urged the Supreme Court to suspend sex-role assumptions and recognize that there were other similarly situated persons in the Air Force to whom the plaintiff could be compared: “Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment.”<sup>83</sup> Ginsburg explained that the Air Force’s policy of immediately discharging pregnant-women officers who continued their pregnancies “reflect[ed] arbitrary notions of woman’s place wholly at odds with contemporary legislative and judicial recognition that individual potential must not be restrained, nor equal opportunity limited, by law-sanctioned stereotypical prejudgments,”<sup>84</sup> and asked the Court to review the regulation under a strict scrutiny framework,<sup>85</sup> echoing the claim for strict scrutiny that she had just presented the Court as an amicus in *Frontiero*.<sup>86</sup>

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78. 404 U.S. 71, 73 (1971).

79. See Franklin, *The Anti-Stereotyping Principle*, *supra* note 14, at 86–87. On pregnancy and the *Struck* case, see *id.* at 125–28.

80. In the early 1970s, Ginsburg authored briefs and law review articles arguing that laws according differential treatment on the basis of pregnancy should be subject to strict scrutiny under the Equal Protection Clause and under the Equal Rights Amendment. See *infra* note 163 (citing sources in addition to the *Struck* brief).

81. Brief for the Petitioner at 3–4, *Struck v. Sec’y of Def.*, 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135840. For the regulation, see *Struck v. Secretary of Defense*, 460 F.2d 1372, 1374 (9th Cir. 1971). For accounts of the *Struck* case, see generally Siegel & Siegel, *supra* note 14, and Neil S. Siegel, *The Pregnant Captain, the Notorious REG, and the Vision of RBG: The Story of Struck v. Secretary of Defense*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES, *supra* note 14, at 33 [hereinafter Siegel, *The Pregnant Captain*]. For a recent interview with the plaintiff and other commentary on the case, see Dahlia Lithwick, Loretta Ross, Neil Siegel & Reva Siegel, *Body of Law: Beyond Roe*, ON THE MEDIA (Dec. 13, 2019), <https://www.wnycstudios.org/podcasts/otm/episodes/on-the-media-body-law-beyond-roe> [https://perma.cc/SR4F-FUEV].

82. See Brief for the Petitioner, *supra* note 81, at 7–12.

83. *Id.* at 17.

84. *Id.* at 14.

85. *Id.* at 26–52.

86. See Brief of American Civil Liberties Union *Amicus Curiae*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694).

Ginsburg closed her brief, filed just before the Court handed down *Roe v. Wade*,<sup>87</sup> with a due process challenge to the policy as violating Struck's "right to sexual privacy, and her autonomy in deciding 'whether to bear . . . a child'"<sup>88</sup> and her right to free exercise of religion.<sup>89</sup> The Air Force ultimately abandoned its discriminatory policy before the Supreme Court could rule on the case, perhaps aware of the dangers of asking the Court to rule in a case in which the government was asking a Catholic woman to have an abortion as the price for maintaining her position in the Air Force.<sup>90</sup>

In *Struck*, Ginsburg argued that because pregnancy was a locus of traditional sex-role stereotyping, laws regulating pregnancy required strict scrutiny. As we will see, this approach was shared by movement lawyers building sex equality jurisprudence under the ERA,<sup>91</sup> and under the Constitution's existing equal protection guarantees.<sup>92</sup> But it was not shared by the Court. Even as the movement lawyers persuaded the Court to hold unconstitutional sex-based laws resting on "'archaic and overbroad generalization[s]'"<sup>93</sup> that enforced "'old notions' of role typing" and "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas,'"<sup>94</sup> the Court resisted such arguments in cases involving pregnancy. Soon after the plurality decision in *Frontiero* calling for applying strict scrutiny to sex-based state action,<sup>95</sup> the Burger Court handed down its 1974 decision in *Geduldig v. Aiello*—upholding exclusion of pregnancy from California's comprehensive disability benefits program on the ground that pregnancy was "an objectively identifiable physical condition with unique characteristics" and observing that "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*."<sup>96</sup>

Part II of this Article examines more closely feminist lawyers' equal protection claims about pregnancy in the 1970s and the Burger Court's response, and then demonstrates how that body of law has evolved in intervening decades.

87. 410 U.S. 113 (1973).

88. Brief for the Petitioner, *supra* note 81, at 54 (alteration in original).

89. *Id.* at 56–58.

90. See Siegel, *The Pregnant Captain*, *supra* note 81, at 42.

91. See, e.g., Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 893–96 (1971); see also *id.* at 930 n.116 (criticizing mandatory maternity leave and suggesting a variety of sex-stereotypical views the policy might reflect).

92. See *infra* Part II.

93. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975).

94. *Craig v. Boren*, 429 U.S. 190, 198–99 (1976).

95. 411 U.S. 677, 688 (1973) (Brennan, J., plurality opinion).

96. 417 U.S. 484, 496 n.20 (1974) (citations omitted). For a fuller legal context, see *infra* Part II, describing interplay of Fourteenth Amendment, ERA, and Title VII claims.

C. SENATOR JENNIFER MCCLELLAN IN 2020: ADVOCATING FOR A PREGNANT WORKERS FAIRNESS ACT—AND THE EQUAL RIGHTS AMENDMENT

Today, a full century since the Nineteenth Amendment was ratified, women have made major gains in their integration in politics, law, and the market.<sup>97</sup> Still, pregnancy discrimination persists.<sup>98</sup> The *New York Times* has recently reported that “[w]hether women work at Walmart or on Wall Street, getting pregnant is often the moment they are knocked off the professional ladder. . . . The number of pregnancy discrimination claims filed annually with the Equal Employment Opportunity Commission has been steadily rising for two decades and is hovering near an all-time high.”<sup>99</sup>

Recently, Jennifer L. McClellan, a Virginia State Senator, became the first member of the Virginia House of Delegates to become pregnant while in office; she reports that she was asked whether she would be retiring.<sup>100</sup> McClellan pointed out that no one asked the same question of her male colleague who was expecting a child.<sup>101</sup> McClellan did not retire but instead ran for the Virginia Senate. There, she has co-led the charge for Virginia to become the thirty-eighth state to ratify the ERA.<sup>102</sup> Moments after the legislative window opened in

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97. For example, a record 102 women were elected to serve in the 116th Congress’s House of Representatives, while 25 women were elected to serve in the U.S. Senate. See Drew DeSilver, *A Record Number of Women Will Be Serving in the New Congress*, PEW RES. CTR. (Dec. 18, 2018), <https://www.pewresearch.org/fact-tank/2018/12/18/record-number-women-in-congress/> [<https://perma.cc/77VV-WPXY>]. In addition, three women now sit on the Supreme Court, one of whom of course is Ruth Bader Ginsburg. See *Current Members*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/S7JQ-EXT4>] (last visited Jan. 11, 2020). Women have made signal advances in law. See Ann E. Marimow, *For the First Time, Flagship Law Journals at Top U.S. Law Schools Are All Led by Women*, WASH. POST (Feb. 7, 2020, 7:00 AM), [https://www.washingtonpost.com/local/legal-issues/for-the-first-time-flagship-law-journals-at-top-us-law-schools-are-all-led-by-women/2020/02/07/b4d3bc64-4836-11ea-bc78-8a18f7afcee7\\_story.html](https://www.washingtonpost.com/local/legal-issues/for-the-first-time-flagship-law-journals-at-top-us-law-schools-are-all-led-by-women/2020/02/07/b4d3bc64-4836-11ea-bc78-8a18f7afcee7_story.html).

Despite advances, discrimination persists across sectors. See, e.g., Maggie Astor, *The Word Female Presidential Candidates Have Been Hearing Over and Over*, N.Y. TIMES (Jan. 16, 2020), <https://www.nytimes.com/2020/01/14/us/politics/woman-president.html>; Jena McGregor, *‘We Blew It’: Forbes Named 99 Men and Only One Woman on Its List of ‘Most Innovative Leaders.’* WASH. POST (Sept. 10, 2019, 7:00 AM), <https://www.washingtonpost.com/business/2019/09/10/we-blew-it-forbes-named-men-only-one-woman-its-list-most-innovative-leaders/>.

98. See Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html>; see also Natalie Kitroeff, *XPO Logistics Will Close Warehouse Where Some Pregnant Workers Miscarried*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/business/xpo-verizon-warehouse-pregnancy-discrimination.html> (detailing the closing of a warehouse in which employees who had miscarried alleged instances of pregnancy discrimination when denied breaks from physically intense work).

99. Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America’s Biggest Companies*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html>.

100. Jennifer L. McClellan, *Virginia Should Ratify ERA*, RICHMOND FREE PRESS (Aug. 30, 2018, 6:00 AM), <http://richmondfreepress.com/news/2018/aug/30/virginia-should-ratify-era/> [<https://perma.cc/9VU2-DPSB>].

101. See *id.*

102. See Rachel Frazin, *Virginia Targets Historic Push on Equal Rights Amendment for Women*, HILL (Dec. 1, 2019, 8:59 PM), <https://thehill.com/homenews/state-watch/472295-virginia-targets-historic-push-on-equal-rights-amendment-for-women> [<https://perma.cc/K9FA-RY9B>]; Timothy Williams,

November 2019, McClellan submitted an ERA-ratification resolution in the Virginia Senate, placing it “at the symbolic head of the list for that chamber.”<sup>103</sup> In explaining her support for the ERA, McClellan emphasized that she was “proud to be among a number of women of color taking up the mantle to ratify the Equal Rights Amendment”<sup>104</sup> after “women of color were overlooked in the building of the ERA and women’s rights.”<sup>105</sup> Recognizing the significance of her own presence in the Virginia General Assembly, McClellan pointed out that she does not “think Thomas Jefferson ever envisioned nursing mothers in this Capitol, but he never would have envisioned me here, period.”<sup>106</sup>

Senator McClellan’s experience of maternity has directly informed her advocacy.<sup>107</sup> McClellan recently helped enact the Pregnant Workers Fairness Act (PWFA) in Virginia requiring the reasonable accommodation of pregnant workers.<sup>108</sup> At this point, *over half of the states*—twenty-nine, many of them “red”—

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*Virginia Approves the E.R.A., Becoming the 38th State to Back It*, N.Y. TIMES (Jan. 16, 2020), <https://www.nytimes.com/2020/01/15/us/era-virginia-vote.html>.

103. Gregory S. Schneider, *Virginia Democrats out of the Gate Quickly with Bills for Next Year: ERA, Gun Control, Voting Access*, WASH. POST (Nov. 18, 2019, 6:04 PM), [https://www.washingtonpost.com/local/virginia-politics/virginia-democrats-out-of-the-gate-quickly-with-bills-for-next-year-era-gun-control-voting-access/2019/11/18/ec1ccec2-0a24-11ea-bd9d-c628fd48b3a0\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-democrats-out-of-the-gate-quickly-with-bills-for-next-year-era-gun-control-voting-access/2019/11/18/ec1ccec2-0a24-11ea-bd9d-c628fd48b3a0_story.html).

104. McClellan, *supra* note 100.

105. Christopher Brown, *100 Years After Women Earned Right to Vote, Will Va. Legislators Pass Equal Rights Amendment?*, NBC 12 (Dec. 11, 2019, 2:18 PM), <https://www.nbc12.com/2019/12/11/years-after-women-earned-right-vote-will-va-legislators-pass-equal-rights-amendment/> [<https://perma.cc/29Q8-E59F>].

106. Mary Wood, *From Lawyer to Leader: Virginia Sen. Jennifer McClellan '97 Discusses Her Path to Public Service*, U. VA. SCH. OF LAW (2019), <https://www.law.virginia.edu/uvalawyer/article/lawyer-leader> [<https://perma.cc/M636-5MCA>]. At the time she became pregnant, there were no lactation rooms in the House, and McClellan was forced to ask for breaks so that she could pump. RVAbreastfeeds, *Breastfeeding Real Talk: A Facebook Live Series*, at 4:06–4:20, FACEBOOK (Dec. 18, 2019), <https://www.facebook.com/SenjenniferMcClellan/posts/10157319742899702>.

107. McClellan recalled explaining, during a committee discussion for a school breastfeeding accommodations bill that ultimately passed, why lactation breaks were essential and why teachers could not “just wait until lunch” to breastfeed. RVAbreastfeeds, *supra* note 106 (McClellan explaining that “[she] put in a bill now that required schools to have a lactation policy that would include breaks and a private place for teachers and students to pump, and a place to store it. And I remember being in a committee meeting where some of the older men, who I guess their wives didn’t breastfeed or something, and they said, ‘Well, can’t you just wait until lunch?’ And I said, ‘Okay, if you have a teacher, school starts at 6:30 in the morning. Even if she’s having lunch at like 11:30, here’s what starts to happen.’ And I started to explain engorgement, and all of a sudden they were all like, ‘Okay, never mind,’ and it was just like, ‘alright,’ like ‘fine.’ But no one had ever been that voice in the General Assembly who could speak from experience like ‘it hurts’ or ‘you leak.’ . . . Or they’re like, you know, ‘Why can’t you just restrain your breast?’ And it’s like, ‘It doesn’t quite work that way.’ . . . I could better put myself in . . . nursing mothers’ shoes because I was going through it myself.”).

108. See S.B. 712, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); H.B. 827, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); see also 2020 Session: SB 712 *Virginia Human Rights Act; Unlawful Discrimination on the Basis of Pregnancy, Childbirth*, VA.’S LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB712> [<https://perma.cc/NY4Y-LLG2>] (last modified Apr. 11, 2020) (summarizing legislative history of Virginia’s Pregnant Workers Fairness Act); see also Julia Raimondi, *Bill Seeks to Clarify Workers’ Rights for Pregnant, Lactating Employees*, VA. BUS. (Feb. 18, 2020), <https://www.virginiabusiness.com/article/bill-seeks-to-clarify-workers-rights-for-pregnant-lactating-employees/> [<https://perma.cc/T6XX-DFN4>].

have passed their own versions of the PWFA.<sup>109</sup> A federal PWFA has been introduced in the House of Representatives, and after its approval in committee markup, has recently moved to the full House for a vote.<sup>110</sup> The Act provides for reasonable accommodations of pregnancy in the workplace, premised on the radical assumption that employees who become pregnant will continue their employment rather than leave the workforce.<sup>111</sup> This view of women's equal citizenship in economic life, mirroring their equal citizenship through leadership in civic life, appears to be gaining traction.

Jennifer Carroll Foy, a colleague of McClellan's in the Virginia General Assembly, has been equally vocal about how her pregnancy has shaped her political advocacy. Three weeks after Carroll Foy launched her election campaign, she learned she was pregnant with twins, which has "shaped some of her policy interests," including her determination to enact paid maternity leave.<sup>112</sup> Carroll Foy has since revealed that people had called her "crazy" for running for office while pregnant with twins.<sup>113</sup> As a champion of the ERA in the House, Carroll Foy values the amendment for its power to strengthen protections against pregnancy discrimination.<sup>114</sup> In addition to her support for equal pay and paid leave, Carroll Foy introduced the Pregnant Workers Fairness Act in the House of Delegates.<sup>115</sup>

The visibility of pregnant legislators is a new phenomenon. The norms that Henrietta Rodman fought against a century ago endure—possibly most acutely in politics (and sports<sup>116</sup>)—so that only ten members of Congress have given birth while serving their terms, and only two in the last decade.<sup>117</sup> On the statewide

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109. See Dina Bakst, *Improving Federal Law for Pregnant Workers*, HILL (Jan. 15, 2020, 2:30 PM), <https://thehill.com/opinion/healthcare/478413-improving-federal-law-for-pregnant-workers> [https://perma.cc/R2ML-WPKZ].

110. See Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019).

111. See Bryce Covert, *The American Workplace Still Won't Accommodate Pregnant Workers*, NATION (Aug. 12, 2019), <https://www.thenation.com/article/pregnant-workers-discrimination-workplace-low-wage>.

112. Julie Carey & Abby Vesoulis, *Mother of Premature Twins Wins Virginia House of Delegates Seat*, NBC4 WASH. (Nov. 10, 2017, 8:39 AM), <https://www.nbcwashington.com/news/local/mother-of-premature-twins-wins-virginia-house-of-delegates-seat/32031/> [https://perma.cc/64PT-GW2V]. Several Virginia legislators have recently had children while in office. See Patrick Wilson, *Va. Lawmaker Announces She's Pregnant with Her Third Child*, RICHMOND TIMES-DISPATCH (Oct. 2, 2019), [https://www.richmond.com/news/virginia/va-lawmaker-announces-she-s-pregnant-with-her-third-child/article\\_4dfd80e1-15c5-5521-a77e-e57ad00d1a40.html](https://www.richmond.com/news/virginia/va-lawmaker-announces-she-s-pregnant-with-her-third-child/article_4dfd80e1-15c5-5521-a77e-e57ad00d1a40.html).

113. Jennifer Carroll Foy (@JCarrollFoy), TWITTER (Feb. 25, 2019, 11:33 PM), <https://twitter.com/JCarrollFoy/status/1100252593492840449> [https://perma.cc/Y3DD-SPDM].

114. See Jennifer Carroll Foy, *Women Are Not Granted Equality Anywhere in the Constitution*, MARIE CLAIRE (Jan 15, 2020), <https://www.marieclaire.com/politics/a30534962/jennifer-carroll-foy-virginia-equal-rights-amendment/> [https://perma.cc/M7XR-7MQC].

115. See Taiya Jarrett, *Standing on the Right Side of History with Jennifer Carroll Foy*, RVA MAG. (Feb. 5, 2020), <https://rvamag.com/politics/virginia-politics/standing-on-the-right-side-of-history-with-jennifer-carroll-foy.html> [https://perma.cc/S56R-3YRU].

116. See, e.g., Natasha Henry, *Serena Williams's Pregnant Victory Reminds Us How Amazing Women's Bodies Are*, GUARDIAN (Apr. 20, 2017, 9:44 AM), <https://www.theguardian.com/commentisfree/2017/apr/20/serena-williams-pregnant-tennis-women> [https://perma.cc/MY5H-MU9J].

117. *Familial Connections of Women Members of Congress*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/WIC/Historical->

level, Sarah Palin (AK) and Jane Swift (MA) are the only Governors who have given birth while in office.<sup>118</sup> When the candidates received considerable public attention for their pregnancies, both expressed concerns about their pregnancies overshadowing their public policy agendas.<sup>119</sup> Though statistics on pregnant, statewide office-holders are not officially gathered, anecdotal evidence suggests there are scarcely any statewide office-holders who have been pregnant.<sup>120</sup> The scarcity of pregnant lawmakers may be explained, in part, by the unwillingness of many voters to elect women who appear to be involved in caring for children.

