Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978

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> Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice . . . an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.
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> – Justice William H. Rehnquist, writing for the majority in *General Electric Co. v. Gilbert*[1]

INTRODUCTION

The ink had barely dried on the Supreme Court's 1976 opinion in *General Electric Co. v. Gilbert* when a coalition of women's activists, feminist lawyers, civil rights groups, and labor organizations began drafting legislation to nullify the Court's ruling. Shortly thereafter, Congress enacted the 1978 Pregnancy Discrimination Act (PDA).[2] The PDA overturned *Gilbert* by amending Title VII of the 1964 Civil Rights Act[3] to explicitly prohibit employment discrimination on the basis of pregnancy or pregnancy-related conditions. The PDA made clear once and for all that pregnancy discrimination was, by definition, sex discrimination barred by Title VII.

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1. 429 U.S. 125, 136 (1976).
2. Pub. L. No. 95-555, 92 Stat. 2076 (1978).
3. 42 U.S.C. § 2000e-e17 (2000).

This Article traces the historical, legal, and cultural forces that converged to place the rights of pregnant women at the forefront of employment discrimination policy in the early- to mid-1970s. The story, to be sure, is a complicated and multi-dimensional one, and space limitations preclude a comprehensive narrative that fully captures all the contours and complexities of this crucial event in society's ongoing struggle to combat sex discrimination in the workplace. Rather, I chronicle what I consider to be among the key contexts and sequences of action that helped usher in transformations in both the symbolism and substance of sex discrimination law in ways that led eventually to the PDA. Such developments certainly include, but are not limited to, major judicial rulings. Making sense of pregnancy discrimination law requires that we take seriously the wider, dynamic contexts in which courts and judges were situated: contexts that include the early history of Title VII's sex provision; the fledgling attempts of the Equal Employment Opportunity Commission (EEOC) to interpret the sex provision; and key organizational and philosophical transformations in a resurgent women's movement increasingly committed to full equal treatment in the workplace.

Early debates over pregnancy discrimination unfolded within a broader cultural and legal examination of gender roles and stereotypes in American society generally, and in the workforce specifically. Many gender-based job classifications were grounded in taken-for-granted sex roles and stereotypes that justified disparate treatment in the workplace. And since pregnancy was arguably the single best example of gender difference, it reinforced widely held assumptions that women's childbearing capacity was paramount to all other social roles, including those of job and career. Of course the roots of these debates stretched back decades and did not spontaneously appear in the mid-1960s. Still, the historical record strongly suggests that the somewhat unexpected inclusion of sex in Title VII of the 1964 Civil Rights Act's prohibition of employment discrimination lit a spark that quickly elevated women's employment rights—including the rights of pregnant women—from the periphery to the center of American law, culture, and politics.

All that said, this Article is not an analysis of the PDA itself. I do not provide an in-depth examination of the legislative debate over the PDA, although I do briefly reference some of the highlights of that debate in later sections. Nor does my time frame go beyond passage of the Act in 1978. Thus the PDA's subsequent impact on society—legally, culturally, politically, or otherwise—is outside the scope of this Article. To restate, my core objective is to outline and illuminate the key historical sequences and socio-legal raw materials that, together, helped transform the legal rules and cultural sensibilities about the employment rights of pregnant workers, culminating with the PDA's enactment in 1978.

I. TITLE VII'S SEX PROVISION AND THE WOMEN'S MOVEMENT

Many (but not all) legal scholars and women's movement historians concur that Title VII's prohibition of sex discrimination was a historical accident.[4] The most influential women's groups at the time—organized largely in the "status of women" committees originally created by President Kennedy—did not actively lobby for the sex provision. Rather, it is widely understood that a conservative southern Congressman proposed the addition in an amendment as a way of potentially derailing the pending civil rights bill. After brief debate on the House floor, the amendment passed, cleared the Senate with apparently even less debate, and was signed into law as part of Title VII of the Civil Rights Act of 1964.[5]

