

PREGNANCY AS A NORMAL CONDITION OF EMPLOYMENT:  
COMPARATIVE AND ROLE-BASED ACCOUNTS OF  
DISCRIMINATION

CUTLER LECTURE

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ABSTRACT

*As the Pregnancy Discrimination Act of 1978 (PDA) turns forty, it is time to consider how we define pregnancy discrimination.*

*In recent years, courts have come to define pregnancy discrimination almost exclusively through comparison. Yet our understanding of discrimination, inside and outside the pregnancy context, depends on judgments about social roles as well as comparison. Both Congress and the Court appealed to social roles in defining the wrongs of pregnancy discrimination. In enacting the PDA, Congress repudiated employment practices premised on the view that motherhood is the end of women's labor force participation, and affirmed a world in which women as well as men would combine work and family—a world in which pregnancy would be a normal condition of employment. A social-roles analytic helps explain the logic of pregnancy discrimination, whether it assumes the form of hostility to pregnant workers or a simple failure to accommodate.*

*Drawing on this social-roles analytic, the Lecture offers a reading of Young v. UPS, the Supreme Court's most recent decision on the*

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*PDA. Young breaks from an exclusively comparative approach and authorizes pregnancy accommodation claims under both disparate treatment and disparate impact frameworks. The Court's approach is informed by a growing popular consensus. As the PDA turns forty, nearly half the states have enacted pregnant worker fairness acts supporting reasonable accommodation of pregnancy in the workplace.*

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*Just defining pregnancy discrimination as sex discrimination does not tell us what it means to discriminate because of pregnancy.*

—*Young v. UPS, Inc. (Scalia, J., dissenting)*.<sup>1</sup>

## INTRODUCTION

Nearly all countries except the United States offer women some form of paid maternity leave.<sup>2</sup> The United States requires employers of over fifty employees to provide their employees twelve weeks of unpaid leave for medical and family-care reasons.<sup>3</sup> But this benefit is of little use to many low-wage workers.<sup>4</sup> In the absence of paid leave, U.S. law asks working women to rely on antidiscrimination protections to retain their jobs during pregnancy—while Americans continue to debate what it means to discriminate because of pregnancy.

In this Lecture, I rejoin the long-running conversation about what it means to discriminate because of pregnancy.<sup>5</sup> In recent years,

1. 135 S. Ct. 1338, 1363 (2015) (Scalia, J., dissenting).

2. See INT'L LABOUR ORG., UNITED NATIONS, 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/2989-ZG4R>] (reporting that the United States was one of two countries that did not offer paid maternity leave).

3. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601, 2611-2612 (2012).

4. 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. See NAT'L P'SHIP 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/F92B-L2RP>]. Only 12 percent of private sector workers receive paid leave, and most who receive the benefit are college educated. See INT'L LABOUR ORG., *supra* note 2, at 38-39 (reporting that both paid and unpaid leave disproportionately benefit high-wage workers). A quarter of women are fired or quit when they bear a child. See LYNDA LAUGHLIN, U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961-2008, at 9 tbl.5 (2011), <https://www.census.gov/prod/2011pubs/p70-128.pdf> [<https://perma.cc/K3SN-HYJB>].

5. I first addressed this question as a student, see Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985) [hereinafter Siegel Note], and have addressed it on occasion since, see, e.g., Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006) [hereinafter Siegel, *You've Come a Long Way, Baby*].

pregnancy discrimination has been defined almost exclusively through comparison.<sup>6</sup> But as I show, our understanding of discrimination, inside and outside the pregnancy context, depends on judgments about social roles as well as comparison. Conservatives as well as liberals appeal to social roles in arguing over discrimination.<sup>7</sup> More to the point, Congress and the Supreme Court have appealed to social roles in defining the wrongs of pregnancy discrimination.

In enacting the Pregnancy Discrimination Act (PDA), Congress repudiated employment practices premised on the view that motherhood is the end of women's labor force participation, and affirmed a world in which women as well as men would combine work and family—a world in which pregnancy would be a normal condition of employment.<sup>8</sup> I show how this social-roles account helps make sense of disparate treatment and disparate impact claims of pregnancy accommodation under *Young v. UPS*,<sup>9</sup> the Supreme Court's most recent decision interpreting the PDA.<sup>10</sup> As the PDA turns forty, the nation increasingly recognizes the importance of accommodating pregnancy in the workplace.