The social science research shows that pregnant women are negatively stereotyped, viewed as less competent and committed, and are less likely to be hired.<sup>121</sup> This negative sex-role stereotyping extends to politics. In a 2018 Pew Research Center survey, fifty-one percent of respondents reported it would be better for a woman seeking high political office to have children before entering politics.<sup>122</sup> About a quarter said a female candidate should wait until she is politically well-established before having children, with an additional nineteen percent reporting it would be better for her not to have children at all.<sup>123</sup>

The beliefs reported in the Pew poll make the success of pregnant lawmakers like McClellan and Carroll Foy even more astonishing. They remind us that sex-role stereotyping is even more robustly entrenched in politics than in the markets. In each domain, norms are slowly evolving—it is remarkable that half of the states have enacted a pregnant workers fairness act, and that a handful of women can now finally run for office, even when they are pregnant and “showing.”<sup>124</sup>

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Data/Familial-Connections-of-Women-Representatives-and-Senators-in-Congress/ [https://perma.cc/XM2R-ZSXU] (last visited Jan. 18, 2020).

118. Yereth Rosen, *Alaska's 1st Female Governor Gives Birth to Son*, REUTERS (Apr. 20, 2008, 8:36 PM), <https://www.reuters.com/article/us-alaska-governor-baby/alaskas-1st-female-governor-gives-birth-to-son-idUSN4I33602420080421> [https://perma.cc/XW9E-LMXX].

119. See Carey Goldberg, *A Pregnant Candidate Discovers She's an Issue*, N.Y. TIMES (May 15, 1998), <https://www.nytimes.com/1998/05/15/us/a-pregnant-candidate-discovers-she-s-an-issue.html> (reporting Ms. Swift stating, “Even if we’re going to focus on the pregnancy, I wish we could shift the debate to about, ‘What . . . [Ms. Swift and her running mate] think they can do on day care and creating more opportunities for flextime and meaningful part-time work?’”); Jodi Kantor et al., *Fusing Politics and Motherhood in a New Way*, N.Y. TIMES (Sept. 7, 2008), <https://www.nytimes.com/2008/09/08/us/politics/08baby.html> (reporting Ms. Palin noting she “didn’t want Alaskans to fear [she] would not be able to fulfill [her] duties”).

120. See Kate Zernike, *‘And I’m a Mom.’ Candidates and Voters Warm to Kids on the Trail*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/politics/women-midterms-children.html> (“Ms. Teachout is believed to be only the third woman to run for statewide office while pregnant.”).

121. In one foundational 1993 study, survey participants viewed pregnant women as “overly emotional, often irrational, physically limited, and less than committed to their jobs. They were not seen as valued or dependable employees.” Jane A. Halpert, Midge L. Wilson & Julia L. Hickman, *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORGANIZATIONAL BEHAV. 649, 655 (1993).

122. Ruth Igielnik & Kim Parker, *When Should a Woman Have Children if She’s Thinking About Running for Office?*, PEW RES. CTR. (May 9, 2019), <https://www.pewresearch.org/fact-tank/2019/05/09/when-should-a-woman-have-children-if-shes-thinking-about-running-for-office/> [https://perma.cc/T3A6-S39K].

123. *Id.*

124. See Alana Abramson, *Zephyr Teachout Wants to Be New York’s Top Lawyer. She’s Also Pregnant. But Don’t Let That Overshadow Her Campaign*, TIME (Aug. 16, 2018, 6:32 PM), <https://time>.

But there are many, many Americans who—consciously and vocally, as well as unconsciously—still hold the views expressed by the New York Board of Education a century ago, tipping the balance against pregnant women and new mothers in markets and in politics, often in ways blamed on the women themselves.

## II. EQUAL PROTECTION, SEX-ROLE STEREOTYPING, AND PREGNANCY: FROM THE BURGER COURT TO THE REHNQUIST COURT

### A. LOCATING EQUAL PROTECTION DOCTRINE IN HISTORY

As the stories opening this Article illustrate, in the century after the ratification of the Nineteenth Amendment, Americans continued to reason through traditional, gender-based family roles as they made decisions about employment and politics. These understandings were carried forward, not simply through custom and consent, but through laws that pushed resisting mothers and mothers-to-be out of employment on the assumption they were dependents of male wage earners.

Could women contesting such laws appeal to constitutional guarantees of equal protection? As we have seen, Ruth Bader Ginsburg and other feminist lawyers challenged laws excluding pregnant women from employment as a core example of sex discrimination in the 1970s. But as we will now examine more closely, the Burger Court was unwilling to incorporate their arguments into the new body of sex-discrimination doctrine it was forging under the Equal Protection Clause. The Burger Court's earliest equal protection, sex-discrimination cases prohibited sex-based state action that imposed stereotypical sex roles on women, but treated laws regulating pregnancy, "an objectively identifiable physical condition with unique characteristics,"<sup>125</sup> as if such laws were not always subject to these same constraints.

I term this limit on equal protection law "physiological naturalism."<sup>126</sup> Physiological naturalism is the belief that objective facts about reproductive differences—rather than judgments about social roles—motivate and justify regulations that uniquely burden one sex.<sup>127</sup>

In what follows, I show how the understanding of sex discrimination and pregnancy dramatically changes in the Court's equal protection cases over the

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com/5357728/zephyr-teachout-pregnant-new-york-attorney-general-race/ [https://perma.cc/T3A6-S39K] (reporting Teachout, who lost the primary for Attorney General, observing that "I think it shows, for so long, an unspoken rule that people don't run while pregnant. . . . Which certainly has been broken [before], but not very often" (alteration in original)).

125. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

126. See Siegel, *supra* note 44, at 267–77.

127. *Id.* at 333. According to the logic of physiological naturalism, because reproductive differences are objective, real, and categorically distinguish the sexes, (1) judgments about pregnancy are free of stereotypes and constitutionally suspect assumptions about social roles and (2) laws imposing unique burdens on one sex are reasonable. In most but not all instances, physiological naturalism justifies regulations that uniquely impose on women—but sometimes it is men who bear the brunt of law's sex-based imposition. See discussion *infra* Section II.C.

decades. The Burger Court initially talked about pregnancy as a real difference, reasoning about pregnancy through the lens of physiological naturalism *in order to limit* the new body of equal protection doctrine that prohibits sex-based state action imposing sex-stereotypical views on women. But with the enforcement of civil rights laws prohibiting pregnancy discrimination,<sup>128</sup> views about pregnancy in the Court's equal protection decisions have significantly evolved. As I document in this section, there is a clear shift from the cases of the Burger Court to the cases of the Rehnquist Court, when the Supreme Court integrated laws regulating pregnancy into the canonical equal protection sex-discrimination framework and prohibited sex stereotyping of "mothers or mothers-to-be."<sup>129</sup>

#### B. CARVING OUT PREGNANCY FROM THE REACH OF NEW SEX-DISCRIMINATION CASES

The Nineteenth Amendment barring sex discrimination in state qualifications for voting changed many things, but it did not enfranchise all women<sup>130</sup> and it did not move judges to eliminate from law sex-based family roles that for so long organized public and private life. In 1937, nearly two decades after the Nineteenth Amendment's ratification, the Court denied a man's equal protection challenge to a poll tax from which the state of Georgia exempted women in *Breedlove v. Suttles*.<sup>131</sup> The Court reasoned that women could be exempted from the poll tax "[i]n view of burdens necessarily borne by them for the preservation of the race,"<sup>132</sup> and further observed that "[t]he laws of Georgia declare the husband to be the head of the family and the wife to be subject to him. To subject her to the levy would be to add to his burden."<sup>133</sup> In 1937, nearly two decades after the Constitution was amended to give women the right to vote, the Court still understood citizenship through the family and authorized sex discrimination by invoking women's capacity to bear children as well as the old rules of the common law of marital status.

By the 1960s, women had mobilized—in the civil rights, labor, and youth movements of the era—to challenge these understandings. They argued that it was impossible to secure equal citizenship for women without changing the conditions in which women raise families,<sup>134</sup> and as the *Struck* case in section I.B.

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128. For work showing how constitutional values can be enforced by legislators as well as courts, see generally Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000), and Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

129. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736–37 (2003) (quoting *Joint Hearing on the Parental and Medical Leave Act of 1986*, *supra* note 3, at 100).

130. See, e.g., Evelyn Brooks Higginbotham, *Clubwomen and Electoral Politics in the 1920s, in AFRICAN AMERICAN WOMEN AND THE VOTE, 1837–1965*, at 134–55 (Ann D. Gordon et al. eds., 1997) (describing the disfranchisement of African-American women in the 1920s, especially in the South).

131. 302 U.S. 277, 282 (1937).

132. *Id.* (citing *Muller v. Oregon*, 208 U.S. 412, 421 (1908)).

133. *Id.* (citation omitted).

134. See, e.g., *supra* text accompanying note 77 (describing the movement's demands in its 1970 Strike for Equality).



illustrates, they challenged laws that pushed men and women into sex-differentiated family roles.<sup>135</sup> And the Supreme Court acted responsively. In 1973, Justice Brennan's plurality opinion in *Frontiero v. Richardson* quoted *Bradwell v. Illinois*—"The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator"<sup>136</sup>—to illustrate the kind of "gross, stereotyped distinctions between the sexes"<sup>137</sup> which American law had enforced for hundreds of years, but that the justices were now interpreting the Equal Protection Clause to forbid.<sup>138</sup> "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas," the Court urged two years later in *Stanton v. Stanton*.<sup>139</sup>

But despite warning against sex-based state action that imposed maternal roles on women, the Court resisted applying this same standard to laws regulating pregnancy. In *Cleveland Board of Education v. LaFleur*, reaching the Court just after *Frontiero* in 1973, feminist lawyers challenged a commonplace restriction: a mandatory maternity-leave law that required a pregnant schoolteacher to take leave without pay for five months before she was due to deliver, and only allowed the teacher to return to work the following semester after the newborn was three months old.<sup>140</sup> Without knowing the story of Henrietta Rodman's campaign, feminists could still ask probing questions about the sex-role assumptions animating mandatory maternity leaves.<sup>141</sup> Lawyers challenged the mandatory maternity law on equal protection grounds, seeking strict scrutiny review.<sup>142</sup> But the Court did

135. See *supra* Section I.B.

136. 411 U.S. 677, 684–85 (1973) (plurality opinion) (internal quotation marks omitted) (quoting *Bradwell v. Illinois*, 83 U.S. 130, 141–42 (1873) (Bradley, J., concurring)).

137. *Id.*

138. *Id.* at 688 (holding that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect").

139. 421 U.S. 7, 14–15 (1975).

140. 414 U.S. 632, 634–35 (1974).

141. In a 1971 article many termed the "unofficial legislative history" of the Equal Rights Amendment, Professor Thomas Emerson and his feminist co-authors argued that the ERA would require strict scrutiny of protective labor legislation mandating maternity leave. They probed the reasoning behind mandatory leave laws, observing:

Another possibility is that the legislators were willing to sacrifice women's roles as workers, which they considered relatively unimportant, to the supposed demands of pregnancy and motherhood, without much investigation either of medical evidence or alternative legislation with less impact on women's rights as independent adults. Or perhaps male legislators were acting on the basis of Victorian beliefs about the impropriety of women who are "in the family way" appearing in public at all. Since denying pregnant women the right to work when they are medically able and willing to work means that they cannot support themselves, this type of legislation, whatever its ostensible purpose, embodies an unrealistic assumption that all pregnant women have men to support them during their forced confinement.

Brown, Emerson, Falk & Freedman, *supra* note 91, at 930 n.116. For contemporary feminist analysis of the mandatory maternity leave policies, see generally Erica B. Grubb & Margarita C. McCoy, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. C.R.-C.L. L. REV. 260 (1972). See also HAYDEN, *supra* note 73, at 42 (documenting mandatory leave laws as of 1973).

142. See Brief for Respondents at 28–41, *LaFleur*, 414 U.S. 632 (No. 72-777).

not ask about the sex-role assumptions shaping a mandatory-leave law that required a pregnant woman to take leave without pay five months before she was to deliver and only allowed her to return to work the following year after the newborn was three months old.<sup>143</sup> The Court avoided the plaintiffs' equal protection claims, but was evidently unsettled by them, ruling that the mandatory maternity-leave policy violated due process by creating an irrebuttable presumption of unfitness to work.<sup>144</sup>

The next year, in the 1974 case *Geduldig v. Aiello*, the Court faced an equal protection challenge to a California law that provided disability benefits for state workers that covered all work-disabling conditions whether incurred on the job or off the job, but excluded disability benefits for normal pregnancy.<sup>145</sup> Plaintiff Sally Armendariz miscarried after she was struck by another car.<sup>146</sup> Ordered by her doctor to stay home for three weeks, Armendariz, the family's breadwinner, sought assistance from California's temporary disability insurance program, a program she had paid into for ten years.<sup>147</sup> The state denied Armendariz's claim, finding her disability related to pregnancy and thus ineligible.<sup>148</sup>

In justifying the exclusion, California invoked the breadwinner/caregiver roles which assume women's market participation ends with motherhood (and that pregnant women are therefore a cost with little benefit to their employers): "Pregnancy and childbirth, unlike illness and injury, often result in a decision to leave the work force."<sup>149</sup> The Court refused to apply heightened scrutiny of the kind the plurality had in *Frontiero*, and deferred to the policy as a rational way of saving public monies.<sup>150</sup>

143. The Supreme Court did not scrutinize the mandatory leave rule to determine whether a law requiring a teacher to take close to a year of unpaid leave reflected or enforced sex-stereotypical reasoning about pregnant women, despite a record suggesting no formal justification for the requirement and much evidence of sex-role stereotyping. *See* 414 U.S. at 644.

The district court found:

The evidence shows that prior to the rule [mandating leave], the teachers suffered many indignities as a result of pregnancy which consisted of children pointing, giggling, laughing and making snide remarks causing interruption and interference with the classroom program of study. . . . The evidence shows that in one instance where a teacher's pregnancy was advanced, children in a Cleveland junior high school class were "taking bets on whether the baby would be born in the classroom or in the hall."

*LaFleur v. Cleveland Bd. of Educ.*, 326 F. Supp. 1208, 1210 (N.D. Ohio 1971). The district court found that the primary purpose of the rule requiring the teacher to take close to a year of unpaid leave was "to protect the continuity of the classroom program." *Id.* at 1211.

144. *See* 414 U.S. at 644-46.

145. 417 U.S. 484, 486 (1974).

146. *See* Dinner, *supra* note 14, at 77.

147. *Id.*

148. *Id.*

149. Reply Brief for Appellant at 13, *Geduldig*, 417 U.S. 484 (No. 73-640).

150. Justice Stewart understood *Geduldig* as a case involving claims on public benefits and emphasized his recent opinion in *Dandridge v. Williams*: "Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. '[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.'"

The Court in turn justified this decision by pointing to facts about the female body. Justice Stewart asserted that when the state regulates reproduction, public authorities form objective judgments about the physiology of the female body, which are presumptively “reasonable” and not likely to raise concerns of the kind at issue in sex-discrimination cases like *Frontiero*: “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 like those considered in *Reed* and *Frontiero*. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics.”<sup>151</sup> Unless plaintiffs could show that the regulation of pregnancy was “mere pretext[]”—animated by “invidious discrimination”—lawmakers were “constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.”<sup>152</sup> “The lack of identity between the excluded disability and gender as such” was clear because the “program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”<sup>153</sup>

The Burger Court was unwilling to extend its cases requiring scrutiny of sex-role assumptions to the regulation of pregnancy in equal protection cases arising under the Constitution; in *General Electric Co. v. Gilbert*, the Court moved to apply its reasoning in *Geduldig* to pregnancy discrimination cases arising under Title VII of the 1964 Civil Rights Act.<sup>154</sup> But Congress soon repudiated the Court’s efforts. Within two years, it enacted the Pregnancy Discrimination Act of 1978 (PDA), which defined discrimination on the basis of pregnancy as discrimination on the basis of sex under the nation’s employment discrimination law.<sup>155</sup> This matrix of legal developments created a framework for a legislative–constitutional settlement of a kind to emerge from the struggles of the 1970s, which, as we will see, would continue to evolve over the decades.

Why did the Justices find the pregnancy exclusions a legitimate way of saving money when they would not have similarly countenanced other sex- or race-based exclusions?<sup>156</sup> In part, the Justices’ unwillingness to extend their cases requiring scrutiny of sex-role assumptions to the regulation of pregnancy in equal protection cases demonstrated the reflex of an all-male bench still unwilling to

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*Geduldig*, 417 U.S. at 495 (alteration in original) (quoting *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970)). Judgments about cost-savings can be the site of sex-stereotyping, as Congress recognized in enacting the PDA. See *infra* note 332 and accompanying text.

151. *Geduldig*, 417 U.S. at 496 n.20 (citations omitted).

152. *Id.*

153. *Id.*

154. 429 U.S. 125 (1976) (involving pregnancy discrimination case arising under 42 U.S.C. §§ 2000e to 2000e-17 (2018)).

155. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018)).

156. See *supra* note 150.

hire women clerks.<sup>157</sup> Justice Blackmun's notes on the *LaFleur* case—written after his decision in *Roe*—show that he repeatedly referred to pregnant teachers as “girl[s]”<sup>158</sup> and concurred in the employer's view of pregnant women as “unattractive.”<sup>159</sup> As Ken Karst described *Geduldig* and *Gilbert* in his *Supreme Court Foreword* in 1977, “These decisions are textbook examples of the effects of underrepresentation on ‘legislative’ insensitivity. Imagine what the presence of even one woman Justice would have meant to the Court's conferences.”<sup>160</sup>

But in the 1970s, the Justices' unwillingness to scrutinize the regulation of pregnancy as they did other forms of sex-based state action was not an unconsidered reflex; it was a considered refusal to embrace feminist arguments.<sup>161</sup> In the

157. Although the first female Supreme Court clerk was hired by Justice Douglas in 1944, the second and third female clerks were not hired until 1966 and 1968, respectively. See TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 20–21 (2006); Jennie Berry Chandra, *Lucile Lomen: The First Female United States Supreme Court Law Clerk*, in IN CHAMBERS: *STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES* 198, 199 (Todd C. Peppers & Artemus Ward eds., 2012). Justice Brennan reportedly told his clerks during the 1968 Term “that he worried about having to watch what he said if a woman clerk worked in his chambers. He did not feel he could have the same sort of relaxed rapport with a female clerk or colleague. If a woman ever got nominated to the Court, Brennan predicted, he might have to resign.” SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 388 (2010). For the 1974 Term, Justice Brennan hired future Ninth Circuit Judge Marsha Berzon as his first female clerk only after one of his former clerks wrote the Justice “an impassioned letter . . . asking him to reconsider” and arguing that his failure to hire Berzon “on account of her sex likely violated the Constitution—in large part due to an interpretation of the Fourteenth Amendment championed by Justice Brennan.” John J. Szmer et al., *Taking a Dip in the Supreme Court Clerk Pool: Gender-Based Discrepancies in Clerk Selection*, 98 MARQ. L. REV. 261, 268–69 (2014); see also Marsha S. Berzon, *Book Review Symposium: The Common Man?*, 89 TEX. L. REV. 1395, 1399–1400 (2011) (recounting Berzon's learning of the backstory of Justice Brennan's decision to hire her as a clerk). From 1973 to 1980, only twenty-four of the Court's 248 clerks were women. See Cynthia L. Cooper, *Women Supreme Court Clerks Striving for “Commonplace,”* 17 PERSP. 18, 19 (2008).