Title VII's sex provision caught many women's activists off-guard. Most women's organizations generally favored equal employment opportunities for women; yet this general consensus was complicated by their simultaneous—and longstanding—commitment to protective labor legislation for women. Protective laws were originally designed—by women's advocates themselves—to shield women from dangerous or burdensome work requirements that interfered with their primary roles as mothers, wives, and homemakers.[6] By the mid-1960s, however, even proponents had grown skeptical that many protective laws, such as maximum hours and weightlifting limits, were out of date and put substantial obstacles in the path of women's career advancement. Nonetheless, many of these same women's leaders did not favor repeal of protective laws altogether; instead, they believed the laws should be updated in ways that still offered women necessary and genuine protections without unduly interfering with their work and career opportunities. This position was best summarized by Mary Keyserling, head of the Women's Bureau within the Department of Labor, at a White House conference on equal employment opportunity shortly after Title VII's passage: "[T]hese laws were

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4. *See* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972, at 136-39 (1990); CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES 1945-1968 (1988); Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. OF SOC. 1718, 1732-33 (2006).

5. Some Title VII scholars, however, argue that the derailment view is overstated. Jo Freeman, for example, suggests that the insertion of the sex provision was not as cynical or deceptive as others assume. She provides evidence that a handful of more conservative women's advocates had lobbied Rep. Smith behind the scenes, thus calling into question the conclusion that Smith's amendment was little more than a spontaneous joke. *See* Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991); *see also* Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37 (1983).

6. *See, e.g.*, JUDITH BAER, THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION (1978); JO FREEMAN, THE POLITICS OF WOMEN'S LIBERATION (1975); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992).

put on the books by women's organizations in the interest of women . . . [and] sought to eliminate the real abuses which prevailed widely in industry[7]. . . the freeing of women from employment discrimination does not demand that they all have identical treatment."[8]

Yet there was a fundamental problem: Title VII was unambiguously written in the language of equal treatment, making it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[9] Employers were thus prohibited from discriminating on account of sex. But protective labor laws, by definition, discriminated on account of sex. This simple fact intensified debate between women's advocates who sought to retain protective laws, and a growing number who believed that such laws were no longer necessary or beneficial for women, and thus should be rescinded altogether.[10] This debate was far more than mere technical differences over policy, however. Disagreements over the status of protective laws under Title VII contributed to an accelerating and potentially transformative cultural discourse of gender: a discourse that embraced rapidly changing ideas about sex stereotypes, taken-for-granted gender roles, and how both impacted women's opportunities outside the home generally, and in the workplace specifically. Within a few years, the discourse of full *equality* for women had gotten the clear upper hand over traditional gender sensibilities that assumed women were fundamentally different—biologically and culturally—than men in ways that justified female-specific protections in the workplace.[11] Either way, by the time major conflict emerged over pregnancy discrimination in the early 1970s, the EEOC, several state anti-discrimination agencies, and many state and federal courts had already begun (with some notable exceptions) to interpret Title VII to require full legal equality for women workers.

II. THE EEOC AND THE EMERGENCE OF NOW

After several years of intense debate in the mid-to-late 1960s, the EEOC by the early 1970s had generally settled on a strong equal treatment interpretation of Title VII's sex provision. For example, Title VII carved out an exception to the non-discrimination requirement in instances where sex was a "bona fide

7. EEOC, White House Conference on Equal Employment Opportunity, Discrimination Because of Sex 22 (August 19-20, 1965) (panel transcript available in the EEOC Library, Washington, D.C.).

8. *Id.* at 26.

9. 42 U.S.C. §2000e-2(a)(1) (2000).

10. *See* Mary Eastwood & Pauli Murray, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 248-53 (1965) (discussing controversy over Title VII's interaction with state protective laws and concluding that it would be difficult to harmonize the anti-discrimination command with the state laws).