In 1978, Congress amended Title VII of the 1964 Civil Rights Act to declare that discrimination against pregnant women was a form of sex discrimination prohibited by federal employment discrimination law.<sup>11</sup> In the Act's first decade, the Supreme Court enforced the PDA in ways that transformed employment practices.<sup>12</sup> However, in the ensuing decades, lower courts narrowed the PDA by rejecting disparate-impact claims and insisting on finding exact "comparators" before holding that the discharge of a pregnant woman was sex-based disparate treatment. Animating this search for perfect comparators was uncertainty about conceptualizing the exclusion of pregnant workers as discrimination—and concern about imposing

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6. See *infra* Part I.B.

7. See *infra* Part II.A.

8. See *infra* Part II.B.

9. 135 S. Ct. 1338 (2015).

10. See *infra* Part III.

11. See Pregnancy Discrimination Act (PDA) of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2012)).

12. See *infra* Part II.B.

on employers the actual or imagined costs of retaining and accommodating pregnant employees.<sup>13</sup>

The public did not accept these judicial decisions narrowly interpreting the PDA. With defeat of discrimination claims under the PDA increasingly common, advocates helped enact pregnant worker fairness acts in twenty-two states, the District of Columbia, and four cities, mandating the reasonable accommodation of pregnancy.<sup>14</sup>

13. See *infra* Part I.B.

14. Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New York, North Dakota, Rhode Island, Texas, Utah, Vermont, Washington, and West Virginia have adopted pregnant worker fairness acts, as have the District of Columbia; Central Falls, R.I.; New York City, N.Y.; Philadelphia, P.A.; and Providence, R.I. See Alaska Family Leave Act, ch. 96, sec. 6, § 23.10.520, 1992 Alaska Sess. Laws 1, 4 (codified at ALASKA STAT. § 39.20.520 (2017)); Act of Mar. 12, 1990, ch. 15, 1990 Cal. Stat. 87 (codified as amended at CAL. GOV'T CODE §§ 12926, 12945 (West 2017)); Act of June 1, 2016, ch. 207, 2016 Colo. Sess. Laws 741 (codified as amended at COLO. REV. STAT. §§ 24-34-401, -402.3 (2017)); An Act Concerning Discrimination, Pub. Act No. 11-55, §§ 1, 3, 2011 Conn. Acts 859, 859-62 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. §§ 46a-51, -60(a)(7) (2017)); Act of Sept. 9, 2014, ch. 429, 79 Del. Laws 1 (codified as amended at DEL. CODE ANN. tit. 19, §§ 710, 711, 716 (2017)); Protecting Pregnant Workers Fairness Act of 2014, Act No. 20-458, 61 D.C. Reg. 11,368 (Oct. 23, 2014) (codified as amended at D.C. CODE § 32-1231 (2017)); Act of Aug. 26, 2011, Pub. Act No. 97-0596, 2011 Ill. Laws 11110 (codified as amended at 775 ILL. COMP. STAT. 5/2-101 to -102 (2017)); Louisiana Employment Discrimination Law, Act No. 1409, 1997 La. Acts. 2926, 2937-38 (codified as amended at LA. STAT. ANN. §§ 23:341-:342 (2017)); Act of May 16, 2013, ch. 547, 2013 Md. Laws 5005 (codified as amended at MD. CODE ANN., STATE GOV'T §§ 20-601, -609 (West 2017)); An Act Establishing the Massachusetts Pregnant Workers Fairness Act, H.1769, 2017 Mass. Acts ch. 54 (to be codified at MASS. GEN. LAWS ch.151B, § 4 (2017)); Women's Economic Security Act, ch. 239, art. 3, §§ 1, 4, 2014 Minn. Laws 767, 779, 781 (codified as amended at MINN. STAT. §§ 181.940, .9414 (2017)); Act of Apr. 13, 2015, Legis. B. No. 627, 2015 Neb. Laws 860 (codified as amended at NEB. REV. STAT. §§ 48-1102 to -1107.2 (2017)); Nevada Pregnant Workers' Fairness Act, 2017 Nev. Stat. ch. 319 (codified at NEV. REV. STAT. § 613.355 (2017)); Act of Jan. 17, 2014, ch. 220, 2014 N.J. Laws 1526 (codified as amended at N.J. STAT. ANN. § 10:5-12 (West 2017)); N.Y. EXEC. LAW §§ 292(5)-(6), 296(1)(g), (3)(a) (McKinney 2017); Act of Apr. 6, 2015, ch. 121, 2015 N.D. Laws 545 (codified as amended at N.D. CENT. CODE § 14-02.4-03 (2017)); Act of July 2, 2015, ch. 151, R.I. Pub. Laws 963 (codified as amended at 28 R.I. GEN. LAWS § 28-5-7.4 (2017)); Act of June 11, 2001, ch. 533, 2001 Tex. Gen. Laws 1012 (codified at TEX. LOC. GOV'T CODE ANN. § 180.004 (West 2017)); Antidiscrimination and Religious Freedom Amendments, ch. 13, § 5, 2015 Utah Laws 68, 71 (codified as amended at UTAH CODE ANN. § 34A-5-106 (2017)); An Act Relating to Accommodations for Pregnant Employees, 2017 Vt. Acts & Resolves No. 21. (Vt. 2017) (codified at VT. STAT. ANN. tit. 21, § 495k (2017)); Healthy Starts Act, ch. 23, sec. 3, 2017 Wash. Sess. Laws. SSB 5835.SL 1, 2-4 (codified at WASH. REV. CODE § 43.10.005 (2017)); Pregnant Workers' Fairness Act, ch. 135, 2014 W. Va. Acts 1121 (codified as amended at W. VA. CODE § 5-11B-1 to -7 (2017)); N.Y.C., N.Y., ADMIN. CODE, tit. 8, §§ 102, 107(22) (2017); PHILA., PA., CODE §§ 9-1102, -1128 (2017); CENTRAL FALLS, R.I., CODE OF ORDINANCES § 12-5 (2014); PROVIDENCE, R.I., CODE OF ORDINANCES §§ 16-54(g)-(h), 57(b)(1), (c)(1)(f)-(g), 84 (2014);