158. See, e.g., Memorandum from Justice Harry A. Blackmun on No. 72-777, *Cleveland Board of Education v. LaFleur*, and No. 72-1129, *Cohen v. Chesterfield County School Board 3* (Oct. 15, 1973) (on file with the Library of Congress, Harry A. Blackmun Papers, Box 175, Folder 72-777) (“Pregnancy entails some additional hazards, but those will be present whether the girl is teaching or is not teaching.”).

159. Justice Blackmun wrote in his notes that “in the later stages of an individual pregnancy a woman may appear rather unattractive. This, in my view, depends a great deal on the particular person concerned. Certainly the same thing happens wholly apart from pregnancy.” *Id.* at 3–4. Justice Blackmun also frequently described the female oral advocates' appearances in his notes; for instance, he described an attorney arguing *Geduldig* with the phrase “long stringy hair, tall 30 open mouth.” Memorandum from Justice Harry A. Blackmun on No. 73-640, *Geduldig v. Aiello* (Mar. 26, 1974) (on file with the Library of Congress, Harry A. Blackmun Papers, Box 188, Folder 73-640).

160. Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 54 n.304 (1977).

161. Justice Blackmun's notes on *Gilbert* show that he voted against applying sex-role scrutiny to the regulation of pregnancy under Title VII over the plea of a female clerk who recounted her experience with pregnancy discrimination. The clerk, Donna Murasky, argued in a bench memo to Justice Blackmun that “Congress might well be aware that much of the discrimination against women has its basis in the childbearing function that they perform,” and then wrote in a footnote, “I thought that I would add a personal note here. In 1972 when I was seeking summer employment, a partner at a major Chicago law firm made numerous inquiries about whether I was planning to have children and whether I was then pregnant. I doubt whether that experience is unique, and I doubt whether my male counterparts

campaign for an equal rights amendment and in cases challenging the exclusion of pregnant women from the workplace, feminist lawyers explained how laws regulating pregnancy could enforce sex-role stereotypes, applying the stereotyping concept to pregnancy even before sociologists did.<sup>162</sup>

In the early 1970s, Thomas Emerson, Ruth Bader Ginsburg, and Wendy Williams authored a number of now largely forgotten briefs and articles calling for strict scrutiny of pregnancy regulations under the ERA, equal protection, and Title VII.<sup>163</sup> They urged the Court to adopt a single, integrated approach in its

were asked similar question [sic] relating to their intentions to stay the entire summer.” Bench Memorandum from Donna Murasky to Justice Harry Blackmun on No. 74-1589, *General Electric Co. v. Gilbert*, and No. 74-1590, *Gilbert v. General Electric Co.* 15 & n.\* (Aug. 14, 1976) (on file with the Library of Congress, Harry A. Blackmun Papers, Box 238, Folder 74-1590). Justice Blackmun appears not to have been swayed by Murasky’s arguments. At the end of the memo, in which Murasky argued that the Court should rule for Gilbert, Justice Blackmun wrote “Donna overstates.” *Id.* at 26; see also MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 175–85 (2016) (discussing the pregnancy cases of the Burger Court).

162. It appears that sociologists began applying the sex-stereotyping concept to pregnancy in the late 1970s. See Annie B. Fox & Diane M. Quinn, *Pregnant Women at Work: The Role of Stigma in Predicting Women’s Intended Exit from the Workforce*, 39 *PSYCHOL. WOMEN Q.* 226, 227 (2015) (citing Shelley Taylor and Ellen Langer’s 1977 study as “one of the earliest studies of pregnancy stigma”). For Taylor and Langer’s 1977 study, see Shelley E. Taylor & Ellen J. Langer, *Pregnancy: A Social Stigma?*, 3 *SEX ROLES* 27 (1977).

163. By 1972, Ruth Ginsburg was already asking the Court to apply strict scrutiny to policies that discriminated on the ground of pregnancy to determine whether sex stereotyping was involved. For Ginsburg’s equal protection arguments in *Struck*, see *supra* Section I.B. See also Brief for the Petitioner, *supra* note 81, at 50–51 (“Petitioner was presumed unfit for service under a regulation that declares, without regard to fact, that she fits ‘into the stereotyped vision . . . of the ‘correct’ female response to pregnancy.” (quoting Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 505, 506 n.1 (S.D. Ohio 1972))). Ginsburg also argued for strict scrutiny of laws regulating pregnancy under the ERA. See *infra* text accompanying notes 173–76; see generally Ruth Bader Ginsburg, *Gender and the Constitution*, 44 *U. CIN. L. REV.* 1 (1975) (discussing equal protection and ERA standards).

Ginsburg was not alone in claiming that sex stereotyping of pregnancy violated the Equal Protection Clause. Philip J. Hirschkop, the same attorney who represented Mildred and Richard Loving in *Loving v. Virginia*, 388 U.S. 1 (1967), made arguments similar to Ginsburg’s in challenging the mandatory maternity leave in *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974). See Brief for Petitioner at 5–6, *Cohen v. Chesterfield Cty. Sch. Bd.*, 411 U.S. 947 (1973) (No. 72-1129), 1973 WL 172268 (arguing that the Court should grant sex suspect status to a mandatory maternity leave policy and “[s]ex discrimination has been held to exist when all or a defined class of women are subjected to disadvantaged treatment based on stereotypical assumptions about their sex which operate to foreclose opportunity based on individual merit” (emphasis omitted)). (The ACLU filed an amicus brief in the case in which Ginsburg argued that “the challenged [pregnancy] regulations establish a suspect classification” and should be “subjected to close judicial scrutiny” under *Frontiero v. Richardson*. See Brief of American Civil Liberties Union et al., *Amici Curiae*, at 26–27, *Cohen*, 411 U.S. 947 (No. 72-1129), and *La Fleur*, 414 U.S. 632 (No. 72-777), 1973 U.S. S. Ct. Briefs LEXIS 11, at \*41, 45–47 (citing *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (Brennan, J., plurality opinion)).)

Likewise, Wendy Williams, the lawyer for Carolyn Aiello and other women who brought an equal protection challenge to California’s disability insurance program for its exclusion of pregnancy-related disabilities in *Geduldig v. Aiello*, argued that “discrimination on the basis of pregnancy often results from gross stereotypes and generalizations which prove irrational under scrutiny.” Brief for Appellees at 24, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 185752. The proper standard of review for such sex stereotyping, according to Williams, was strict scrutiny. *Id.* at 25. Williams further anticipated counterarguments based on the ERA’s unique physical characteristic exception and explained how the legislative history of the ERA supported her view. *Id.* at 42–46.

sex-discrimination cases, and ensure that the regulation of pregnancy was subject to the same prohibition on enforcing traditional family roles that the Court was applying to other forms of sex-discriminatory action.

Employers who wanted the Court to reaffirm their prerogative to exclude pregnant women from the workplace were canny in appealing to the Justices President Nixon appointed.<sup>164</sup> They did not use the language of separate spheres that the New York Board of Education had invoked in Henrietta Rodman's case in 1911.<sup>165</sup> They understood that the Justices who decided *Frontiero* accepted changes in women's roles, but were concerned about moving "too fast" and constitutionalizing the ERA and the entitlements of the welfare state.<sup>166</sup>

And so defenders of the status quo urged the Burger Court to employ modern language to preserve traditional sex roles and to develop a special equal protection standard for the regulation of pregnancy that was expressed in the language of the ERA's "unique physical characteristic exception" (UPC) rather than in old modes of sex-role talk. The unique physical characteristics exception was a corollary principle to the ERA explaining when and why the regulation of pregnancy was a permissible form of state action and when it was an impermissible violation of the ERA's prohibition on sex-based state action.<sup>167</sup> General Electric first called for the Court to incorporate a (very diluted) reading of the UPC into equal protection law in an amicus brief in *Geduldig*.<sup>168</sup> A month later, the U.S. Chamber of

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For an account of how mandatory maternity leave would be analyzed under the ERA, see Brown, Emerson, Falk & Freedman, *supra* note 91, at 930 ("It is true that the state may regulate conditions of employment for women in a physical condition unique to their sex, but the kind of regulation imposed would be subject to careful judicial review, utilizing [strict scrutiny].").

164. For the stance of the business community litigating these cases, see Deborah Dinner, *Strange Bedfellows at Work: Neomaterialism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 475-80 (2014):

Employers, insurance executives, and business trade associations mobilized family-wage and separate-sphere ideologies to justify the exclusion from coverage within disability, sick leave, and health insurance. They argued that women were only marginal labor-market participants who would leave the workforce when they entered their childbearing years. The discriminatory treatment of pregnancy and childbirth under public and private insurance schemes rested not only on cost rationales but also on ideologies about both the family and wage work.

*Id.* at 475; see also Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 425 (2011) (discussing defendant companies' attempts to persuade the Court "that the pregnancy exclusion derived from a legitimate economic calculus rather than from sex-based animus").

165. See *supra* text accompanying note 53.

166. President Nixon's three appointees to the Court were Justices Blackmun, Powell, and Rehnquist. Justices Blackmun and Powell concurred in *Frontiero*, declining to join Justice Brennan's plurality opinion extending strict scrutiny to sex classifications. Justice Rehnquist dissented. In *Geduldig*, Justice Stewart emphasized his recent decision in *Dandridge v. Williams*, see *supra* note 150 and accompanying text, and was joined by Justices Blackmun, Powell, and Rehnquist.

167. See Brown, Emerson, Falk & Freedman, *supra* note 91, at 893-96.

168. General Electric submitted a brief in *Geduldig* asserting that the legislative history of the ERA "supports the argument that the pregnancy exclusion in the California statute before the Court reflects a reasonable, non-arbitrary, classification." Brief for General Electric Company as Amicus Curiae at 10, *Geduldig v. Aiello*, 417 U.S. 484 (No. 73-640).

Commerce followed General Electric's lead in weaponizing the ERA in its own amicus brief in the case.<sup>169</sup> Through these briefs, the business community showed the Court that it could carve out a special rule for the regulation of pregnancy in its new sex-discrimination cases, and do so not in the older and now-discredited language of separate spheres, but in new language of sex equality, in physiological discourse associated with exceptions under the ERA.<sup>170</sup>

General Electric filed an amicus in *Geduldig*, the case concerning California's disability benefits program, because its own case was headed toward the Court presenting the question of pregnancy discrimination under federal employment discrimination law. (General Electric offered its employees a disability plan for nonoccupational sickness and accidents that did not cover disabilities relating to pregnancy.<sup>171</sup>) When the Court soon thereafter took *General Electric Co. v. Gilbert*, Ginsburg and Emerson filed an amicus in the case designed to correct the misimpression about ERA jurisprudence that General Electric's brief in *Geduldig* had created, and to dissuade the Court from applying its decision in *Geduldig* to Title VII.<sup>172</sup>

The Ginsburg–Emerson brief explained how the ERA applied to laws regulating pregnancy and reiterated the view that Emerson's article on the ERA had set forth in 1971: the ERA's unique physical characteristic principle required strict scrutiny of pregnancy regulations to ensure that they did not enforce sex stereotypes.<sup>173</sup> Under the ERA, Ginsburg and Emerson argued, courts must apply strict scrutiny to pregnancy classifications because they purport to deal with

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The legal principle underlying the Equal Rights amendment as proposed by Mrs. Griffiths [Rep. Martha Griffiths of Michigan] is that the law must deal with the individual attributes of the particular person and not with stereotypes or over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness". As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex.

*Id.* at 33 (alteration in original) (emphasis omitted) (quoting H.R. REP. NO. 92-359, at 7 (1971)). *See also id.* at 31–38 (containing a seven-page discussion of the unique physical characteristic principle in the ERA's legislative history and concluding that "the legislative history underlying the ERA teaches that . . . where, as with the pregnancy exclusion in the California statute, there exists a basis for differentiation predicated on the unique characteristics of the female sex, a classification based on such differentiation is neither unreasonable nor unlawful").

169. *See* Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of the Appellant at 31–32, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 186477 (Mar. 12, 1974) (citing the same testimony of Rep. Martha Griffiths of Michigan as General Electric did and concluding that "if a physical characteristic such as the capability to bear children is unique to one sex, the proposed Equal Rights Amendment does not prohibit legislation which regulates or applies to that unique characteristic, since the regulation could not deny equal rights to the sex not possessing this characteristic").

170. Presumably, the ERA's unique physical characteristic exception is the source of *Geduldig*'s observation that "[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics." 417 U.S. at 496 n.20; *see supra* text accompanying note 151.

171. *See* *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 127 (1976).

172. *See* Brief Amici Curiae of Women's Law Project and American Civil Liberties Union, *Gilbert*, 429 U.S. 125 (Nos. 74-1589 & 74-1590) (on file with American Civil Liberties Union Archives).

173. *Id.* at 5, 14. For Emerson's article, see source cited *supra* note 91 and accompanying text.

physical characteristics unique to one sex.<sup>174</sup> They set forth the unique physical characteristics inquiry as a two-step test: “(1) Is the unique feature of the characteristic relevant to the purpose of the classification? (2) Is there a compelling state interest in legislating on this particular subject in this manner?”<sup>175</sup> The classifications at issue in the case failed this test, they wrote, because the purpose of a pregnancy classification was not “related to the unique properties of that characteristic.”<sup>176</sup>

In *General Electric Co. v. Gilbert*, Ginsburg and Emerson were able to persuade Justice Brennan to adopt the stereotyping inquiry in dissent,<sup>177</sup> but the majority decided to apply its reasoning in *Geduldig* to Title VII.<sup>178</sup>

The Court’s decision in *Gilbert* ignited a firestorm, and within twenty-two months over 200 organizations mobilized in a Campaign to End Discrimination Against Pregnant Workers and persuaded Congress to override the Court’s decision<sup>179</sup> and enact the Pregnancy Discrimination Act of 1978.<sup>180</sup> This legislation made clear that under Title VII of the 1964 Civil Rights Act, distinctions on the basis of pregnancy are distinctions on the basis of sex. Moved to action by a broad-based feminist mobilization, Congress enacted the PDA on the understanding that pregnant women *are* subject to sex-role stereotyping.<sup>181</sup>

174. See Brief Amici Curiae of Women’s Law Project and American Civil Liberties Union *supra* note 172, at 14.

175. *Id.* at 16.

176. *Id.* at 17; see also Ginsburg, *supra* note 163, at 37–38 (explaining how and why the strict scrutiny framework would apply under the unique physical characteristics exception of the ERA). As a practical matter, all feminist theorists of the UPC understood that an exception required oversight or the exception would swallow the rule; and with an exception involving pregnancy this was especially the case.

177. Justice Brennan grasped the stereotyping argument, which he sets out in his *Gilbert* dissent:

General Electric’s disability program was developed in an earlier era when women openly were presumed to play only a minor and temporary role in the labor force. . . . More recent company policies reflect common stereotypes concerning the potentialities of pregnant women [such as] *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644 (1974), and have coupled forced maternity leave with the nonpayment of disability payments.

*Gilbert*, 429 U.S. at 149 n.1 (1976) (Brennan, J., dissenting) (citations omitted).

178. See *id.* at 136–38.

179. See Kevin Schwartz, *Equalizing Pregnancy: The Birth of a Super-Statute*, YALE L. SCH.: YALE L. SCH. STUDENT PRIZE PAPER SERIES, May 7, 2005, at 58.

180. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018)).

181. As Senator Jacob Javits, Senate cosponsor of the PDA, explained:

Mr. President, we can no longer in this country legislate with regard to women workers on the basis of outdated stereotypes and myths. The facts are that women, like men, often need employment to support families, that women, like men, find their work and their careers important sources of self-esteem and personal growth, and that women, like men, have the skills and motivation to make important contributions to this country’s life, if only we will clear away the arbitrary restraints that sometimes stand in the way. I believe that this body’s commitment to equality of treatment by sex is firm, and thus we should now reaffirm the policy of equality on the job, especially when the female employee is uniquely female, when she is pregnant.



Initially, at least, the interbranch conflict created a split regime: the PDA governed only cases arising under the civil rights statute and so isolated Title VII from the equal protection framework the Burger Court fashioned to govern sex-discrimination cases. Each of these bodies of law grew as distinct bodies of law, but as we will see, in time they converged.

By the end of the 1970s, the Court developed a new body of equal protection law that prohibited sex-based state action reflecting and enforcing traditional sex-role assumptions about women as mothers;<sup>182</sup> yet the Court invoked women's physical differences from men as a reason to refuse to apply similar sex-role scrutiny to laws regulating women when they are pregnant. Once again, conflict modernized the rules and reasons of gender-status law.<sup>183</sup> By subjecting laws concerning pregnancy to weak equal protection scrutiny, the Court could commit to scrutinizing sex-based state action yet allow government to regulate women's conduct in matters concerning pregnancy without effective oversight.

#### C. PHYSIOLOGICAL NATURALISM IN EQUAL PROTECTION CASES, AND THE RISE OF SOCIAL SCIENCE ON THE SEX STEREOTYPING OF PREGNANT WOMEN

The views the Justices expressed about pregnancy in the 1970s equal protection cases persisted long after the 1970s, on occasion finding expression in the case law. After examining these scattered passages in the case law, I trace a less noticed dynamic in the cases, showing how the Justices' views about sex stereotyping of pregnant women have evolved over the decades—likely as they have participated in enforcing the PDA itself.

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123 CONG. REC. 29,387 (1977) (statement of Sen. Javits), *reprinted in* STAFF OF SEN. COMM. ON LABOR & HUMAN RES., 95TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 67 (Comm. Print 1980) [hereinafter LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978]. As the House Report observed, “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.” H.R. REP. NO. 95-948, at 3 (1978) (testimony of Rep. Carl Dewey Perkins, Comm. on Educ. & Labor), *reprinted in* STAFF OF SEN. COMM. ON LABOR & HUMAN RES., 95TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 149 (Comm. Print 1980).