11. *See* Pedriana, *supra* note 4.

occupational qualification" (BFOQ).[12] Spurred on by women's activists, the EEOC issued interpretive guidelines that narrowly construed the BFOQ exception: "[T]he bona fide occupational qualification will not be allowed on the bases of assumptions of employment characteristics in general or stereotyped images of the sexes."[13] Yet in a bizarre reversal of this general position, the agency subsequently ruled that employers could continue to place job ads in sex-segregated columns in the classified employment sections of newspapers (for example, column headings that read "help wanted male" or "help wanted female"). In fact, the EEOC's early intransigence on discriminatory help-wanted ads stunned and angered virtually all women's advocates, and was among the defining conflicts that led to formation of the National Organization for Women (NOW) in 1966.[14] After battling for several years with the EEOC and major newspaper publishers, NOW and other women's groups finally convinced the Commission to rewrite its employment advertising guidelines to flatly prohibit employers from placing job ads in sex-designated newspaper columns, or to state in any other way a gender preference in job advertisements.[15]

Once NOW entered the political scene in late 1966, activists quickly embraced a full commitment to equal treatment under the law, and any lingering debates over protective policies abruptly disappeared. Almost immediately, NOW pressured both the EEOC and the federal courts to dismantle all sex-specific employment practices, including protective labor laws. For several years the EEOC had waffled—in ways that bordered on incoherence—on the question of whether Title VII's blanket ban on sex discrimination preempted state laws that required sex-specific protective classifications. The Commission first ruled that employers could cite state protective laws as a valid BFOQ to avoid Title VII liability; shortly thereafter it changed its mind and decided to punt the entire issue to the courts; the Commission later shifted again by stating it would deal with protective laws on a case-by-case basis.[16]

Meanwhile, NOW continued to push the EEOC to invalidate state protective laws and filed a series of key lawsuits in the federal courts. In *Weeks v. Southern Bell Telephone & Telegraph Co.*,[17] the Fifth Circuit reversed the

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12. 42 U.S.C. §2000e-2(e) (2000).

13. 1 EEOC, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION DURING THE ADMINISTRATION OF LYNDON B. JOHNSON, NOVEMBER 1963–JANUARY 1969, at 239 (1968) (available at Lyndon Baines Johnson Library, Austin, TX).

14. *See* BETTY FRIEDAN, IT CHANGED MY LIFE: WRITINGS ON THE WOMEN'S MOVEMENT (1991); Freeman, *supra* note 5; Nicholas Pedriana, *Help Wanted NOW: Legal Resources, the Women's Movement, and the Battle Over Sex-Segregated Job Advertisements*, 51 SOC. PROBLEMS 182 (2004).

15. Press Release, EEOC, EEOC Issues Guidelines on Classified Advertising, Rules Separate Male-Female Ads Illegal (Aug. 6, 1968) (on file with author); *see also* HARRISON, *supra* note 4, at 190; Pedriana, *supra* note 14; *Newspaper Want-Ads*, WALL ST. J., Aug. 6, 1968, at 1.

16. *See* Pedriana, *supra* note 4.

17. 408 F.2d 228 (5th Cir. 1969).

district court's ruling that Southern Bell's blanket exclusion of women from the job of "switchman" fell under Title VII's BFOQ exemption. Two years later in *Rosenberg v. Southern Pacific*,[18] the Ninth Circuit not only affirmed the district court's invalidation of California's twenty-five-pound lifting limit for women workers, it ruled more generally that *all* state protective laws illegally discriminated against women, writing, "It would appear that these state law limitations upon female labor run contrary to the general objectives of Title VII of the Civil Rights Act of 1964, as reviewed above, and are therefore, by virtue of the Supremacy Clause, supplanted by Title VII."[19] In response, the EEOC unequivocally ruled—in yet another update of its interpretive guidelines—that state protective laws violated Title VII and could not be cited as a BFOQ defense. Within a few years, nearly all state protective policies disappeared forever.[20]

In short, by the time major cultural and legal debate over the rights of pregnant workers began in the early 1970s, the women's movement, the courts, and the EEOC had already converged—however clunkily and disjointedly—on a general, across-the-board equal treatment approach to sex discrimination and women's employment rights. Under Title VII, employers could no longer rely and act upon traditional gender stereotypes to justify sex classifications in the workplace. The law required that women workers be treated as individuals rather than as members of a generalized class subject to outdated cultural sensibilities and practices. There was perhaps good reason, then, for cautious optimism that the issue of pregnancy would be swept up in the equal treatment momentum that was helping redefine the discourse of gender in and out of the women's movement, the EEOC, and the courts. For example, in 1972 the EEOC issued new interpretive guidelines that unambiguously required equal treatment of pregnant workers: "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment."[21]