And, in 2015, the Supreme Court finally intervened, holding in *Young v. UPS*, under long-standing Title VII principles, discrimination claims can impose costs on employers,<sup>15</sup> that plaintiffs can bring disparate-impact as well as disparate-treatment claims of pregnancy discrimination,<sup>16</sup> and that disparate-treatment claims are properly analyzed in a framework that employs comparison and balancing, modes of analysis that the disparate-impact framework employs.<sup>17</sup>

Before the Court's judgment in *Young*, courts reasoned as if the wrong of pregnancy discrimination could be defined solely through techniques of comparison. Techniques of comparison do play a key role in antidiscrimination law. We often talk about discrimination as if it consisted solely in the differential treatment of persons with respect to some trait we deem irrelevant to an individual's ability to perform or contribute. But in this Lecture, as in my other work, I question the sufficiency of this account. Deciding when different treatment, or same treatment, is wrongful requires making a judgment about the larger social world in which the challenged practice occurs. At bottom, then, the wrong of discrimination concerns the social roles and relations it perpetuates.<sup>18</sup>

Yet the social-roles perspective is not just a matter of discrimination theory; it is a matter of law. As I show, both liberals and conservatives appeal to social roles as they argue about the proper application of antidiscrimination law and concern about social roles

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CAL. CODE REGS. tit. 2, § 11049 (2017); HAW. CODE R. § 12-46-107 (LexisNexis 2017); N.Y. COMP. CODES R. & REGS. tit. 9, § 466.1(a)-(b) (2017).

15. See 135 S. Ct. 1338, 1354 (2015).

16. See *id.* at 1353-55.

17. See *id.* at 1354-55; *infra* Part III.

18. See Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 82 (2000) ("[A]ntidiscrimination law regulates the social practices that sustain the relative social position of whites and blacks, men and women."); cf. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 16 (2003) ("[I]nconsistency in the decision rules used to implement the antidiscrimination principle allows the principle to be applied in ways that accommodate competing social values, preserve status-linked practices and understandings, and, at times, shift in response to social protest discrediting a practice that inflicts status-harm."). See generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) [hereinafter Siegel, *Equality Talk*] (analyzing the interplay of anticlassification and antisubordination values in equal protection case law).

appears in disparate bodies of antidiscrimination law.<sup>19</sup> Most importantly for present purposes, a social-roles understanding of discrimination shaped Congress's decision to enact the PDA.