182. See *supra* text accompanying notes 136–39 (quoting *Frontiero* and *Stanton*). In *Califano v. Westcott*, the Court struck down a policy granting government aid to the children of unemployed fathers but not unemployed mothers, explaining that the presumption that “the father has the ‘primary responsibility to provide a home and its essentials,’ while the mother is the ‘center of home and family life,’” 443 U.S. 76, 89 (1979) (citations omitted) (quoting *Stanton v. Stanton*, 421 U.S. 7, 10 (1978) and *Taylor v. Louisiana*, 419 U.S. 522, 534 n.15 (1975) (internal quotation marks omitted)), is “part of the ‘baggage of sexual stereotypes,’” *id.* (quoting *Orr v. Orr*, 440 U.S. 268, 283 (1979) (internal quotation marks omitted)), and not a legitimate ground for government-imposed sex classifications. “Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.” *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982); see also *Orr v. Orr*, 440 U.S. 268, 283 (1979) (“Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the ‘proper place’ of women and their need for special protection.”).

183. On preservation-through-transformation, see *supra* note 42 and accompanying text.

Physiological naturalism in equal protection cases is not limited to cases concerning pregnancy; on occasion, Justices will reason this way in upholding sex-based laws that regulate extramarital sex. In the 1981 case *Michael M. v. Superior Court*, which upheld a sex-based statutory rape law that punished young men but not women for sex in which both might have consented, Justice Rehnquist reasoned that the state could punish only men in order to equal the deterrent that the threat of pregnancy presented for women: “We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity.”<sup>184</sup> On this account, the burdens the sex-based statutory rape law imposed on men reflect facts about the female body and not constitutionally suspect beliefs about social roles.<sup>185</sup>

Twenty years later in *Nguyen v. INS*, Justice Kennedy emphasized reproductive differences in rejecting an equal protection challenge to a law that conferred citizenship on the children of U.S. citizens when the child was born abroad and out of wedlock, even though the statute’s criteria for citizenship depended on whether the citizen parent was a woman or a man.<sup>186</sup> Justice Kennedy’s opinion for the Court upheld the sex-based law on the ground that Congress could regulate the transmission of citizenship in a way that took account of the different roles women and men play in reproduction.<sup>187</sup> Justice Kennedy objected that “[m]echanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real”; asserted that “the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class”; and emphasized, “[t]he difference between men and women in relation to the birth process is a real one, and the

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184. 450 U.S. 464, 471 (1981) (plurality opinion); *see id.* at 473 (“[T]he risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly ‘equalize’ the deterrents on the sexes.”).

185. Justice Stewart explained, “while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot.” *Id.* at 478 (Stewart, J., concurring). Justice Stewart immediately distinguished sex classifications that concern reproductive differences from other sex classifications which he saw as reflecting constitutionally-suspect generalizations or status judgments, observing that “a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.” *Id.* (quoting *Parham v. Hughes*, 441 U.S. 347, 354 (1979) (internal quotation marks omitted)).

186. 533 U.S. 53, 73 (2001). Where the dissenters viewed the sex-differentiated treatment of parents as reflecting sex-role stereotypes, *see id.* at 89–94 (O’Connor, J., dissenting), the majority understood the law as vindicating Congress’s interest in ensuring that parents transmit citizenship to children born out of wedlock only when a tie develops between them, a relationship opportunity that birth affords the mother but not the father. *See id.* at 66 (majority opinion).

187. *See id.* at 73.

principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.”<sup>188</sup>

Passages like these in *Michael M.* and *Nguyen* are rare, but seem to articulate a belief that is playing some significant but not adequately explained role in shaping equal protection law—the belief that laws based on reproductive differences between the sexes do not rest on constitutionally suspect stereotypes in the way that laws based on generalizations about social differences between the sexes do.<sup>189</sup> As we have seen, reasoning of this kind appears in *Geduldig v. Aiello*.<sup>190</sup> In these scattered passages in the case law, Justices suggest that because reproductive differences are objective, real, and categorically distinguish the sexes, judgments about pregnancy are free of stereotypes and constitutionally suspect assumptions about social roles.

Of course, the model of physiological naturalism, which imagines that legislative judgments about real sex differences that categorically distinguish men and women are based on facts *and* free of sex-role assumptions, is demonstrably wrong. Judgments about pregnant women are shaped by social roles.

Volumes of social science report that “people, especially men, tend to hold negative stereotypes about pregnant women.”<sup>191</sup> “When women become mothers, their labor market prospects tend to suffer”<sup>192</sup>—a dynamic social psychologists term a “motherhood penalty”<sup>193</sup> or family responsibilities discrimination.<sup>194</sup> The

188. *Id.*

189. *Cf.* Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1450 (2000) (“[V]irtually every sex-respecting rule struck down by the Court in the last quarter century embodied a proxy that was overwhelmingly, though not perfectly, accurate. Moreover, overbreadth alone seems to be enough to doom a sex-respecting rule. This is so even though many of the generalizations embodied in sex-respecting rules struck down by the Court are not only overbroad but also ‘archaic.’ That is to say, that as well as being descriptively less than perfectly accurate, these generalizations also embody outdated normative stereotypes (i.e., ‘fixed notions concerning the roles and abilities of males and females’ or ‘the accidental byproduct of a traditional way of thinking about females’).” (footnotes omitted)).

190. 417 U.S. 484 (1974). There, the Court reasoned that, “[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics.” *Id.* at 496 n.20 (citations omitted). Unless plaintiffs could show that that the regulation of pregnancy was “mere pretext[]”—animated by “invidious discrimination”—lawmakers were “constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.” *Id.*

191. Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1369 (2008).

192. *Id.* at 1359.

193. *See id.* For studies examining discrimination against pregnant women, see *id.* at 1369–72.

194. *Id.* at 1362; *see, e.g.*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, No. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 10 (2007) (“Employment decisions that discriminate against workers with caregiving responsibilities are prohibited by Title VII if they are based on sex or another protected characteristic, regardless of whether the employer discriminates more broadly against all members of the protected class. For example, sex discrimination against working mothers is prohibited by Title VII even if the employer does not discriminate against childless women.”); Joan C. Williams & Stephanie Bornstein, *The Evolution of*

social science research shows that pregnant women are viewed as less competent and committed, and are less likely to be hired.<sup>195</sup> In one foundational 1993 study, survey participants viewed pregnant women as “overly emotional, often irrational, physically limited, and less than committed to their jobs. They were not seen as valued or dependable employees.”<sup>196</sup> In performing a task, they are viewed as doing worse than nonpregnant women performing the same task.<sup>197</sup> Studies from psychology and sociology reveal pervasive stereotypes about a pregnant worker’s competence,<sup>198</sup> commitment,<sup>199</sup> absenteeism,<sup>200</sup> and likely attrition.<sup>201</sup> These judgments reflect sex-role expectations, as demonstrated by a recent series of field studies in which managers differently rated applicants when the applicants wore a pregnancy prosthesis.<sup>202</sup>

At this point, decades of social science studies—as well as decisions under the *PDA itself*<sup>203</sup>—demonstrate that pregnant women are regularly subject to sex-role stereotyping. And these decisions have created a fascinating feedback loop. Federal judges deciding cases under Title VII are regularly asked to decide cases with fact patterns involving sex stereotyping and pregnancy discrimination, and

“FRd”: *Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1313 (2008) (“FRD is discrimination against employees based on their responsibilities to care for family members. It includes pregnancy discrimination, discrimination against mothers and fathers, and discrimination against workers with other family caregiving responsibilities.” (footnote omitted)); Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don’t Get Caught Off Guard*, 22 LAB. LAW. 293, 293–94 (2007) (“FRD often, but not always, occurs when an employee suffers discrimination at work based on unexamined biases about how employees with family caregiving responsibilities will or should act.” (emphasis omitted)).

195. See, e.g., Jennifer Cunningham & Therese Macan, *Effects of Applicant Pregnancy on Hiring Decisions and Interview Ratings*, 57 SEX ROLES 497, 504 (2007); Halpert, Wilson & Hickman, *supra* note 121, at 650.

196. Halpert, Wilson & Hickman, *supra* note 121, at 655.

197. See *id.*; see also Jane A. Halpert & Julia Hickman Burg, *Mixed Messages: Co-Worker Responses to the Pregnant Employee*, 12 J. BUS. & PSYCHOL. 241, 247 (1997) (“Many women felt that their skills, abilities, and work were not viewed as positively by others in the organization when they became pregnant.”).

198. See, e.g., Sara J. Corse, *Pregnant Managers and Their Subordinates: The Effects of Gender Expectations on Hierarchical Relationships*, 26 J. APPLIED BEHAV. SCI. 25 (1990); Halpert, Wilson & Hickman, *supra* note 121; Barbara Masser et al., ‘We Like You, But We Don’t Want You’—*The Impact of Pregnancy in the Workplace*, 57 SEX ROLES 703 (2007).

199. See, e.g., Fox & Quinn, *supra* note 162, at 238; Halpert, Wilson & Hickman, *supra* note 121, at 655.

200. See, e.g., Cunningham & Macan, *supra* note 195, at 504.

201. See, e.g., *id.*

202. See, e.g., Michelle R. Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards That Maintain Traditional Roles*, 92 J. APPLIED PSYCHOL. 1499, 1499 (2007). The field studies are particularly persuasive because three sets of observers—the actresses (with and without the pregnancy prosthesis), paired in-store observers, and blinded coders listening to tape recordings—all independently rated managers as more hostile toward the “pregnant” applicant. See *id.* at 1504; Whitney Botsford Morgan et al., *A Field Experiment: Reducing Interpersonal Discrimination Toward Pregnant Job Applicants*, 98 J. APPLIED PSYCHOL. 799, 804–07 (2013). For similar studies, see Benard et al., *supra* note 191, at 1369–72.

203. For an account of the statute’s enforcement history authored by two experts in the field, see generally Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL’Y 67 (2013).

so have become increasingly familiar with the dynamics of pregnancy discrimination as they have been called upon to enforce the civil rights statute over the decades. As I will now show, over the decades since enactment of the PDA, these understandings about the dynamics of pregnancy discrimination have gradually reshaped constitutional case law.

Claims of physiological naturalism have declined in equal protection law. By 2003, even Chief Justice Rehnquist came to recognize that sex-role stereotyping shapes judgments about pregnancy, declaring that Congress had power under the Fourteenth Amendment to redress equal protection violations in cases where states provide lengthy maternity leave to women employees but not men, reasoning that “differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”<sup>204</sup> In 2015, Justice Kennedy offered a lengthy account of the stereotyping endured by pregnant employees in his dissent from *Young v. United Parcel Service*, the Court’s most recent decision enforcing the PDA;<sup>205</sup> and then in 2016, Justice Kennedy joined a majority opinion that distinguished his opinion in *Nguyen* and struck down a related sex-based citizenship law in *Sessions v. Morales-Santana*.<sup>206</sup> One of the striking things about Justice Kennedy’s dissent in the Court’s *Young* decision is the way it weaves reasoning from statutory and constitutional precedents concerning pregnancy discrimination.<sup>207</sup>

As an outgrowth of these dynamics, views about pregnancy in the Court’s equal protection decisions have evolved and the Court itself has begun to integrate laws regulating pregnancy into the heightened scrutiny framework for equal protection sex-discrimination cases.

204. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003).

205. 575 U.S. 206, 251 (2015) (Kennedy, J., dissenting). In the Court’s most recent case interpreting the PDA, Justice Kennedy offered a clear account of the sex-role stereotyping that pregnant workers face, even as he dissented from the Court’s holding:

There must be little doubt that women who are in the work force—by choice, by financial necessity, or both—confront a serious disadvantage after becoming pregnant. . . .

“Historically, denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second.” *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736, 123 S.1972, 155 L. Ed.2d 953 (2003) (quoting The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 100 (1986)). Such “attitudes about pregnancy and childbirth . . . have sustained pervasive, often law-sanctioned, restrictions on a woman’s place among paid workers.” *AT & T Corp. v. Hulteen*, 556 U.S. 701, 724, 129 S.Ct. 1962, 173 L.Ed.2d 898 (2009) (Ginsburg, J., dissenting). Although much progress has been made in recent decades and many employers have voluntarily adopted policies designed to recruit, accommodate, and retain employees who are pregnant or have young children, pregnant employees continue to be disadvantaged—and often discriminated against—in the workplace.

*Id.* at 251–52.

206. 137 S. Ct. 1678, 1686 (2017).

207. *See supra* note 205.

D. THE REHNQUIST COURT INTEGRATES PREGNANCY INTO THE EQUAL PROTECTION SEX-DISCRIMINATION FRAMEWORK

The Supreme Court's evolving approach to pregnancy in its equal protection cases is a completely ordinary part of the development of sex-discrimination law. In the early 1970s, when the Burger Court declared that the Constitution prohibited state action that imposes sex roles or sex stereotypes, the Court, in the first several years of enforcing sex-discrimination law, prohibited all the practices that it understood as contributing to unjust sex-based restrictions on individual opportunity.<sup>208</sup>

But the meaning and application of the equality principle evolves in history, as Americans engage in—often contentious—debate over the principle.<sup>209</sup> The nation's understanding of sex stereotyping—of what is reasonable and arbitrary in state enforcement of sex roles—has shifted dramatically in the intervening decades.<sup>210</sup>

In the more than half a century since the National Organization of Women organized to seek enforcement of the sex-discrimination provisions of the 1964 Civil Rights Act<sup>211</sup> and the forty years since the PDA's passage, Americans—including judges called upon to enforce the statutes—have shifted in their views of pregnant employees and working mothers, and these evolving views *are expressed in the Supreme Court's equal protection decisions*. As I show, the Supreme Court itself has restated the intermediate scrutiny standard in terms that explicitly include pregnancy and it has reasoned about sex stereotyping in terms that include pregnancy. Lower courts have noticed and acted on these developments.

1. *Virginia*: Restating Intermediate Scrutiny to Include Pregnancy

After nearly twenty years of cases under the Pregnancy Discrimination Act, the Court expressed the heightened scrutiny standard for its equal protection sex-discrimination cases in *United States v. Virginia* in terms that recognized physical differences between the sexes and extended scrutiny to regulation implicating differences, rather than suggest that real differences might stand outside equality's reach.<sup>212</sup>

208. See *supra* note 182 and accompanying text.

209. See generally Reva B. Siegel, *Brennan Center Symposium Lecture: Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006) [hereinafter Siegel, *Constitutional Culture*] (showing how movement conflict guided courts in interpreting the Fourteenth Amendment in sex discrimination cases); Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728 (2017) [hereinafter Siegel, *Community in Conflict*] (examining how arguments evolved during the decades of debate over same-sex marriage).

210. See, e.g., KIMBERLY A. YURACKO, *GENDER NONCONFORMITY AND THE LAW* (2016); Franklin, *The Anti-Stereotyping Principle*, *supra* note 14; Franklin, *Biological Warfare*, *supra* note 14; Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757 (2013).

211. See CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945–1968*, at 192–96 (1988); SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 29–30 (2011).

212. 518 U.S. 515, 533 (1996).

The Court's opinion in *Virginia*, written by Justice Ruth Bader Ginsburg a few years after she joined the Court and speaking for a majority that included Justices Stevens, O'Connor, Kennedy, Souter, and Breyer, remains to this day the leading case on the heightened scrutiny standard in sex-discrimination cases.<sup>213</sup> In *Virginia*, Justice Ginsburg reaffirmed and restated the standard;<sup>214</sup> and then in the next paragraph explained the standard in terms that included and covered pregnancy. Justice Ginsburg observed that "[s]upposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications," but "[p]hysical differences between men and women . . . are enduring."<sup>215</sup>

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," *Califano v. Webster*, 430 U.S. 313, 320 (1977) (*per curiam*), to "promot[e] equal employment opportunity," see *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289 (1987), to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, see *Goesaert*, 335 U.S., at 467, to create or perpetuate the legal, social, and economic inferiority of women.<sup>216</sup>

*Virginia*'s canonical restatement of the heightened scrutiny standard discussed *the regulation of pregnancy as an example of a sex-based classification* by citing *California Federal Savings and Loan Ass'n v. Guerra*,<sup>217</sup> a decision arising under the PDA and involving a state law mandating the reasonable accommodation of pregnant employees. Like *Geduldig*, *Virginia* assumed equal protection coverage extends to pregnancy, but it approached the question of protection differently. Rather than depict regulation concerning sex differences as presumptively beyond the reach of equal protection, *Virginia* expressed heightened scrutiny in terms that recognize sex differences and provide substantive criteria for determining the kinds of sex classifications that violate the Constitution. *Virginia* set out a normative framework concerned with determining, in historical context, whether a law subordinates.<sup>218</sup> In *Virginia*, the Court explained that sex classification's

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213. The case arose after the United States sued the Commonwealth of Virginia and the Virginia Military Institute, alleging that the school's all-male admissions policy violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 523.

214. *Id.* at 533 (observing that "[t]he State must show 'at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'"); see also *id.* (observing that "the reviewing court must determine whether the proffered justification is 'exceedingly persuasive'").

215. *Id.* (citation omitted).

216. *Id.* at 533–34 (alteration in original).

217. 479 U.S. 272.

218. See Franklin, *The Anti-Stereotyping Principle*, *supra* note 14, at 145–46 ("In *Virginia*, anti-stereotyping doctrine serves as a check on the state's regulation of 'real' differences. *Virginia* makes clear that anti-stereotyping doctrine governs all instances of sex-based state action, whether or not 'real' differences are involved. In fact, the Court's opinion suggests that equal protection law should be

constitutionality depends on whether the classification is employed for a legitimate end (such as remedying past wrongs or promoting equal opportunity) or inflicts constitutional wrongs of the kind that sex classifications inflict when they are used “as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”<sup>219</sup>

*Virginia* treats a California law regulating pregnancy as an example of a sex classification subject to heightened scrutiny and offers a historically informed antisubordination standard to determine whether laws regulating pregnancy violate equal protection. This historically informed standard invites the decision-maker to attend to the understanding of social roles on which the legislation is premised,<sup>220</sup> and can be applied to laws regulating pregnancy like the law at issue in *Cal Fed*.