In addition, a solid judicial consensus emerged in the district and appellate courts that pregnancy-based classifications were by definition sex-based classifications prohibited by Title VII. That said, the earliest pregnancy cases to reach the federal courts were constitutional challenges brought against state and municipal employers[22] under the Equal Protection Clause of the Fourteenth

18. 444 F.2d 1219 (9th Cir. 1971).
19. *Id.* at 1225.
20. *See* BAER, *supra* note 6; Freeman, *supra* note 5.
21. 37 Fed. Reg. 6837 § 1604.10(b) (Mar. 31, 1972).
22. This was possible because state and local employers were not covered by Title VII until 1972.

Amendment.[23] Several of these cases foreshadowed many of the arguments and rulings that would soon follow in the subsequent wave of pregnancy discrimination cases under Title VII.

III. PREGNANCY DISCRIMINATION AND THE FOURTEENTH AMENDMENT

In a series of sex-discrimination cases in the early 1970s, the Supreme Court had struck down several state-imposed gender classifications in part by subjecting sex distinctions to greater judicial scrutiny.[24] Thus, the Equal Protection Clause seemed a promising legal avenue for women workers alleging pregnancy discrimination by their government employers. The Supreme Court in 1974 first confronted such a claim in *Cleveland Board of Education v. LaFleur*,[25] a typical early pregnancy discrimination case. Public school teachers who became pregnant were required to take maternity leave beginning at the fifth month of pregnancy. LaFleur challenged the policy, arguing that the five-month rule was arbitrary and failed to acknowledge the growing evidence and medical consensus that many women were capable of working well into the later stages of their pregnancies. Thus, the five-month rule was driven by inaccurate gender stereotypes rather than an individualized determination as to whether a pregnant school teacher could adequately perform her job duties. The district court disagreed and ruled that the maternity leave policy did not violate the Equal Protection Clause. The court accepted the Board's argument that the policy was a constitutionally permissible means to ensure its legitimate interests in ensuring continuity of classroom education and protecting pregnant teachers' health. The Court of Appeals for the Sixth Circuit reversed, arguing that the Board's maternity leave policy discriminated against pregnant women without constitutional justification.

The Supreme Court affirmed that the five-month rule violated the Fourteenth Amendment, but based its decision on the Due Process Clause, rather than on equal protection grounds. Building on the Court's substantive due process and privacy rights jurisprudence—including *Griswold v. Connecticut*[26] and *Roe v. Wade*[27]—Justice Stewart wrote that the right to

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23. *See, e.g.*, Seaman v. Spring Lake Park Sch. Dist., 387 F. Supp. 1168 (D. Minn. 1974); Crawford v. Cushman, 378 F. Supp. 717 (D. Vt. 1974), *rev'd*, 531 F.2d 1114 (2d Cir. 1976); deLaurier v. San Diego Sch. Dist., No. 74-176-E, 1974 U.S. Dist. LEXIS 6115 (S.D. Cal. Oct. 24, 1974); Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973); Green v. Waterford Bd. of Educ., 349 F. Supp. 687 (D. Conn. 1972), *rev'd*, 473 F.2d 629 (2d Cir. 1973); Williams v. S.F. Sch. Dist., 340 F. Supp. 438 (N.D. Cal. 1972); Schattman v. Tex. Employment Comm'n, 330 F. Supp. 328 (W.D. Tex. 1971), *rev'd*, 459 F.2d 32 (5th Cir. 1972); Cohen v. Chesterfield Sch. Bd., 326 F. Supp. 1159 (E.D. Va. 1971), *aff'd*, 467 F.2d 262 (4th Cir. 1972), *rev'd en banc*, 474 F.2d 395 (4th Cir. 1973).

24. Frontiero v. Richardson, 411 U.S. 677 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Reed v. Reed, 404 U.S. 71 (1971).

25. 414 U.S. 642 (1974).

26. 381 U.S. 479 (1965).