When Congress enacted the PDA to amend Title VII, it rejected the long-standing employer practice of firing women who became pregnant, and affirmed the importance of women as well as men supporting themselves and their families when they become parents. Congress amended federal employment discrimination law on the view that pregnancy is, or ought to be, a normal condition of employment. Substantial authority in Title VII case law, in the legislative history of the PDA, and in the case law interpreting the statute supports a social-roles approach to pregnancy discrimination.<sup>20</sup>

Because the social-roles account finds substantial authority in the PDA's legislative history and in Title VII case law, because the social-roles account can illuminate workplace dynamics that might otherwise pass unnoticed, and because the social-roles account is crucial in considering the distributive dimensions of pregnancy-discrimination claims,<sup>21</sup> I draw upon the social-roles account to guide enforcement of disparate-treatment and disparate-impact claims of pregnancy discrimination as the Court most recently addressed them in *Young*.<sup>22</sup>

In the United States, the limitations of the antidiscrimination framework have become sufficiently plain that members of both parties have endorsed proposals for paid leave.<sup>23</sup>

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19. See *infra* Part II.A.

20. See *infra* Part II.B.

21. See *infra* Part II.C.

22. See *infra* Part III.

23. See Emily Bazelon, *How Republican Politicians Learned to Love 'Working Mothers,'* N.Y. TIMES MAG. (Oct. 4, 2016), <https://www.nytimes.com/2016/10/09/magazine/how-republican-politicians-learned-to-love-working-mothers.html> [<https://perma.cc/SD2Z-4U58>] (“We need working mothers to be fairly compensated for their work and to have access to affordable, quality child care for their kids,” Trump told a Pennsylvania audience.”); Claire Cain Miller, *What a Bipartisan Paid Leave Plan Might Look Like*, N.Y. TIMES: THE UPSHOT (June 6, 2017), <https://www.nytimes.com/2017/06/06/upshot/what-a-bipartisan-paid-leave-plan-might-look-like.html> [<https://perma.cc/PE53-7FA2>] (“Paid parental leave seems as if it has at least a chance of becoming reality in the United States for the first time.”); Danielle Paquette & Damian Paletta, *U.S. Could Get First Paid Family Leave Benefit Under Trump Budget Proposal*, WASH. POST: WONKBLOG (May 18, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/05/18/u-s-could-get-first-paid-family-leave-benefit-under-trump-plan/> [<https://perma.cc/SFL2-37MR>] (“The president’s first detailed budget request on Tuesday will



But paid leave will not supplant the need for antidiscrimination law. Antidiscrimination and welfare mandates are complements, not substitutes. Generously enforced, antidiscrimination laws shift costs from employees to employers,<sup>24</sup> although how completely the law does so will vary from case to case. Antidiscrimination mandates may well not be sufficient to enable certain women to work in workplaces built on the sex-role assumptions of separate spheres. Even so, antidiscrimination mandates still provide important social goods. For women who are able to keep working, antidiscrimination laws help secure an income stream at levels that wage-replacement laws generally do not. And antidiscrimination law has the potential to transform gender norms and expectations about the “ideal worker”<sup>25</sup> in ways that leave alone does not.<sup>26</sup>

Part I of this Lecture demonstrates how views about pregnant women in the workplace have evolved—and persisted—over the last century. In the years before passage of the PDA, judges employed practices of comparison to mark pregnant workers as “different” and to justify their exclusion from the workplace. As I show, these practices of interpretation continued under the PDA itself. Part II argues that practices of comparison depend on explicit or implicit judgments about roles. It demonstrates that appeals to role-based reasoning are commonplace in antidiscrimination law, illustrating this point with examples drawn from race-discrimination law, sex-discrimination law, and the legislative history and case law of the PDA itself. In prohibiting pregnancy discrimination as sex discrimination, Congress employed role-based as well as comparative reasoning. Congress affirmed that women as well as men could combine

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seek funds for the creation of a program to grant mothers and fathers six weeks of paid leave after the birth or adoption of a child.”); *see also* Aparna Mathur & Isabel V. Sawhill, *Paid Family Leave: An Issue Whose Time Has Come?*, BROOKINGS INST.: SOC. MOBILITY MEMOS (Jan. 23, 2017), <https://www.brookings.edu/blog/social-mobility-memos/2017/01/23/paid-family-leave-an-issue-whose-time-has-come/> [<https://perma.cc/3KSZ-WDNW>] (“Polls show that the public is overwhelmingly in favor of paid family and medical leave.”).