In *Cal Fed*, Justice Marshall upheld California’s statute mandating the reasonable accommodation of pregnant employees under the Pregnancy Discrimination Act, employing a standard much like *Virginia*’s; he declared that the law was consistent with Title VII and served like ends after ascertaining that the law mandating accommodation was narrowly drawn to cover pregnancy and the period of actual physical disability only, and did not reflect stereotypical notions about pregnant workers associated with protective labor legislation of the early twentieth century.<sup>221</sup> Justice Marshall’s analysis in *Cal Fed* exemplifies the kind of historically informed antisubordination inquiry that *Virginia* itself mandates to determine whether state action regulating pregnancy violates equal protection.

## 2. *Hibbs*: Recognizing Sex Stereotyping Involving Pregnancy Under Equal Protection

Justice Ginsburg was able to speak for a majority of the Rehnquist Court in *Virginia* because the Justices’ views had evolved in the intervening twenty years. We can see an even more pronounced expression of these changes in *Nevada Department of Human Resources v. Hibbs*, when Chief Justice Rehnquist held that Congress could enact the family leave provisions of the Family and Medical Leave Act to remedy and deter sex-stereotyping violations of equal protection involving women when they are “mothers or *mothers-to-be*” and never paused to mention *Geduldig*.<sup>222</sup> Writing for six members of the Court, Chief Justice

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particularly alert to the possibility of sex stereotyping in contexts where ‘real’ differences *are* involved, because these are the contexts in which sex classifications have most often been used to perpetuate sex-based inequality.”).

219. *Virginia*, 518 U.S. at 534 (citation omitted).

220. Cf. Siegel, *supra* note 4 (advancing a social-roles analysis of pregnancy discrimination).

221. See *Guerra*, 479 U.S. at 290 (observing that the statute was “narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions. Accordingly, unlike the protective labor legislation prevalent earlier in this century, § 12945(b)(2) does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers. A statute based on such stereotypical assumptions would, of course, be inconsistent with Title VII’s goal of equal employment opportunity” (footnote omitted)).

222. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (emphasis added) (quoting *Joint Hearing on the Parental and Medical Leave Act of 1986*, *supra* note 3, at 100). Chief Justice Rehnquist’s silence about *Geduldig* is all the more striking given his 1976 opinion in *Gilbert* extending



Rehnquist analyzed the question in ways that showed a maturing grasp of sex stereotyping in matters of reproductive regulation.

There is a world of difference between *Geduldig* and *Hibbs*. *Hibbs* reasoned from a sophisticated understanding of how the motherhood penalty and family-responsibilities discrimination shapes judgments about pregnancy.<sup>223</sup> Chief Justice Rehnquist compared the treatment of expectant parents and observed that *sex-role stereotyping, rather than physical difference, explained the provision of maternity leave*:

Many States offered women extended “maternity” leave that far exceeded the typical 4- to 8-week period of physical disability due to pregnancy and child-birth, but very few States granted men a parallel benefit. . . . This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.<sup>224</sup>

Chief Justice Rehnquist went on to explain how “the pervasive sex-role stereotype that caring for family members is women’s work” produces the interlocking stereotypes, identified by sociologists as well as theorists of the motherhood penalty and family responsibilities discrimination: that pregnant women and new mothers lack competence and commitment *as employees*.<sup>225</sup> Rehnquist observed:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.<sup>226</sup>

In *Hibbs*, nearly thirty years after *Geduldig*, Chief Justice Rehnquist explained that Congress could use its Section Five power to enact the leave provisions of the Family and Medical Act to redress equal protection violations harming both sexes that involved maternity leave and the sex stereotyping of pregnant

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*Geduldig* to Title VII. See Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 133–36 (1976). For Chief Rehnquist’s evolution, see Siegel, *supra* note 15.

223. See *supra* notes 191–202 and accompanying text.

224. *Hibbs*, 538 U.S. at 731 (footnotes omitted).

225. See *supra* notes 191–202 and accompanying text.

226. *Hibbs*, 538 U.S. at 736. To see how far Rehnquist’s views evolved since the era of *Geduldig*, see Siegel, *supra* note 15, at 1875 (reporting Rehnquist’s views on the ERA in 1970, including the worry that it would “transform ‘holy wedlock’ into ‘holy deadlock’”).

women.<sup>227</sup> Use of Section Five power was appropriate, Chief Justice Rehnquist emphasized, to remedy or deter violations involving “subtle discrimination that may be difficult to detect on a case-by-case basis.”<sup>228</sup>

Neither *Virginia* nor *Hibbs* mentioned *Geduldig*, which the Court has not cited in an equal protection decision since Congress enacted the PDA in the mid-1970s.<sup>229</sup> Given the Court’s failure to mention *Geduldig* in a constitutional decision in over forty years, even when urged,<sup>230</sup> it is reasonable to read *Virginia* and *Hibbs* as doing more than limiting *Geduldig sub silentio*. The Court’s subsequent decisions in *Virginia* and *Hibbs* answer the question *Geduldig* raised; they demonstrate how regulation of pregnancy fits in the Court’s equal protection cases. *Geduldig* understood judgments about pregnancy as judgments about the body,<sup>231</sup> whereas *Hibbs* demonstrates that judgments about pregnancy can be, and are also shaped by sex-role judgments, like other judgments about embodied persons. In this way, *Hibbs* rejects the premises of physiological naturalism: that regulatory judgments about pregnancy simply reflect physical facts and should be accorded more deference than other sex-dependent (or for that matter, or race-dependent) judgments.

*Virginia* and *Hibbs* integrate laws regulating pregnancy into an ordinary equal protection framework. *Virginia* explained heightened scrutiny with attention to

227. See Siegel, *supra* note 15, at 1886–94. For commentators who have since read *Hibbs* as recognizing that pregnancy can be subject to sex stereotyping, see *supra* note 14.

228. *Hibbs*, 538 U.S. at 736.

229. Shortly after the Court decided *Geduldig*, the Court tried applying *Geduldig* to federal employment discrimination law and was roundly rebuked by the Congress, which amended Title VII in 1978 to clarify that distinctions on the basis of pregnancy are distinctions on the basis of sex, and to prohibit pregnancy discrimination in employment. See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018)); *supra* notes 154–55 and accompanying text.

Citations to *Geduldig* in the Court’s equal protection cases stop after these developments in the mid-1970s. I have not found a majority opinion invoking *Geduldig* to interpret the Equal Protection Clause since the era of its repudiation by Congress in the PDA.

A quarter-century ago, Justice Scalia invoked *Geduldig* in a statutory case concerned with proving sex-based animus in abortion-clinic protests. See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 274 (1993) (holding that under the civil rights statute 42 U.S.C. § 1985(3), plaintiffs had to prove “invidiously discriminatory animus” such as ill will, and that the goal of preventing abortion “is not the stuff out of which a § 1985(3) ‘invidiously discriminatory animus’ is created”).

Justice Scalia’s opinion for the Court in *Bray* claims that the Court applied *Geduldig* to its abortion funding decision in *Harris v. McRae*, 448 U.S. 297 (1980). See *Bray*, 506 U.S. at 271–73. That is false. Justice Stewart’s opinion in *McRae*—which he wrote just two years after Congress rejected *Geduldig*–*Gilbert* reasoning by passing the PDA—never even mentioned the equal protection–sex discrimination line of cases or *Geduldig*, even though the government invoked *Geduldig* as a reason for rational basis. See Brief for the Secretary of Health, Education, & Welfare at 27, *Harris v. McRae*, 448 U.S. 297 (1980) (No. 79-1268), 1980 WL 339637 (“Similarly, the Court has reviewed legislative classifications involving pregnancy in accordance with the rational basis test.” (citing *Geduldig v. Aiello*, 417 U.S. 484, 495–96 (1974))).

230. See *infra* note 294 (discussing *Coleman v. Court of Appeals of Md.*, 466 U.S. 30 (2012)).

231. See *supra* note 190 and accompanying text (discussing the majority’s reasoning in *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (“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 like those considered in *Reed . . . and Frontiero*.”)).

inherent sex differences, expressly mentioning a law providing pregnancy leave as an example of sex classification, and setting out a historically informed antisubordination standard for determining when such regulation violates equal protection: “Sex classifications may be used . . . to ‘promot[e] equal employment opportunity,’ . . . . But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”<sup>232</sup> *Hibbs* employs comparative analysis to probe whether laws singling out pregnancy are enforcing sex-role stereotypes or other constitutionally impermissible social roles—or instead accommodating the distinctive physical features of reproduction.<sup>233</sup>

No longer does the Court employ physiological naturalism to isolate the regulation of pregnancy from the constitutional prohibition on sex stereotyping, as it did in *Geduldig*. Instead in *Hibbs*, the Court showed how the regulation of pregnancy can trigger core sex-role stereotypes and a “self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.”<sup>234</sup> These historically enforced and subordinating stereotypes include the sex-differentiated breadwinner/caregiver family roles of the separate-spheres tradition (“The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.”<sup>235</sup>). For hundreds of years, American law imposed these gender-differentiated roles, but the Court has now interpreted the Equal Protection Clause to forbid it: “No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”<sup>236</sup> Yet employers may mistrust working pregnant women and new mothers who violate traditional role expectations, “foster[ing] employers’ stereotypical views about women’s commitment to work and their value as employees,”<sup>237</sup> as the Court observed in *Hibbs*—stereotyping that is exacerbated in low-wage workplaces, and with workers of color.<sup>238</sup>

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232. *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (alteration in original) (citations omitted).

233. Comparator evidence is helpful but not necessary to demonstrate discriminatory bias:

Role-based accounts of discrimination seek to transform social relations to include and respect those whom we have excluded or disrespected. Role-based approaches to antidiscrimination law often employ tools of comparison to identify expressions of disrespect or the imposition of disfavored roles. Comparison may help identify discriminatory judgments or acts, without defining the essence of discrimination.

Siegel, *supra* note 4, at 988 (footnote omitted).

234. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

235. *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) (quoting *Bradwell v. Illinois*, 83 U.S. 130, 141–42 (1873) (Bradley, J., concurring)).

236. *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975).

237. *Hibbs*, 538 U.S. at 736.

238. See Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL’Y 1, 5, 16, 39 (2012); see also *infra* note 338 and accompanying text.

### 3. Case Law Recognizing These Developments in Equal Protection Law

Most pregnancy-discrimination litigation remains under the PDA, but there are lower court opinions recognizing these developments in the constitutional case law—cases in which judges have read *Hibbs* to modify *Geduldig* and thus enlarge the scope of 42 U.S.C. § 1983 sex-stereotyping claims under the Equal Protection Clause. As one court put it: “*Geduldig* has not been overruled, though *Hibbs* and *Back* make clear that discrimination based on stereotypical assumptions regarding pregnant women does violate the Equal Protection Clause.”<sup>239</sup>

The Second Circuit affirmed another section 1983 decision which followed *Hibbs* in recognizing that laws on pregnancy could reflect stereotypical views about pregnant women. The court rejected a *Hibbs*-inspired sex-discrimination challenge to a maternity leave policy that was only available to women, on the ground that the challenged policy appropriately distinguished between medical leave and child care leave that was available to both sexes, and so was “substantially related to the actual medical requirements of pregnancy and birth, not traditional notions of a mother’s role in the family.”<sup>240</sup>

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239. *Zambrano-Lamhaoui v. N.Y. City Bd. of Educ.*, 866 F. Supp. 2d 147, 174 n.11 (E.D.N.Y. 2011) (emphasis omitted) (citing Siegel, *supra* note 15, at 1891–92) (“[*Geduldig*] leaves open the possibility that some legislative classifications concerning pregnancy are sex-based classifications. . . . We might read *Hibbs* as limiting *Geduldig* sub silentio, but it seems as reasonable to read *Hibbs* as answering the question *Geduldig* reserved. Where regulation of pregnant women rests on sex-role stereotypes, it is sex-based state action within the meaning of the Equal Protection Clause.” (emphasis omitted) (footnote omitted)).

240. *Wahl v. County of Suffolk*, No. 09-CV-1272 (SJF) (ARL), 2011 WL 1004879, at \*5 (E.D.N.Y. Mar. 16, 2011), *aff’d*, 466 F. App’x 17 (2d Cir. 2012) (“The ability to use accrued sick leave does not reflect the ‘[s]tereotypes about women’s domestic roles’ and corresponding ‘stereotypical views about women’s commitment to work and their value as employees’ in the manner warned against in [*Hibbs*]. The maternity leave policy is substantially related to the actual medical requirements of pregnancy and birth, not traditional notions of a mother’s role in the family.” (citation omitted) (quoting *Hibbs*, 538 U.S. at 736)); *see also id.* at \*4 (distinguishing the challenged leave policy from “unconstitutional ‘protective labor legislation’ that ‘reflect[ed]’ archaic or stereotypical notions about pregnancy and the abilities of pregnant workers” (alteration in original) (quoting *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 290 (1987))). For another district court opinion that authorizes section 1983 actions in cases involving pregnancy discrimination without discussion of *Geduldig*, see *Nagle v. East Greenbush Central School District*, No. 1:16-CV-00214 (BKS/ATB), 2018 WL 4214362, at \*15 (N.D.N.Y. Feb. 21, 2018), which applies the PDA standard to a section 1983 case in a pregnancy case. *See also Wilson v. Ontario Cty. Sheriff’s Dep’t*, No. 12-CV-06706 EAW, 2014 WL 3894493, at \*5–9 (W.D.N.Y. Aug. 8, 2014) (recognizing that a claim of pregnancy discrimination would lie under the Equal Protection Clause but dismissing on factual grounds).

The Eleventh Circuit claims to be open to equal protection claims challenging discrimination against pregnant women based on stereotypes. *See Johnson v. Ala. Dep’t of Human Res.*, 508 F. App’x 903, 906 (11th Cir. Jan. 31, 2013) (“Johnson’s claim lies at the intersection of these two rules. Claims like Johnson’s may allege a type of pregnancy classification or gender stereotype discrimination that amounts to gender discrimination under the equal protection clause. They may allege neither.”).

But the Eleventh Circuit seems to have difficulty recognizing stereotypes about pregnant women. The district court reasoned:

Plaintiff has not proffered admissible evidence that Defendants terminated her for any gender-related reason or stereotype aside from the pregnancy itself. According to Plaintiff, her supervisor exclaimed, at the time of their meeting, “Oh no, they sent me another pregnant lady,” and commented she did not think Plaintiff would make it to her due date. Plaintiff

The Ninth Circuit has also recognized that *Hibbs* modified *Geduldig*—“laws which facially discriminate on the basis of pregnancy . . . can still be unconstitutional if the medical or biological facts that distinguish pregnancy do not reasonably explain the discrimination”<sup>241</sup>—but was only confident that *Hibbs* addressed the scope of Congress’s powers under Section Five, and was not as confident about the decision’s bearing on section 1983 equal protection claims challenging medical regulations burdening abortion more than other procedures of comparable or greater risk.<sup>242</sup>

### III. EQUAL CITIZENSHIP AND PREGNANCY, AT THE CENTENNIAL

As we have seen, equal protection law is continuing to grow. Where the Burger Court first imagined pregnancy as a “real difference” that was typically not subject to the sex stereotyping enjoined in equal protection cases, the Rehnquist Court applied the core principles of the sex-discrimination cases to pregnancy. *Virginia* and *Hibbs* provide a framework for applying equal protection antistereotyping principles to laws regulating pregnancy. Today, judges are far more versed in recognizing “invidious discrimination”<sup>243</sup> involving pregnancy than they were a half century ago. We know much more about the sociology of pregnancy discrimination than judges would have had any reason to grasp in the early 1970s,<sup>244</sup> and now have a historical understanding of the ways government

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contends that when she was terminated, she was told she was being let go because she could not keep up with her work due to her pregnancy and would be taking maternity leave. Plaintiff cites *Back v. Hastings on Hudson Union Free School Dist.* for the proposition that unlawful gender stereotyping exists when an employer concludes that “a woman cannot be a good mother and have a job that requires long hours, or in the statement that a mother who received tenure would not show the same level of commitment she had shown because she had little ones at home.” However, Plaintiff has not submitted any evidence that she was discriminated against because of stereotypes of motherhood. Plaintiff already had a child at the time of her employment, and no mention was made of her inability to do her job with a child or children at home. *Viewing the evidence in the light most favorable to the Plaintiff, all evidence of discrimination relates solely to the condition of pregnancy.* This is not a Title VII case. Plaintiff has not produced sufficient evidence to convince a reasonable jury that Defendants violated the Equal Protection Clause of the Fourteenth Amendment.

*Johnson v. Ala. Dep’t of Human Res.*, No. 2:10-CV-03030-LSC, 2012 WL 12892180, at \*4 (N.D. Ala. Mar. 20, 2012) (emphasis added) (quoting *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004)), *aff’d*, 508 F. App’x 903 (11th Cir. 2013), *reh’g granted, judgment vacated* (Apr. 8, 2013), *on reh’g*, 546 F. App’x 863 (11th Cir. 2013), and *aff’d*, 546 F. App’x 863 (11th Cir. 2013). In this remarkable passage, the court is presented with a series of stereotypes about a pregnant worker (the worker is defined through her pregnancy, is asserted to be unreliable in virtue of her pregnancy, is told that she would be let go because of incompetence related to her pregnancy), but even when claiming to construe the evidence in the light most favorable to the plaintiff, the court reads the allegations as concerning the condition of pregnancy rather than stereotypes of motherhood, presumably on the understanding that problems with pregnancy are “real” and problems with stereotypes of motherhood begin after birth.

241. *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 548 (9th Cir. 2004).

242. *Id.*

243. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

244. *See supra* notes 191–202 (reviewing sociological literature).

has shaped family and market relations.<sup>245</sup> With this foundation, it is easier to understand how laws regulating pregnancy can enforce the breadwinner/care-giver sex-roles discussed in the sex-discrimination cases of the early 1970s.<sup>246</sup>

In what follows, I briefly consider how courts can continue to build upon the framework in *Virginia* and *Hibbs* that they have already begun to apply. I then turn to consider how Congress might also redress the legacy of state action by enacting legislation that mandates the reasonable accommodation of pregnancy in the workplace.

#### A. APPLYING THE VIRGINIA/HIBBS FRAMEWORK TO LAWS REGULATING PREGNANCY

In *United States v. Virginia*, the Court reaffirmed its sex-discrimination case law, reciting a “heightened review standard” that the Court has employed since the 1970s and early 1980s. This standard requires the government to show that sex-based state action serves important government objectives and that the discriminatory means employed are substantially related to the achievement of those ends.<sup>247</sup> In fact, *Virginia* offers a gloss on the 1970s inquiry that, as we have seen, focuses the reviewing court on questions of discriminatory bias *even in circumstances implicating sex-role differentiation* that makes the framework newly capable of discerning discriminatory bias *in cases including pregnancy*, and it expressly applied the framework to a case involving pregnancy. Perhaps most fruitfully for present purposes, the *Virginia* framework supplies normative guidance for future applications, expressing the equal protection inquiry in terms of a historically informed social-roles analysis.