27. 410 U.S. 113 (1973).

decide whether or not to bear a child was fundamental, and thus that state policies that substantially interfered with such a decision were an unconstitutional infringement on individual liberty. Mandatory leave policies that forced women out of the workplace for extended periods might put substantial economic and/or career pressure on them to delay or forego pregnancy, thereby unduly interfering with fundamental rights involving family and childbearing. Yet because the Court avoided the case's equal protection dimension, it left key questions about pregnancy-based classifications unanswered. Most importantly, *LaFleur* did not directly address whether pregnancy discrimination was tantamount to sex discrimination, a central question—in and out of the courts—that would eventually lead to passage of the PDA in 1978.

In *Geduldig v. Aiello*[28] the Supreme Court confronted another constitutional question that would subsequently become among the most contested statutory questions about pregnancy discrimination under Title VII: whether employers could legally exclude pregnancy from temporary disability, sick leave, or other income protection benefits. At issue was California's disability insurance fund for private employees experiencing a temporary disability or sickness not covered by workman's compensation. The fund, however, excluded certain conditions including those associated with normal pregnancy. The Court found no constitutional violation, writing that "[the fund] does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program. The classification challenged in this case relates to the asserted underinclusiveness of the set of risks that the State has selected to insure."[29] Nor according to the Court was there any evidence "that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program."[30]

Geduldig was not a Title VII case, but it was a possible signal of things to come. A majority of the justices appeared to think that *pregnancy*-based distinctions generally, and with respect to benefits packages specifically, was not a *sex*-based classification. If so, then not only did pregnancy-based exclusions like the one in *Geduldig* not violate the Constitution, but they quite possibly did not violate Title VII, either.

IV. PREGNANCY AND TITLE VII IN THE LOWER COURTS

Throughout the early 1970s, the lower federal courts were extremely receptive to Title VII plaintiffs claiming pregnancy discrimination. In a

28. 417 U.S. 484 (1974).
29. *Id.* at 494.
30. *Id.* at 496.

substantial number of cases between 1971 and 1975, district courts addressed the substantive question of whether pregnancy discrimination was indistinguishable from sex discrimination prohibited by Title VII. The vast majority concluded that it was. One court, dealing with a board of education's maternity leave policy bluntly wrote, "It is the opinion of this Court that whereas here a woman is compelled to take maternity leave of absence because of pregnancy and where such person is capable of performing her job adequately, that to force maternity leave upon her is a violation [of Title VII]."[31] Another court, in striking down a company's exclusion of pregnancy from its temporary disability plan concluded: "[P]regnancy is the only disability . . . not covered by the Income Protection Plan. Pregnancy is a condition limited to women. Conditions limited to men, such as prostate troubles, are not excluded, nor is any exclusion provided for a number of illnesses whose incidence among males is greatly predominant."[32] Other district courts made similar findings and employed similar language.[33]

The appellate circuits were equally friendly to pregnancy discrimination claims. In a series of key decisions in 1975, appeals courts affirmed lower court rulings that Title VII prohibited pregnancy discrimination in nearly all its forms[34] and reversed courts that concluded otherwise.[35] One of the affirmed cases was *Gilbert v. General Electric.*[36] At issue was G.E.'s non-occupational sickness and accident plan that excluded "sickness or other disabilities arising

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31. Singer v. Mahonig Bd. of Mental Retardation, 379 F. Supp. 986, 989 (N.D. Ohio 1974), *aff'd*, 519 F.2d 748 (6th Cir. 1975).

32. Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1162 (W.D. Pa. 1974), *aff'd*, 511 F.2d 199 (3d Cir. 1975).