Rather than declare all sex classifications suspect, or enshrine rigidly comparative accounts of discrimination, *Virginia* focused equal protection scrutiny of sex-based state action on the legitimacy of the government’s ends, asking whether the government is regulating in ways that perpetuate historically subordinating conditions. The Court cautioned that “[i]nherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”<sup>248</sup> The Court then explained that a sex classification’s constitutionality depended on whether the classification was employed for a legitimate end—such as remedying past discrimination or promoting equal opportunity—or was instead enforced in such a way as “to create or perpetuate the legal,

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245. See generally ALICE KESSLER-HARRIS, *WOMEN HAVE ALWAYS WORKED: A CONCISE HISTORY* (2d. ed. 2018); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (20th anniversary ed. 2003); Dorothy E. Roberts, *Welfare: Yesterday and Today*, 24 CONTEMP. SOC. 1 (1995) (reviewing LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994) and JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994)).

246. See *supra* notes 136–39 and accompanying text.

247. *United States v. Virginia*, 518 U.S. 515, 533 (1996). The standard was first adopted in *Craig v. Boren*, 429 U.S. 190, 197 (1976).

248. 518 U.S. at 533.

social, and economic inferiority of women.”<sup>249</sup> Under this framework, not all sex-based classifications impermissibly discriminated. *Virginia* characterized the state law in *Cal Fed*, which mandated accommodating pregnant workers in a non-stereotypical fashion, as a law that classified on the basis of sex “to promot[e] equal employment opportunity.”<sup>250</sup> But under *Virginia*’s framework, a law that classified on the basis of pregnancy would be unconstitutional if it enforced “artificial constraints on an individual’s opportunity,” or worked to “perpetuate the legal, social, and economic inferiority of women.”<sup>251</sup>

*Hibbs* illustrated one paradigmatic way in which laws regulating pregnancy can violate equality guarantees: by enforcing sex stereotypes premised on traditional breadwinner/caregiver roles of the family. In such a case, the law is imposing, and not merely reflecting, social roles. This Article demonstrates how laws regulating pregnancy have long enforced women’s role as economic dependents of wage earners rather than as households’ economic providers, exacerbating sex-linked wage disparities. Consider how these restrictions on the employment of pregnant workers and new mothers, enforced across sectors and over time, disrupted and marginalized women’s employment and depressed their wages. Henrietta Rodman’s story shows how the New York City Board of Education used talk of spheres to justify its ban on married women, pregnant women, and new mothers;<sup>252</sup> more than a half century later, government entities were still defending mandatory maternity leaves in *Cleveland Board of Education v. LaFleur*.<sup>253</sup> In that same era, the government excluded women from military service when pregnant<sup>254</sup> and denied women disability benefits when pregnant,<sup>255</sup> and the ACLU documented “the kinds of penalties that major institutions in our society routinely inflict upon pregnant women.”<sup>256</sup>

But this Article also shows that laws regulating pregnancy evolved in justification. As the feminist movement gained strength in the 1970s, the Court began to treat talk of separate spheres as suspect.<sup>257</sup> In *Geduldig*, when California urged the Court to uphold its exclusion of pregnancy from an otherwise comprehensive disability-benefits program, the state instead pointed to pregnancy as the role-marker of economic dependency: “Pregnancy and childbirth, unlike illness and

249. *Id.* at 534.

250. *See id.* at 533–34 (alteration in original) (quoting *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987)). *Cal Fed* upheld the state law on the grounds that it was narrowly drawn to cover pregnancy and the period of actual physical disability only and did not reflect stereotypical notions about pregnant workers associated with protective labor legislation of the early twentieth century.

251. *Id.*

252. *See supra* note 53 and accompanying text.

253. 414 U.S. 632 (1974).

254. *See supra* Section I.B. (discussing *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971)).

255. *See supra* text accompanying notes 145–48.

256. HAYDEN, *supra* note 73, at 2; *see generally id.* (documenting laws and other practices discriminating against pregnant women in public schools and higher education; in employment, including benefits and insurance; and in credit).

257. *See supra* notes 136–39 and accompanying text.

injury, often result in a decision to leave the work force.”<sup>258</sup> In *Geduldig*, we saw employers urging the Court to justify its benefits decision in the language of the ERA’s unique physical characteristic exception rather than in the now constitutionally suspect language of separate spheres.<sup>259</sup> The example suggests that, with modernization, social roles are expressed in terms of reproductive physiology rather than in the language of separate spheres, domesticity, or marriage.

Yet, thirty years later, our case law has begun to decipher this transformation, and to ask judges to probe biological and seemingly functional justifications for regulating pregnancy in order to determine whether laws regulating pregnancy might nonetheless reflect and enforce constitutionally suspect sex roles. In *Hibbs*, Chief Justice Rehnquist saw evidence of sex-role stereotyping when states offered lengthy maternity leave to women only in statutes that coupled time for recovery from birth with time for early infant care that might have been given to parents of either sex.<sup>260</sup> (In recent years the Supreme Court has extended *Hibbs*’ skeptical scrutiny of biological justifications into other equal protection contexts as well.<sup>261</sup>)

Courts can follow *Virginia*’s directions to determine whether sex-based state action perpetuates historically subordinating conditions by reading the Fourteenth and Nineteenth Amendments together, synthetically, so that *Virginia*’s inquiry is informed by the long constitutional history of family- and household-based restrictions on women’s citizenship. As I have shown, at the founding, the law gave male heads of household authority over women and the ability to represent them in voting and the market. This understanding of women as *dependent* citizens, defined through family relations to men, continued to shape the law long after women’s enfranchisement.<sup>262</sup> Women’s quest for emancipation from representation by men in the household, politics, and the market can orient *Virginia*’s analysis, which appeals to history when it prohibits laws that “perpetuate” subordination.<sup>263</sup> I have elsewhere described this synthetic, historically informed inquiry:

Women’s long quest for the vote and for freedom and equality in the family can guide how judges apply equal-protection law. Just as the constitutional disestablishment of slavery and segregation orients race-discrimination law, so too can the disestablishment of male household headship—intersectionally understood—orient sex-discrimination law. . . .

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258. Reply Brief for Appellant, *supra* note 149, at 13.

259. See *supra* notes 167–70 and accompanying text.

260. See *supra* notes 223–26 and accompanying text.

261. Cary Franklin offers an extended and important analysis of this point in the context of the Court’s equal protection decisions on the marital presumption in same-sex relationships and on parental recognition outside of marriage. See generally Franklin, *Biological Warfare*, *supra* note 14 (discussing the Court’s decisions in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), and *Pavan v. Smith*, 137 S. Ct. 2075 (2017)).

262. See Siegel, *The Nineteenth Amendment*, *supra* note 5. On the household at the founding, see *id.* at 458–59.

263. *United States v. Virginia*, 518 U.S. 515, 534 (1996).



. . . Reading the Fourteenth and Nineteenth Amendments together gives specific constitutional grounding to disestablishment of traditional sex roles in the family, amplifying the constitutional authority of sex-discrimination law in ways that those concerned with original understanding can respect.<sup>264</sup>

For this very reason, I understand this synthetic reading of the Fourteenth and Nineteenth Amendments as applying *Virginia*'s framework, and not departing from it. Those who fought for women's right to vote sought "to emancipate women from legally-enforced dependence on men and to recognize women as juridically, politically, and economically *independent* from men in matters of family life."<sup>265</sup>

Recovering this history helps identify the assumptions about social roles structuring laws regulating pregnancy today. Do laws that regulate pregnant citizens treat them as economically independent citizens, or do they perpetuate the history of women's legally enforced dependence on men? Are laws regulating the pregnant citizen based on biology only, or are they also based on social roles enforced in ways that "perpetuate the legal, social, and economic inferiority of women"?<sup>266</sup> Do the laws enforce "[s]tereotypes about women's domestic roles" and "reinforce[] parallel stereotypes presuming a lack of domestic responsibilities for men"?<sup>267</sup> Courts can draw on the history of women's quest for equal citizenship to guide application of *Virginia*'s antistatutory framework and *Hibbs*'s anti-stereotyping principle.

To illustrate, we might apply this equal protection framework to the California law at issue in *Geduldig*—a law that provided disability benefits coverage for all work-disabling conditions except for workers who became pregnant. Under the California law, wage earners who contributed to a state fund designed to insure against wage loss resulting from non-occupational disabilities could claim benefits for most any kind of disability-related wage loss, but wage earners could not claim benefits when they missed work for pregnancy-related reasons; because Sally Armendariz miscarried after a car accident, she could not recover from a disability fund she had paid into for a decade, even as her family's sole breadwinner.<sup>268</sup> California explained the sex-role assumptions animating its adverse treatment of pregnant workers when it justified its decision to exclude benefits for pregnant workers by invoking sex-role stereotypes about the likelihood of new mothers leaving the work force,<sup>269</sup> appealing to the view of women's position in the labor force that the New York City Board of Education used to force the

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264. See Siegel, *The Nineteenth Amendment*, *supra* note 5, at 484–85. For an originalist account of this synthesis, see generally Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

265. Siegel, *The Nineteenth Amendment*, *supra* note 5, at 485.

266. *Virginia*, 518 U.S. at 534.

267. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

268. See *supra* text accompanying notes 145–48.

269. See *supra* text accompanying note 149.

resignation of teacher–mothers.<sup>270</sup> The California law at issue in *Geduldig* assumed women are economic dependents of a (male) wage earner just as the New York Board of Education did. In *Geduldig*, talk of the physiology of pregnancy distracts attention from these crucial, social-role based judgments. Does the law view a pregnant wage earner as economically independent, or does the law view a pregnant wage earner as the dependent of a male wage earner?

As we have seen, since *Hibbs* a growing number of federal judges realize that equal protection review of laws regulating pregnancy cannot stop at claims about physiology, but instead requires consideration of the judgments about social roles on which the law is based. Following Justice Rehnquist’s lead in *Hibbs*, they apply the antistereotyping principle to laws regulating pregnancy and analyze state action directed at pregnant employees to insure that it does not reflect “[s]tereotypes about women’s domestic roles.”<sup>271</sup> These cases involving equal protection claims alleging sex-role stereotyping that excludes on the basis of pregnancy converge with other section 1983 cases alleging sex-stereotyping that excludes on the basis of gender identity or sex orientation.<sup>272</sup> *Hibbs* demonstrates that workplace norms have long rested on law-backed understandings about the ideal family roles supporting workplace participation. Workers may choose to participate in these arrangements, but the Court’s equal protection cases tell us that it is unconstitutional for the state to impose traditional family roles on citizens as a condition of employment.

To this point we have considered how applying *Virginia* informed by a synthetic reading of the Fourteenth and Nineteenth Amendments can enable those enforcing the Constitution more clearly to recognize and remedy gendered restrictions on citizenship. But if the turn to history identifies gendered restrictions on citizenship, that same history shows that women are subject to regulation along axes including race, class, citizenship, sexuality, and religion, and thus demonstrates the importance of enforcing *Virginia* with attention to an intersectional understanding of equality.<sup>273</sup> Consider the example of pregnancy discrimination in the workplace. Employers may direct pregnancy discrimination against both majority and minority women, yet minority and low-wage workers seem more likely to be excluded.<sup>274</sup> These dynamics are systematically underreported; for example, it is rarely noted that Lillian Garland, the complainant–receptionist

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270. See *supra* text accompanying note 53.

271. *Wahl v. County of Suffolk*, No. 09-CV-1272 (SJF) (ARL), 2011 WL 1004879, at \*4–5 (E.D.N.Y. Mar. 16, 2011), *aff’d*, 466 F. App’x 17 (2d Cir. 2012) (quoting *Hibbs*, 538 U.S. at 736); see *supra* note 240 and accompanying text; *supra* Section II.D.3.

272. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (holding that firing a transgender employee because of gender nonconformity is sex-based discrimination violating equal protection); see *id.* at 1316 (discussing sex stereotyping and citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989)). For an example involving harassment on the basis of sexual orientation, see *Winstead v. Lafayette County Board of County Commissioners*, 197 F. Supp. 3d 1334, 1345 (N.D. Fla. 2016) (citing *Price Waterhouse* on sex stereotyping).

273. See sources cited *supra* note 130; cf. Siegel, *The Nineteenth Amendment*, *supra* note 5, at 486–87.

274. See *infra* notes 303–06 and accompanying text.

who was pushed out of her job in the *Cal Fed* case, was African American.<sup>275</sup> Family-responsibilities discrimination takes the form of mistrust—belief that the woman worker’s dual loyalties to family and market will compromise her commitment and competence in the workplace—as a man’s dual loyalties to family and to market do not.<sup>276</sup> These doubts seem to be exacerbated when workers are marginalized and devalued along more than one axis of status.<sup>277</sup> The kinds of discrimination at play in any given case are of course fact-dependent, with the logic of an exclusion varying with the domain and the group targeted.<sup>278</sup>

There are many reasons for integrating the history before and after the Nineteenth Amendment into the *Virginia* framework, much as the Supreme Court considers *Brown v. Board of Education*<sup>279</sup> in interpreting the Equal Protection Clause.<sup>280</sup> This history helps identify restrictions on women’s citizenship as they may diverge from race-based restrictions on citizenship—and as they may intersect with race-based restrictions on citizenship. It teaches us to appreciate how meanings, structures, and distributions from the old world of women’s disfranchisement can be carried forward in time and across domains in new institutional forms. As we consider this history, we can recognize connections between gender roles enforced in the family, in the market, and in politics. We can see relationships between norms espoused in the 2018 Pew poll on women in politics<sup>281</sup> and norms espoused by the New York Board of Education a century earlier in 1911,<sup>282</sup> and appreciate how practices in one domain may shape the other.

But federal courts are not the only institutions with the power to intervene and break the generation-to-generation renewal of these gendered restrictions on women’s participation in the market and other domains of citizenship. Congress also has a role in enforcing the Constitution’s equality guarantees. I consider how Congress might enact a law mandating reasonable accommodation of pregnancy in the workplace, a law that might remedy in some small part sex-role understandings in markets and politics that law has helped entrench. I show how Congress could enact such a law in exercise of its powers to enforce the Fourteenth Amendment, and in closing, under the Nineteenth Amendment as well.

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275. See GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN’S LIVES AT WORK* 107–08 (2016).

276. See *supra* text accompanying notes 191–202.

277. See *supra* text accompanying notes 234–38.

278. This Article focuses on cases of pregnancy discrimination in the workplace and does not attempt to analyze the complex variations involved as regulation shifts in subject matter, domain, and focal group.

279. 347 U.S. 483 (1954).

280. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743–48 (2007) (plurality opinion) (repeatedly invoking *Brown v. Board* in debating the meaning of the Equal Protection Clause); Siegel, *She the People*, *supra* note 5, at 1031–35 (discussing the importance of post-ratification history in constitutional interpretation, focusing on the Fourteenth and Nineteenth Amendments).

281. See source cited *supra* note 122 and accompanying text.

282. See *supra* notes 53–54 and accompanying text.

B. HOW CONGRESS CAN PLAY A ROLE IN ENFORCING EQUAL PROTECTION: A SECTION FIVE CASE FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT

Congress can enforce the understandings we have seen emerge in the Court's equal protection case law through exercise of its powers to enforce the Fourteenth Amendment. One way Congress can remedy and deter sex stereotyping against pregnant and potentially pregnant workers and secure equality of opportunity in the workplace in accordance with *Virginia* and *Hibbs* is by enacting a law that would require employers to make reasonable accommodations for pregnant workers—for example, through a bill called the Pregnant Workers Fairness Act.<sup>283</sup> By enacting such a law, Congress would be acting in conformity with the law of the Rehnquist Court, which requires that exercises of Section Five power enforce constitutional rights recognized by the Court in its Section One case law. At the same time, taking a longer view, Congress would be engaged in acts of legislative constitutionalism, strengthening understandings of equal citizenship that prior acts of legislative constitutionalism helped engender.<sup>284</sup>

The process of enacting and enforcing a Pregnant Workers Fairness Act would develop the understandings of sex stereotyping that have been emerging since the dawn of the sex-discrimination cases, and, in the process, break down barriers to women's equal participation in the public and private spheres.

1. Case Law on Congress's Power to Enact Section Five Legislation Regulating Pregnancy

Congress's power to enforce the Fourteenth Amendment is tied to the Court's interpretation of Section One of the Fourteenth Amendment, as the Court emphasized in *City of Boerne v. Flores*.<sup>285</sup> Congress must remedy or deter violations of Section One as interpreted by the Court: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>286</sup>

Congress has authority to enforce the equal protection guarantee in cases of state action regulating pregnancy, as our discussions of *Virginia* and *Hibbs* have

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283. Currently, there is one such bill under consideration in Congress. See Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019). Over half of states have enacted such laws. A BETTER BALANCE, PREGNANCY ACCOMMODATION LAWS IN STATES & CITIES (2020), <https://www.abetterbalance.org/resources/fact-sheet-state-and-local-pregnant-worker-fairness-laws/> [<https://perma.cc/ZV3U-YBD7>].

284. Understandings of equal protection were shaped over time by the ratification of the Nineteenth Amendment, then by Congress inaugurating ratification debates over the Equal Rights Amendment, which provoked and guided federal courts into enforcing Fourteenth Amendment in cases of sex discrimination, see Siegel, *Constitutional Culture*, *supra* note 209, at 1403–18; Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 794 (2004), and then by Congress's role in enacting a host of civil rights statutes that prohibit sex discrimination, see, for example, Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1995–96 (2003) (discussing legislation enacted by the 92nd Congress at the same time as it was sending the ERA to the states for ratification), including the PDA and the FMLA.

285. 521 U.S. 507, 519–20 (1997).

286. *Id.* at 520.

shown and as the Ninth Circuit and several other courts have explained.<sup>287</sup> To date there are only a few cases to guide the exercise of that authority. The Supreme Court affirmed Congress's Section Five authority to enforce federal employment discrimination law against the states two years before Congress enacted the PDA,<sup>288</sup> but has never addressed Congress's Section Five authority to enact the PDA itself. Some lower courts have addressed Congress's constitutional authority to enforce the PDA (but only a few courts have done so since *Boerne*<sup>289</sup>), but none has done so as this Article does: as enforcing guarantees of equal citizenship for women and securing their right to participate in public life on equal terms, and to be free from sex-role stereotyping directed against "mothers or mothers-to-be"<sup>290</sup>—a right the Court has enforced in cases spanning the last half century including not only *Geduldig* but also *Virginia* and *Hibbs*.

As we have seen, the Court has already addressed Congress's Section Five authority to enforce equal protection through the Family and Medical Leave Act in ways that implicate pregnancy. In *Hibbs*, the Court ruled that Section Five provided Congress authority to enact the family-leave provisions of the FMLA because they were congruent and proportional to the goal of remedying and deterring sex discrimination that would violate equal protection—and reasoned about excessively long maternity leave as an example of unconstitutional sex-stereotyping.<sup>291</sup> But in another FMLA case, *Coleman v. Court of Appeals of Maryland*, the Court ruled that Congress lacked Section Five authority to enact the portions of

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287. See *supra* notes 239–42 and accompanying text. The Ninth Circuit ruled that *Hibbs* modifies *Geduldig* and recognized that Congress has Section Five authority to redress sex stereotyping involving pregnancy. See *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 548 (9th Cir. 2004).

288. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Title VII abrogates state sovereign immunity). The PDA amends the definitional provisions of Title VII. See *Pregnancy Discrimination Act of 1978*, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018)).

289. In early PDA cases, courts relied on both the Commerce Clause and an expansive notion of Section Five power as a basis for the PDA's legitimacy. See, e.g., *Vineyard v. Hollister Elementary Sch. Dist.*, 64 F.R.D. 580, 585 (N.D. Cal. 1974) ("Under Section 5 of the Fourteenth Amendment, Congress has the power to pass appropriate legislation to implement the dictates of the Equal Protection Clause. The implementing legislation may reach more broadly than the Equal Protection Clause itself. Congress intended Title VII to be just such a broad implementing legislation." (citation omitted)); *EEOC v. County of Calumet*, 519 F. Supp. 195, 197 n.1 (E.D. Wis. 1981) ("Congress often passes legislation under its Fourteenth Amendment power to prohibit discrimination that the Constitution would otherwise permit. For example, in [*Geduldig*], the Supreme Court held that a State disability insurance plan that excluded pregnancy benefits was a rational classification that did not violate equal protection. In 1978, Congress amended Title VII to add § 701(k), which makes unlawful disability plans that exclude pregnancy benefits."). Even immediately after to the Court's decision in *Boerne*, 521 U.S. 507, courts viewed the PDA as an example of Congress validly overruling the Supreme Court. See *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 860 (8th Cir. 1998); *Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge)*, 220 B.R. 386, 397 (D. Idaho 1998).

After *Boerne* took hold, courts discussed the PDA as redressing sex discrimination more generally. See *Laro v. New Hampshire*, 259 F.3d 1, 14 (1st Cir. 2001) ("In enacting the PDA, Congress was expressly concerned with the issues of gender-based discrimination. . . .").

290. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (quoting *Joint Hearing on the Parental and Medical Leave Act of 1986*, *supra* note 3, at 100).

291. See *id.* at 737.

the statute that mandate self-care leave for employees who miss work due to illness including pregnancy.<sup>292</sup> The Court reasoned that the FMLA's legislative record did not establish a sufficient connection between medical leave and violations involving the Court's equal protection sex-discrimination cases.<sup>293</sup>

*Coleman* does not bar using Section Five power to legislate on pregnancy, and can in fact be read as wholly aligned with *Virginia* and *Hibbs*.<sup>294</sup> At its core, *Coleman* counsels the importance of holding congressional hearings to compile record evidence of constitutional violations involving state action that enforces sex stereotypes within the meaning of the Court's Section One cases. Such hearings could, at one and the same time, consolidate a twenty-first-century understanding of the Court's sex-discrimination case law from *Reed* to *Young* and continue the project of engaging the judiciary and the public about the dynamics of sex stereotyping involving pregnant and potentially pregnant workers.<sup>295</sup>

With this brief review of pertinent case law, we are in a position to consider how Congress might draw on its Commerce Clause and Section Five powers to enact legislation to redress pregnancy discrimination in the workplace—in this case a Pregnant Workers Fairness Act.

## 2. How a Pregnant Workers Fairness Act Could Enforce Guarantees of Equal Citizenship

*Coleman* requires that, before legislating, Congress must hold hearings to educate public and private decisionmakers (including both employers and judges)

292. 566 U.S. 30, 43–44 (2012) (plurality opinion); *id.* at 44 (Thomas, J., concurring); *id.* at 44 (Scalia, J., concurring).

293. *See id.* at 37–39.

294. *Coleman* merits brief discussion in that it seems to present a problem with using Section Five power to address pregnancy discrimination, and oddly winds up providing additional unexpected support for the exercise of such power—from Justice Kennedy, of all sources. In *Coleman*, Maryland invoked *Geduldig* to argue that Congress lacked Section Five power to enact the self-care leave provisions of the FMLA. *See* Brief for the Respondents at 23, *Coleman*, 566 U.S. 30 (No. 10-1016), 2011 WL 6046212 (“Before the FMLA was enacted, it was well established that a state’s refusal to provide pregnancy leave to its employees was not unconstitutional.” (citing *Geduldig v. Aiello*, 417 U.S. 484, 495 (1974))). This prompted Justice Ginsburg in dissent to call for reversing *Geduldig*. *See Coleman*, 566 U.S. at 54–57 (Ginsburg, J., dissenting).

But Justice Kennedy, writing for the plurality, came to the conclusion that Congress lacked Section Five power to enact the self-care leave provisions of the FMLA *without ever citing Geduldig*—as Ginsburg herself points out. *See id.* at 60 n.6 (“Notably, the plurality does not cite or discuss *Geduldig v. Aiello* . . .”). Justice Kennedy instead objected that Congress had failed to create a legislative record showing how providing unpaid leave for the employees’ medical needs, including pregnancy, remedied and deterred sex discrimination. *See id.* at 37–42 (plurality opinion).

In the course of reviewing the legislative record, Justice Kennedy pointed out that “Congress did not document any pattern of States excluding pregnancy-related illnesses from sick-leave or disability-leave policies”—though this observation suggested that such a pattern *would be* evidence of an equal protection sex-discrimination violation. *See id.* at 39. *In this respect, the Coleman plurality reasons from the understanding of equal protection and pregnancy in Virginia and Hibbs even as it rejects the Section Five claim.*

295. *See, e.g., Long Over Due: Exploring the Pregnant Workers’ Fairness Act: Hearing on H.R. 2694 Before the Subcomm. on Civil Rights & Human Servs. of the H. Comm. on Education & Labor*, 116th Cong. (2019) [hereinafter *Long Over Due: Exploring the Pregnant Workers’ Fairness Act Hearing*] (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance).

and to create a record of constitutional violations that a Section Five statute would remedy and deter.<sup>296</sup> Hearings of this kind would, of necessity, address the very questions that *Geduldig* raised a half century ago.<sup>297</sup> Congress would examine sociology and case law (1) on the sex stereotypes that pregnant women lack competence and commitment as workers;<sup>298</sup> and, just as importantly, (2) on the role that employer bias against “mothers or mothers-to-be”<sup>299</sup> plays in decision-making that limits women’s employment prospects even when women are not mothers or even pregnant. When Congress finds facts showing that constitutional violations are widespread yet hard to prove, it can enact remedial legislation that alleviates the burden on individual litigants.<sup>300</sup>

Even the most cursory preview of facts Congress might hear would suggest why a statute mandating the reasonable accommodation of pregnant workers—enabling pregnant workers to retain their jobs to the extent consistent with business necessity—would not only provide practical support to American workers and their families, but combat centuries of sex-based stereotypes inculcated by generations of public and private action.

Today, the United States is one of only two countries in the world that do not offer working women some form of paid maternity leave.<sup>301</sup> The United States instead offers working women the safeguards of the PDA and the FMLA—anti-discrimination law and unpaid leave. But after decades of PDA and FMLA enforcement, pregnancy discrimination and pregnancy-related job loss remains an immense practical problem.<sup>302</sup> A recent survey of over 700 professional women found that twenty-three percent of pregnant women reported problems with discrimination in the workplace.<sup>303</sup> Women working in lower paid jobs are

296. See *supra* note 294 and accompanying text.

297. See *supra* notes 145–53 and accompanying text.

298. See, e.g., Bornstein, *supra* note 238, at 16 (“Statements made to many of these employees reveal supervisors acting upon stereotypes related to pregnancy—either a fear that the employee will need to quit soon or will be physically unable to work due to pregnancy, regardless of how physically demanding the actual job, or that she will be less committed to working.”); *supra* notes 191–202 and accompanying text (discussing empirical literature on stereotyping of pregnant workers).

299. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (quoting *Joint Hearing on the Parental and Medical Leave Act of 1986*, *supra* note 3, at 100).

300. See *id.* (discussing Congress using its Section Five power to remedy “subtle discrimination that may be difficult to detect on a case-by-case basis”); *Katzenbach v. Morgan*, 384 U.S. 641, 652–58 (1966) (discussing the findings that might justify the exercise of Section Five authority as “appropriate legislation to enforce the Equal Protection Clause”); *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (discussing how factfinding might justify Congress exercising its power to enforce the Fifteenth Amendment: “Congress ha[s] found that case-by-case litigation [i]s inadequate to combat widespread and persistent discrimination in voting . . . Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims”).

301. See INT’L LABOUR ORG., MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD 16 (2014), [http://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms\\_242615.pdf](http://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_242615.pdf) [<https://perma.cc/A44P-PZXS>].

302. See Kitroeff & Silver-Greenberg, *supra* note 99.

303. Rachel C.E. Trump-Steele et al., *The Inevitable Stigma for Childbearing-Aged Women in the Workplace: Five Perspectives on the Pregnancy-Work Intersection*, in RESEARCH PERSPECTIVES ON WORK AND THE TRANSITION TO MOTHERHOOD 79, 96 (Christiane Spitzmueller & Russell A. Matthews

at special risk; employers may impose job definitions inflexibly, and employees may not be FMLA-covered or able to afford taking unpaid leave.<sup>304</sup> “Only 39 percent of working parents and 35 percent of working mothers” are both eligible for FMLA leave and can afford to take unpaid leave.<sup>305</sup> A quarter of women are fired or quit when they bear a child.<sup>306</sup> The section 1983 cases provide a sampling of this dynamic as it unfolds in the public sector.<sup>307</sup>

Hearings of this kind might usefully explore reasons why the PDA and FMLA have not proven sufficient to prevent and deter discrimination against pregnant and potentially pregnant employees.<sup>308</sup> PDA cases typically compare treatment of the pregnant employee to other employees who are “similar in . . . ability or inability to work”<sup>309</sup> to determine whether exclusion of a pregnant employee is discriminatory. Forty years of PDA litigation has demonstrated both practical and normative problems with this comparative approach.<sup>310</sup> Disparate impact might provide an alternate path to accommodation, and disparate impact is available

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eds., 2016) (“A total 23% of women who were pregnant with their first child, 23% of women who were pregnant and already had a child/children, and 13% of women who had children and were done being pregnant reported that they had experienced [pregnancy] discrimination in the workplace.”); *id.* at 82–83 (discussing survey design).

304. See Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 J. GENDER, SOC. POL’Y & L. 459, 474 (2008) (“The problems resulting from the FMLA’s limitations are numerous and provide significant barriers to access for some groups, especially women, minorities, and the poor.”).

305. NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, *EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF LAWS THAT HELP EXPECTING AND NEW PARENTS* 12 (4th ed. 2016), <http://www.nationalpartnership.org/research-library/work-family/expecting-better-2016.pdf> [<https://perma.cc/ZU29-P7BA>]. Only twelve percent of private-sector workers receive paid leave, and most who receive the benefit are college-educated. See INT’L LABOUR ORG., *supra* note 301, at 37–39 (reporting that, worldwide, both paid and unpaid leave disproportionately benefit high-wage workers).

306. See LYNDA LAUGHLIN, *MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961–2008*, U.S. CENSUS BUREAU 9 tbl.5 (2011), <https://www.census.gov/prod/2011pubs/p70-128.pdf> [<https://perma.cc/52A4-RT5R>]. For other data, see NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, *BY THE NUMBERS: WOMEN CONTINUE TO FACE PREGNANCY DISCRIMINATION IN THE WORKPLACE* 3 (2016), <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/by-the-numbers-women-continue-to-face-pregnancy-discrimination-in-the-workplace.pdf> [<https://perma.cc/YLD3-ANM6>], in which the National Partnership for Women and Families analyzes Equal Employment Opportunity Commission and Fair Employment Practice Agency data and reports that black women brought nearly three in ten claims of pregnancy discrimination, twice their share of the workforce.

307. See *supra* notes 239–42 and accompanying text.

308. See, e.g., *Long Over Due: Exploring the Pregnant Workers’ Fairness Act Hearing*, *supra* note 295 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (pointing out that the comparative framework of the PDA fails women, particularly women in low-wage and physically demanding jobs, and that these women also often fall through the cracks of the FMLA).

309. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2018)).

310. Where employers have different accommodation practices for different classes of employees, litigation turns into a dispute about which comparator should determine the question of discrimination. See *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015). As litigation has repeatedly demonstrated, a particular workplace may not have sufficient and relevant cases to determine—on the basis of comparison—whether refusal to accommodate in a particular case is discriminatory. See generally Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 IDAHO L. REV. 825, 851–54 (2016).



under the PDA as all justices recently recognized in *Young*,<sup>311</sup> but there is scarcely any case law enforcing PDA disparate impact claims because judicial resistance has been so great.<sup>312</sup>

For these and other reasons, redress of pregnancy discrimination is expanding beyond rigidly comparative frameworks. Rather than assume a pregnant woman loses her job unless she can find an exact comparator to anchor any claim to accommodation, federal and state laws are moving to a new norm, premised on the assumption that a woman who becomes a mother is entitled to keep her job, just as a man who becomes a father is entitled to keep his.<sup>313</sup>

Congress sought to provide job security of this kind on a universalist model when it enacted the FMLA, but because of objections about expense the statute provides twelve weeks of *unpaid* leave for medical disabilities including pregnancy and only for employees of employers of fifty or more. The statute's self-care and family leave provisions were structured to avoid exacerbating sex stereotyping by employers apprehensive about women taking leave,<sup>314</sup> but bargaining over the costs of the FMLA's universalist coverage resulted in other restrictions and compromises that reduced the FMLA's utility for many low-wage workers.<sup>315</sup> As we have seen, for those pregnant employees who work for

311. Siegel, *supra* note 4, at 1004 (“[B]oth the majority and the dissents recognized that plaintiffs may advance both disparate-impact and disparate-treatment claims of pregnancy discrimination. *Young* reminds us that even when there is no ‘comparator,’ the disparate-impact framework provides an alternative avenue for challenging rigid job descriptions and claiming reasonable accommodations that might allow a pregnant worker to hang onto her job, without imposing onerous costs on her employer.” (footnotes omitted)).

312. See, e.g., *id.* at 982 & n.45.

313. Describing an early state statute mandating that employers provide their employees leave for pregnancy to the extent compatible with business necessity, Justice Marshall observed that its aims were coincident with the PDA's: “By ‘taking pregnancy into account,’ California’s pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs.” Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 289 (1987).

314. Justice Ginsburg recounts this history in her dissent in *Coleman*. See *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 50–51 (2012) (Ginsburg, J., dissenting):

Adhering to equal-treatment feminists’ aim, the self-care provision, 29 U.S.C. § 2612(a)(1) (D), prescribes comprehensive leave for women disabled during pregnancy or while recuperating from childbirth—without singling out pregnancy or childbirth. See S. Rep. No. 101-77, p. 32 (1989) (A “significant benefit of the temporary medical leave provided by this legislation is the form of protection it offers women workers who bear children. Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy-related disability. Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect.”).

315. See Anthony, *supra* note 304, at 474 (“The problems resulting from the FMLA’s limitations are numerous and provide significant barriers to access for some groups, especially women, minorities, and the poor.”); see also Patricia A. Shiu & Stephanie M. Wildman, *Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker’s Right to Job-Protected, Paid Leave*, 21 YALE J. L. & FEM. 119, 157 (2009) (observing that “the absence of paid leave” is “a barrier for those who cannot take leave because they cannot forego their income”).

smaller employers, and for the many workers who need each and every paycheck to support themselves and their family, the FMLA offers little relief; it is estimated that only about a third of working mothers are eligible for and can afford to take FMLA leave.<sup>316</sup> Until the nation provides parents paid leave, the best solution seems to be helping workers stay employed to the extent they can do so consistent with their health and their employer's business needs.

Responding to the inadequacies of the PDA as presently interpreted and of the FMLA as currently designed, twenty-nine states, including some of the most conservative states, have enacted PWFAs imposing on employers a duty to make reasonable accommodations for the pregnant worker.<sup>317</sup> These statutes impose a duty of accommodation that is pregnancy-specific, though not necessarily sex-specific.<sup>318</sup> The states enacting PWFAs impose this duty of reasonable accommodation on grounds of equality—and efficiency.<sup>319</sup> The statutes mark the felt inadequacies of federal antidiscrimination and welfare standards and express a transformed understanding of sex equality in the workplace that must be traced at least in part to the PDA and FMLA whose requirements the states now feel the need to supplement.

Despite the changed understandings of pregnancy discrimination expressed by the passage of PWFAs in twenty-nine states, the persistence of pregnancy discrimination demonstrates the need for a federal law, backed by federal enforcement resources, to build on these state-law developments.<sup>320</sup> A federal PWA would ease the burden on working women who lack the time and resources to bring difficult-to-prove PDA claims,<sup>321</sup> and who are not eligible for or cannot take FMLA leave.

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316. See *supra* note 305 and accompanying text.

317. As of April 2020, twenty-nine states and five localities “provide explicit protections for pregnant workers in need of a modest accommodation.” A BETTER BALANCE, *supra* note 283.

318. The substantive provisions of some PWFAs are drafted with gender-neutral language. See, e.g., Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019) (extending protections to “a job applicant or employee affected by pregnancy, childbirth, or related medical conditions”); CAL. GOV'T CODE § 12945(a)(3)(A)–12945(a)(3)(C) (West 2020) (extending protections to “an employee [with] a condition related to pregnancy, childbirth, or a related medical condition”). Other PWFAs use sex-specific language that refers exclusively to female employees. See, e.g., NEV. REV. STAT. §§ 613.4353–4383 (2019) (“‘Reasonable accommodation’ means an action . . . taken by an employer for a female employee or applicant for employment who has a condition relating to pregnancy, childbirth or a related medical condition.”); N.J. STAT. ANN. § 10:5-12(s) (West 2020) (“[A]n employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation in the workplace.”).