33. *See* EEOC v. Barnes Hosp., No. 75-545 C(3), 1975 U.S. Dist. LEXIS 14682 (E.D. Mo. Dec. 22, 1975); Stansell v. Sherman-Williams Co., 404 F. Supp. 696 (N.D. Ga. 1975); McArthur v. S. Airways, 404 F. Supp. 508 (N.D. Ga. 1975); Polston v. Metro. Life Ins. Co., No. 7685-A, 1975 U.S. Dist. LEXIS 16516 (W.D. Ky. Aug. 19, 1975); Oakland Fed'n of Teachers v. Oakland United Sch. Dist., No. C74 1768 WTS, 1975 U.S. Dist. LEXIS 11410 (N.D. Cal. July 16, 1975); Valiant v. Bristol-Meyers Co., No. 74-137-C(2), 1975 U.S. Dist. LEXIS 12198 (E.D. Mo. May 27, 1975); Liss v. Sch. Dist., 396 F. Supp. 1035 (E.D. Mo. 1975); Zichy v. Philadelphia, 392 F. Supp. 338 (E.D. Pa. 1975); Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784 (N.D. Iowa 1975); Satty v. Nashville Gas Co., 384 F. Supp. 765 (M.D. Tenn. 1974), *aff'd*, 522 F.2d 850 (6th Cir. 1975); Vineyard v. Hollister Elementary Sch. Dist., No. C-73-1821 WHO, 1974 U.S. Dist. LEXIS 5987 (N.D. Cal. Nov. 1, 1974); Hutchison v. Lake Oswego Sch. Dist., 374 F. Supp. 1056 (D. Or. 1974), *aff'd*, 519 F. 2d 961 (9th Cir. 1975); Farkas v. S.W. City Sch. Dist., No. C2 73-169, 1974 U.S. Dist. LEXIS 9094 (S.D. Ohio Apr. 18, 1974); Gilbert v. General Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975); Lillo v. Plymouth Local Bd. of Educ., 1973 U.S. Dist. LEXIS 11651 (N.D. Ohio Oct. 3, 1973); Dessenberg v. Am. Metal Forming Co., No. C72-48T, 1973 U.S. Dist. LEXIS 11650 (N.D. Ohio Oct. 3, 1973); Healen v. E. Airlines, Inc., No. 18097, 1973 U.S. Dist. LEXIS 11973 (N.D. Ga. Sept. 10, 1973); Vick v. Tex. Employment Comm'n, No. 70-H-1164, 1973 U.S. Dist. LEXIS 12104 (S.D. Tex. Aug. 30, 1973); Doe v. Osteopathic Hosp., 333 F. Supp. 1357 (D. Kan. 1971); Schattman v. Texas Employment Comm'n, 330 F. Supp. 328 (W.D. Tex. 1971).

34. Berg v. Richmond United Sch. Dist., 528 F.2d 1208 (9th Cir. 1975); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975); Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975); Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199 (3d Cir. 1975).

35. Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975); Comm'n Workers v. AT&T, 513 F.2d 1024 (2d Cir. 1975).

36. Gilbert v. General Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974), *aff'd* 519 F.2d 661 (4th Cir. 1975), *rev'd* 429 U.S. 125 (1976).

from pregnancy, miscarriage or childbirth."[37] A year earlier, the district court had struck down G.E.'s policy, relying heavily on the EEOC's revised 1972 guidelines requiring that pregnancy be treated like any other temporary disability. In affirming the district court, the Fourth Circuit spoke clearly:

> Pregnancy is a condition unique to women and a basic characteristic of their sex. A disability program which, while granting disability benefits generally, denies such benefits expressly for disability arising out of pregnancy, a disability possible only among women, is manifestly one which can result in a less comprehensive program of employee compensation and benefits for women employees than for men employees; and would do so on the basis of sex. . . . In so concluding, we are following the opinion reached by most of the Courts which have considered the issue and are giving effect to the construction of the Act as adopted by the Equal Employment Opportunity Commission in its guidelines, to which the courts are directed to give "great deference" in applying the Act.[38]

The court further addressed GE's claim that the Supreme Court's recent ruling in *Geduldig* that pregnancy-excluding benefits plans did not unlawfully discriminate on the basis of sex should control the present case. The appeals court countered that *Geduldig* was a *constitutional* challenge to a legislative act analyzed under the Fourteenth Amendment's Equal Protection Clause. In contrast, GE's plan was challenged under *statutory* law:

> To satisfy constitutional Equal Protection standards, a discrimination need only be "rationally supportable" and that was the situation in Aiello [v. Geduldig] . . . . Title VII, however, authorizes no such "rationality" test . . . . It represents a flat and absolute prohibition against all sex discrimination in conditions of employment . . . . It outlaws all sex discrimination in the conditions of employment . . . . Its denial of pregnancy-related disability from the application of its employee disability benefit program, in our opinion, falls clearly within the prohibitions of Title VII and Aiello confers no immunity for such denial. The District Court properly so held.[39]

Thus by the time *General Electric v. Gilbert* reached the Supreme Court, almost all the district courts, and six appeals courts, had each come to the same conclusion that Title VII prohibited pregnancy discrimination, including exclusion of pregnancy from benefits packages.[40] Nonetheless, the Court's 6-3 majority reversed the Fourth Circuit, ruling that G.E.'s exclusion of pregnancy from its sickness and accident plan did not violate Title VII. The Court acknowledged that, unlike *Geduldig*, *Gilbert* was a Title VII case not technically subject to constitutional/equal protection scrutiny. Yet the majority

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37. *Id.* at 368-69.
38. 519 F.2d at 664.
39. *Id.* at 667.
40. *See, e.g.*, *Equality Sometimes*, N.Y. TIMES, Dec. 11, 1976, at 17; cases cited *supra* note 33.

saw a fundamental continuity between the two cases that transcended constitutional versus statutory distinctions. The Court argued, as it had in *Geduldig*, that differences in treatment on account of pregnancy were not per se differences in treatment on account of sex. Rather, pregnancy was a particular condition and pregnant women were simply a subset of women generally. Thus when an employer excluded pregnancy from temporary disabilities plans, it was not, as a matter of law, discriminating on the basis of sex at all, but only treating one particular medical condition less favorably than others:

> There is no more showing in this case than there was in Geduldig that the exclusion of pregnancy benefits is a mere "pretex[t] designed to effect an invidious discrimination against the members of one sex or the other" . . . . [W]e have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex. Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability . . . . We do not therefore infer that the exclusion of pregnancy disability benefits from petitioner's plan is a simple pretext for discriminating against women.[41]

V. FROM *GILBERT* TO THE PREGNANCY DISCRIMINATION ACT

The response among women's activists to the *Gilbert* decision was immediate and vocal. In light of the movement's recent transformation towards unequivocal embrace of equal treatment, the ruling was harshly criticized as an affront to workplace equality. At the same time, by permitting exclusion of pregnancy-related benefits, *Gilbert* was also assailed, as one NOW spokesperson put it, as a "slap in the face to motherhood."[42] Two days after it was handed down, the *New York Times* wrote that the decision "outraged women's rights advocates . . . . labor and women's groups said yesterday that they were preparing legislation to counteract the decision and require that disability plans provide for the payment of wages to women out of work because of pregnancy."[43] A few days later, feminist lawyers and women's groups announced formation of the "Coalition to End Discrimination Against Pregnant Workers" and vowed to "work to draft legislation to combat the high court ruling."[44] Shortly thereafter, Congress introduced legislation reversing *Gilbert* and held hearings beginning in early 1977.

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41. 429 U.S. at 136.

42. *Feminist Leaders Plan Coalition for Law Aiding Pregnant Women*, N.Y. TIMES, Dec. 15, 1976, at 40.

43. Damon Stetson, *Women Vow Fight for Pregnancy Pay*, N.Y. TIMES, Dec. 9, 1976, at 19.

44. *Feminist Leaders*, *supra* note 42.

The proposed legislation was remarkably simple. The PDA would do nothing more than add a single, short paragraph (subsection "k") to Section 701 of Title VII, which read:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in Section 703(h) of this title shall be interpreted to permit otherwise.[45]

In addition to women's advocates, a long list of witnesses urging enactment testified at House and Senate hearings including members of Congress, the EEOC, and other government agencies, along with feminist lawyers, physicians, and representatives from the AFL-CIO; the International Union of Electrical, Radio, and Machine Workers; the American Civil Liberties Union; and the NAACP. The unanimous view that pregnancy discrimination was, fundamentally, a denial of equal rights for *all* women in the workplace was perhaps best summarized by Susan Ross in a statement prepared on behalf of the Coalition to End Discrimination Against Pregnant Workers. Explicitly mobilizing equality and equal treatment discourse, Ross told Congress:

> [S]ince most women workers do bear children at some point in their working lives, this one decision [*Gilbert*] could thus be used to justify a whole complex of discriminatory employment practices designed to insure that women wo[r]ker's role in the market place be confined to low-paying, dead-end jobs . . . . Employers routinely fire pregnant workers, refuse to hire them, strip them of seniority rights, and deny them sick leave and medical benefits given other workers. Such policies have a lifetime impact on women's careers. Together, they add up to one basic fact: employers use women's role of childbearer as the central justification of and support for discrimination against women workers. Thus, discrimination against women workers cannot be eradicated unless the root discrimination, based on pregnancy and childbirth, is also eliminated.[46]

By contrast, opposition to the PDA's central premise—that employers must treat pregnancy like any other temporary medical condition—seemed somewhat half-hearted and perfunctory.[47] The central critique emphasized the

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45. *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the H. Comm. on Educ. and Labor*, 95th Cong. 1 (1977).

46. *Id.* at 31-32 (statement of Susan Deller Ross, Campaign to End Discrimination Against Pregnant Workers).

47. I say this with the important caveat that there *was* a major point of contention over the PDA about whether it would cover women who had abortions. The final version did allow employers to exclude elective abortions, unless carrying the fetus to term threatened the mother's life or if there were medical complications resulting from abortion. To be sure, many women's activists were outraged over

potentially prohibitive costs that the PDA might impose on employers. I make no authoritative claims as to why the debate was apparently so one-sided. Still, one might reasonably speculate that, by 1976, the *Gilbert* ruling was simply out of touch with an expanding cultural and political discourse of gender organized around the principles and language of women's equality. As I partly chronicled above, the major actors—from the EEOC to the lower courts to the women's movement to Congress—were, to greater or lesser extents tilted towards gender equality and away from the usual suspects of biological and cultural difference that traditionally justified discrimination against women workers generally, and pregnant employees in particular. Either way, in lopsided votes, the PDA passed the House and Senate, and was signed into law by President Carter.

CONCLUSION

Enactment of the PDA was a great victory for women's employment rights, one that continued the slow and choppy, but nonetheless steady movement towards equal treatment for women workers under Title VII. This introductory Article has visited some of the key historical events and sequences through which pregnancy discrimination came to be viewed—legally and culturally—as a pressing social problem requiring legal redress. The PDA was of course made possible in part by the combined interaction of employer behavior, court rulings, and EEOC interpretations of Title VII. At the same time, a rapidly changing cultural discourse of gender—one that aggressively challenged taken-for-granted sex-roles and gender stereotypes in and out of the home and workplace—also had a fundamental impact on the expansion of legal protections for women workers generally, and for pregnant workers specifically. And it was a resurgent women's movement unequivocally committed to full legal equality for women workers that was arguably most responsible for constructing, mobilizing, and diffusing an aggressive equal treatment discourse that partly transformed both the cultural norms and legal rules governing the rights and opportunities of working women who would or might become pregnant.

Yet the PDA was in many ways not the end, but the beginning, of society's ongoing—and too often insufficient—attempts to secure the rights and opportunities of women workers. Female employees throughout the nation continue to face lingering stereotypes about their primary family and childbearing roles in ways that still routinely elicit discriminatory treatment at all levels of the employment relationship. In recent decades legislation

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the abortion exemption. Thus my claim that there was not much of an organized opposition to the PDA refers to its central principle that, notwithstanding elective abortion, pregnancy discrimination was sex discrimination prohibited by Title VII. *See Pregnancy Disability Rights*, CQ ALMANAC 1978 (1979), *available at* http://library.cqpress.com/cqalmanac/cqal78-1239650.

providing for family leave has attempted to supplement laws like the PDA to ensure that workers need not make the cruel choice between their careers and their family obligations. Whether and to what extent such efforts have been successful is beyond this Article's purview. In either case, the PDA blazed the trail by establishing formal rights and a system of legal redress available to pregnant workers facing discrimination in the workplace.