319. See DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT 27–28, 34 (2019) (discussing business case and equality arguments for pregnant workers fairness acts), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf> [<https://perma.cc/9NA6-ADUH>]; *infra* text accompanying notes 336–38.

320. See Kitroeff & Silver-Greenberg, *supra* note 99; Silver-Greenberg & Kitroeff, *supra* note 98.

321. See A BETTER BALANCE, FACT SHEET: THE PREGNANT WORKERS FAIRNESS ACT (2020), <https://www.abetterbalance.org/resources/fairness-for-pregnant-workers-bill-factsheet/> [<https://perma.cc/V9LJ-JQ8A>] (explaining that currently, women who need accommodations must identify another similar person in the workplace who was given an accommodation, and that women lost two-thirds of the cases

It is exactly for this reason that an accommodation mandate can remedy and deter violations of equal protection. The reasonable accommodation framework relieves individual employees of the burden of proving animus: of showing that an employer's inflexible imposition of workplace standards reflects sex stereotyping that flows from the invidious assumption that pregnant workers are not competent or committed workers.<sup>322</sup> By changing tacit or explicit sex-role assumptions about pregnancy that have long structured the workplace, a federal PWFA would remedy and deter stereotyping in the hiring and promotion of young potentially pregnant women.<sup>323</sup>

Finally, it should go without saying, that the record of state action is plentiful in these cases: visible both as administrative action in the section 1983 cases we

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brought after *Young v. UPS* due primarily to the difficulty of meeting this evidentiary standard, which is not imposed on claims for accommodations under the Americans with Disabilities Act of 1990.

322. For testimony developing the case that the PWFA's accommodation mandate combats sex stereotyping in the workplace, see *Long Over Due: Exploring the Pregnant Workers' Fairness Act Hearing*, *supra* note 295, at 21–22 (arguing that the PWFA, like the PDA, combats pernicious sex-role stereotypes and through its accommodation mandate provides equal treatment for pregnant workers).

For commentary on the ways that employers can use inflexible management styles to force pregnant workers out of the workplace, see Bornstein, *supra* note 238, at 21 (“A third way in which employers of low-wage workers demonstrate hostility to pregnancy is by refusing to allow even the smallest of workplace adjustments for pregnant workers—adjustments that employers would often make for other, non-pregnant employees who needed them.”); *id.* at 26 (“The inflexibility of many low-wage jobs is often compounded by rigid attendance policies that penalize workers for justifiable absences, for being minutes late, or even for assumption of future absences—for example, the stereotype that a single mother will be ‘unreliable.’”). For a report illustrating the interplay of employer stereotyping and inflexibility in management style, see NAT'L WOMEN'S L. CTR. & A BETTER BALANCE, IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 7 (2013), [https://www.nwlc.org/wp-content/uploads/2015/08/pregnant\\_workers.pdf](https://www.nwlc.org/wp-content/uploads/2015/08/pregnant_workers.pdf) [<https://perma.cc/JHF4-G3Q6>] (“When a woman worker is already seen as an outsider, her pregnancy and any requests for changes in her job related to the pregnancy can be taken as further evidence that the job is inappropriate for a woman, leading employers to refuse to make accommodations.”); *id.* at 10 (quoting one woman who reported that “[a]lthough my employer provided indoor work for employees with on-the-job injuries and accommodated people with disabilities, I was never permitted to work inside. . . . I feel like I was punished for being pregnant”); *id.* at 11 (reporting that after another woman became pregnant, she asked her manager for permission to avoid heavy lifting at the supermarket, and he responded by giving her more heavy lifting assignments; she miscarried the child; during her next pregnancy, the employer refused accommodation despite accommodating a coworker with a shoulder injury and she was fired); Brigid Schulte, *Discrimination Against Pregnant Workers Has Been Rising, Report Says*, WASH. POST (June 17, 2013), [https://www.washingtonpost.com/local/discrimination-against-pregnant-workers-has-been-rising-report-says/2013/06/17/118937f8-d79c-11e2-a9f2-42ee3912ae0e\\_story.html](https://www.washingtonpost.com/local/discrimination-against-pregnant-workers-has-been-rising-report-says/2013/06/17/118937f8-d79c-11e2-a9f2-42ee3912ae0e_story.html) (highlighting selective accommodation in the story of Peggy Young, who did not receive accommodation for her pregnancy although workers received accommodations for other conditions). For sociology documenting the sex stereotyping of pregnant women, see *supra* text accompanying notes 191–202.

323. On the use of Section Five law to alleviate burdens of proof on individual claimants, see *supra* note 300 and accompanying text. A Section Five statute that accommodates pregnancy in the workplace inhibits sex discrimination in hiring and promoting young women. It also remedies unconstitutional sex stereotyping involving pregnancy. Courts have upheld Title VII's disparate impact provision as a remedy for intentional discrimination that is difficult to prove. See *In re Emp't Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1321–23 (11th Cir. 1999); see also *Okruhlik v. Univ. of Ark.*, 255 F.3d 615, 626 (8th Cir. 2001) (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 987, 990 (1988)); Claude Platten, *Title VII Disparate Impact Suits Against State Governments After Hibbs and Lane*, 55 DUKE L.J. 641 (2005).

have examined<sup>324</sup> and as a thick web of law and norms reaching back to the era of women's disfranchisement in the stories of Henrietta Rodman, Susan Struck, and others throughout this Article. An accommodation statute like the PWFA is at best a modest offset, given the centuries of state action that helped engender the sex-role understandings about a mother's place that continue to limit prospects, both for the pregnant and the potentially pregnant, in the marketplace, education, and politics.

#### CONCLUSION

Only recently has our constitutional law rejected understandings of citizenship that justified women's disfranchisement. At the founding, the law gave male heads of household authority over women and the ability to represent them in voting and the market; and the government continued to enforce that understanding of women as dependent citizens, defined through family relations to men, long after women's enfranchisement, despite women's efforts to secure equal citizenship. As this Article shows, for generations it was commonplace for federal and state law to force pregnant women and new mothers out of employment, dramatically restricting their career prospects and earning capacity and marking women wage-earners as intermittent members of the labor force. In this way, even as the Constitution formally protected woman's right to vote, the law perpetuated meanings, structures, and distributions from the world of woman's disfranchisement and carried forward the understanding of a woman as a dependent of her husband (or father) across domains in new institutional forms.

These arrangements were *constitutional* arrangements, imposed over protest and sanctioned by the Supreme Court under Fourteenth Amendment for most of its life.<sup>325</sup> Even as the Supreme Court declared laws imposing breadwinner/care-giver stereotypes unconstitutional in the 1970s, the Court deferred to laws regulating pregnancy in *Geduldig*,<sup>326</sup> reasoning that pregnancy is an "objectively identifiable physical condition with unique characteristics" and assuming these laws to be "reasonable" unless shown to reflect "invidious discrimination."<sup>327</sup> In initially excepting laws regulating pregnancy from close equal protection scrutiny, equal protection doctrine itself legitimated laws imposing dependency on women as a "natural" incident of reproduction itself.

But this Article tells a story of change as well as continuity. Women mobilized to challenge laws imposing dependency and enforcing discrimination in the public and private spheres; helped provoke national debate over the ERA; filed suits prompting the growth of equal protection doctrine; and organized to pass, amend, and enforce civil rights statutes, including the PDA and the FMLA. Over time,

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324. See notes 239–42 and accompanying text.

325. For accounts showing efforts to protest laws of this kind spanning the nineteenth, twentieth, and twenty-first centuries, see Siegel, *The Nineteenth Amendment*, *supra* note 5; Siegel, *She the People*, *supra* note 5.

326. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

327. *Id.* at 496 n.20; see *supra* Section II.B.

the Nation's understanding of pregnancy discrimination markedly, if unevenly, evolved.<sup>328</sup> And as we have seen, the Supreme Court itself internalized these changes. By the turn of this century, the Supreme Court was emphasizing that women deserve equal protection of the law even when they differ from men, and extending the prohibition on sex-stereotyping to laws governing pregnancy.<sup>329</sup>

We stand then at a pivotal historical juncture. After centuries of law-enforced sex-role stereotyping, pregnancy discrimination is widespread, and continues to play a critical role in limiting opportunities for women in the market and in politics.<sup>330</sup> Yet public norms concerning pregnancy are slowly evolving, have reoriented our equal protection law, and moved twenty-nine states and five localities to enact laws mandating the accommodation of pregnant workers. These numbers suggest that large numbers of Americans are beginning to recognize that it is not right to treat women as the law once taught them to—and that changes slowly appearing in our constitutional and civil rights law express an emergent understanding of equality with broad-based popular support.

In 1974, in *Geduldig*, Justice Stewart assumed that laws drawing distinctions on the basis of pregnancy were as likely “reasonable” as “invidious,” thought of pregnant workers as “expensive,” and concluded that there was “an objective and wholly noninvidious basis for the State’s decision not to create a more comprehensive insurance program than it has.”<sup>331</sup> In the early 1970s, the bench did not recognize that apparently objective judgments about cost can themselves be the site of sex stereotyping—as Congress recognized in passing the PDA.<sup>332</sup> As late as the 1990s, Richard Posner interpreted PDA disparate-treatment and disparate-impact claims in a cost-benefit analysis that authorized generalizations about a pregnant worker’s likely failure to return to work, speculated about a pregnant worker’s low value to the employer, and showed no awareness that judgments about cost could be informed by sex stereotyping.<sup>333</sup>

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328. See *supra* Sections I.B, II.A–C.

329. See *supra* Section III.D.

330. See *supra* Sections I.C, II.C; *supra* text accompanying notes 191–202.

331. *Geduldig*, 417 U.S. at 495–96, 496 & n.20.

332. See, e.g., 123 CONG. REC. 10,583 (1977) (statement of Rep. Augustus F. Hawkins), reprinted in LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, *supra* note 181, at 27 (noting that General Electric put forth a cost estimate of \$1.5 billion in *Gilbert*, but arguing that this figure was “vastly inflated and, indeed, based on assumptions which themselves involve stereotypes based on sex”); see also S. Rep. No. 95-331, at 9 (1977), reprinted in LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, *supra* note 181, at 46 (“Written testimony submitted by the Chamber of Commerce of the United States, and testimony by representatives of the American Council of Life Insurance and the Health Insurance Association of America, indicated that the total cost of this bill might be as high as \$1.7 billion.”); 123 CONG. REC. 29,642 (1977) (statement of Sen. Birch Bayh), reprinted in LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, *supra* note 181, at 75 (noting that the U.S. Department of Labor estimated the cost of the bill in disability insurance at \$119.5 million).

333. See *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 737–38 (7th Cir. 1994). Judge Posner offered a thought experiment to provide cost-benefit guidance in interpreting Title VII, in which he offered no warning against generalizing about members of a protected class or warning about the content of the particular sex stereotypes directed at the group in question. Posner’s assumptions about accommodating pregnant women are also expressed in his refusal to recognize disparate impact claims under the PDA.

State pregnant workers fairness acts belong to a new world; they grew out of the world of the PDA and the FMLA, the world of *Virginia* and *Hibbs*. With the passage of antidiscrimination laws like the PDA and with greatly improved societal mechanisms for coordinating work and family-care arrangements, expectations about the value and reliability of working pregnant woman have begun to change, reflecting an evolution in norms that antidiscrimination law has helped prompt.<sup>334</sup> The state PWFAs enacted in over half the country provide clear and compelling evidence—in addition to sociological studies, PDA case law, and the Supreme Court’s own case law—that the nation’s understanding of what is “reasonable” and what is “invidious” in the treatment of pregnant workers has evolved dramatically in the last half century.

Half a century after *Geduldig*, even conservative states enacting PWFAs can grasp the business case for providing reasonable accommodation for pregnant employees.<sup>335</sup> Half a century after *Geduldig*, even conservative states enacting PWFAs recognize equality reasons for providing reasonable accommodation for pregnant employees; a law promoting gender equality can be justified as probusiness, profamily, and prolife. In Utah, a PWFA “benefits the economy and is good for business. Providing reasonable accommodations improves recruitment and retention, increases employee satisfaction and productivity, reduces absenteeism, and improves workplace safety. Our economy benefits when women are able keep working, continue supporting their families, and avoid getting on public assistance programs.”<sup>336</sup> Accommodations “promote healthy families. For many women, work is not a choice. Women who are denied accommodations but must work have no choice often but to continue working under unhealthy conditions which may pose a risk to them or their unborn child.”<sup>337</sup> As Nevada Senator Nicole Cannizzaro put it: “It is important for women to be able to say that they want to or have to provide for their families but also that they want to have families to begin with. These two decisions should not be mutually exclusive. It is shameful women are still being fired, forced out of their jobs or denied

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*See, e.g., id.* at 738 (“Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees. . . . But, properly understood, disparate impact as a theory of liability is a means of dealing with the residues of past discrimination, rather than a warrant for favoritism.”).

334. *Cf. Siegel, supra* note 4, at 996 n.103 (noting that, in the context of Title IX and sports, antidiscrimination law has supported coordination enabling the emergence of new social norms).

335. *See Hearing on H.B. 1463 Before the H. Comm. on Indus., Bus. & Labor*, 64th Leg., Reg. Sess. attachment 1, at 3 (N.D. 2015) [hereinafter *Hearing on H.B. 1463*] (statement of Rep. Naomi Muscha (“I think common sense tells us that treating employees well results in good bottom lines for businesses. High employee morale contributes to raising other aspects of a business such as recruitment and retention of employees, safety, productivity, and reduced absenteeism.”); *cf. H.B. 8*, 98th Gen. Assemb., Reg. Sess. (Ill. 2015) (“Enabling pregnant workers to work through pregnancy is good for businesses. Providing pregnant employees with reasonable, temporary accommodations increases worker productivity, retention, and morale, decreases re-training costs, and reduces health care costs associated with pregnancy complications.”)).

336. *Antidiscrimination and Workplace Accommodations Revisions: Hearing on S.B. 59*, 2016 Leg., Gen. Sess. at 39:28 (Utah 2016) (statement of Rep. Rebecca Edwards), <https://le.utah.gov/av/floorArchive.jsp?markerID=95717>.

337. *Id.* at 39:13.

employment opportunities simply because they become pregnant.”<sup>338</sup> *Young v. UPS*, the most recent PDA case, demonstrates that conservatives on the Court may be receptive where accommodating pregnancy is concerned.<sup>339</sup> (As another Nebraska senator who identified as prolife observed, “I believe this is a bill that we need to ensure that women can confidently remain employed as they are nursing children and that’s an important part of . . . our work force.”<sup>340</sup>)

The great and striking development in this story is that as the Nineteenth Amendment turns 100, Americans of many political stripes are recognizing the wrong of forcing pregnant employees out of work. Legislators enacting accommodation mandates reason that the exclusions harm workers’ job prospects, health, families, and businesses all at once. These judgments are of critical importance: they represent an emergent public understanding of equality spanning communities with divergent perspectives on the family that legislators and judges can enforce.

But this emergent understanding of equality is one that will require law to enforce. We know that pregnancy discrimination remains an immense practical problem in workplaces of every kind.<sup>341</sup> As we have seen, large numbers of Americans openly report that they consider a woman’s family responsibilities in determining her fitness to hold office.<sup>342</sup> Meanings and arrangements entrenched by centuries of law do not simply dissipate; they evolve into new forms and stubbornly persist, structuring work and politics and multiple domains of social life. Because meanings traverse domains, the question happily can be addressed from the margins and the center, concurrently, through law, politics, and culture. The newly enacted accommodation statutes have begun to address the problem. Just over half the states have enacted them, and the statutes are so new that it will take at least another decade to discover the most practical ways to enforce them and for federal civil rights legislation, existing and future, to incorporate these new

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338. Minutes of the Sen. Comm. on Commerce, Labor & Energy, 79th Sess. 5 (Nev. 2017) (statement of Sen. Nicole Cannizzaro), <https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Meeting/6191?p=2006191> [<https://perma.cc/LE8D-7KAM>].

Many legislators emphasized that low-wage workers have a particular need for reasonable accommodations. Representative Naomi Muscha (D, sponsor) of North Dakota said, “Statistics show that the majority of pregnant workers who need some slight accommodations are low-wage earners or in nontraditional occupations. Very frequently the women are primary breadwinners in the family or even the sole breadwinner. If they are forced to leave work unpaid, it’s not just the woman who suffers, but rather the whole family.” *Hearing on H.B. 1463, supra* note 335, attachment 1, at 3 (statement of Rep. Naomi Muscha).

339. 575 U.S. 206 (2015). Chief Justice Roberts joined Justice Breyer’s majority opinion in *Young* along with Justices Ginsburg, Sotomayor, and Kagan; Justice Alito filed a separate concurrence. *See generally* Katherine Shaw, “*Similar in Their Ability or Inability to Work*”: *Young v. UPS* and the Meaning of Pregnancy Discrimination, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES, supra* note 14, at 205. Shaw discusses coalition politics in *Young* and the PDA before it. *See id.* at 216–17, 222.

340. Mar. 12, 2015 Floor Debate, 104th Sess. 45 (Neb. 2015) (statement of Sen. Lydia Brasch), <https://nebraskalegislature.gov/FloorDocs/104/PDF/Transcripts/FloorDebate/r1day44.pdf> [<https://perma.cc/93YJ-L3VQ>].

341. *See supra* notes 98–99 and accompanying text; *supra* notes 302–07 and accompanying text.

342. *See supra* notes 122–23 and accompanying text.

approaches to enforcing longstanding principles requiring equal treatment and prohibiting sex-stereotyping.

As the Nineteenth Amendment enters its second century, it is time for officials in federal, state, and local government to enforce the Nineteenth Amendment together with the Reconstruction Amendments, with an equally dynamic understanding of equal citizenship.<sup>343</sup> Read together, the Amendments provide ample authority to redress norms and structures in the workplace and in politics that are the legacy of dependent citizenship.<sup>344</sup>

But the history chronicled in these pages reminds us of law's deep duality. After centuries of enforcing dependent citizenship over generations and across domains, can law finally break this tradition? Can law reimagine and support the citizen who is active in the household, in the market, and in democratic politics in the twenty-first century?

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343. See Siegel, *The Nineteenth Amendment*, *supra* note 5, at 451 & n.1 (observing that “the nation’s understanding of transformative amendments may evolve with the constitutional community they help reshape” and that it was “nearly a century after the Fourteenth Amendment’s ratification when the Court made clear that equal protection prohibited laws imposing racial segregation”).

344. See, e.g., *id.* at 478–89 (discussing courts’ and Congress’s power to enforce equal citizenship under the Reconstruction Amendments and the Nineteenth Amendments).