24. *See infra* note 65 and accompanying text.

25. *See* JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 103 (2010) (“The ideal-worker standard and norm of work devotion push mothers to the margins of economic life. And a society that marginalizes its mothers impoverishes its children. That is why the paradigmatic poor family in the United States is a single mother and her child.”).

26. In addition, the antidiscrimination framework reminds us that legislators, employers, and judges of goodwill may misestimate the costs of accommodating pregnant workers.

work and family, so that pregnancy would become a normal condition of employment. Part III then draws on this role-based account to analyze pregnancy accommodation claims within disparate-treatment and disparate-impact frameworks under the Supreme Court's 2015 decision in *Young v. UPS*.

As Part IV observes in conclusion, the Supreme Court's decision in *Young*—which invites new consideration of disparate treatment and disparate impact claims of pregnancy accommodation—reflects a growing popular consensus. Forty years after the PDA's enactment, nearly half the states have enacted pregnant worker fairness acts supporting reasonable accommodation of pregnancy in the workplace. As antidiscrimination law and evolving social norms come to inform one another, pregnancy may yet become a normal condition of employment.

#### I. COMPARATIVE MODELS OF DISCRIMINATION AND PREGNANCY AS DIFFERENCE—BEFORE AND AFTER THE PDA

Practices of comparison can authorize as well as limit sex discrimination against women workers, as this Part briefly demonstrates. History illustrates that, standing alone, the comparative method is indeterminate and can be mobilized in the service of explicit or implicit role-based judgments.<sup>27</sup> History also illustrates that judgments about pregnancy as “unique” or “different” that preceded the PDA and prompted its enactment have resurfaced in case law enforcing the statute.<sup>28</sup>

##### A. *Pregnancy Discrimination Under the Constitution: The Uniqueness Trap*

Our law's view of discrimination on the basis of pregnancy has evolved dramatically. In the early twentieth century, after the Supreme Court restricted protective labor legislation for men in *Lochner v. New York* in 1905,<sup>29</sup> the Court allowed legislatures to impose such restrictions on women's work in *Muller v. Oregon*.<sup>30</sup>

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27. See *infra* Part I.A.

28. See *infra* Part I.B.

29. See 198 U.S. 45, 64 (1905).

30. See 208 U.S. 412, 422-23 (1908).

*Muller* pointed to reproductive differences between men and women to justify laws that discriminated between the sexes: “The two sexes differ in structure of body, in the functions to be performed by each ... [, and t]his difference justifies a difference in legislation.”<sup>31</sup> In the Court’s view, women’s special role in reproduction justified state laws limiting the hours and locations in which women could work, in ways that states could not regulate men’s work.

With the feminist mobilizations of the 1970s, the Court’s views changed in part. Judges no longer viewed women’s distinctive role in reproduction as an all-purpose justification for sex-discriminatory laws and struck down protective labor legislation that allowed employers to segregate jobs by sex.<sup>32</sup> Yet even as the Supreme Court began to strike down state laws that discriminated by sex under civil rights law and under the Constitution, the Court created a carve-out in its equal protection cases for laws that specifically regulated pregnancy. In 1974, the Court rejected an equal protection challenge to a state law that provided employees with disability benefits for common work-disabling conditions incurred on or off the job, except pregnancy.<sup>33</sup> In denying the equal protection claim in *Geduldig v. Aiello*, the Court again emphasized that physical differences between the sexes might justify different treatment:

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 .... Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.<sup>34</sup>

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31. *Id.*

32. *See, e.g.*, *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198-99 (1991).

33. *See Geduldig v. Aiello*, 417 U.S. 484, 494-97 (1974); *cf.* *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647-48 (1974) (striking down a law mandating pregnancy leave as a deprivation of due process).

34. 417 U.S. at 496 n.20.

Comparing men and women again framed pregnancy as “different” or “unique,” and so seemed to preclude the possibility of a discrimination claim.<sup>35</sup> (*Geduldig* continues to shape equal protection law today.<sup>36</sup>)

The Court next applied this understanding of pregnancy discrimination to federal employment discrimination law in *General Electric Co. v. Gilbert*.<sup>37</sup> Drawing on *Geduldig*, the Burger Court reasoned that under Title VII of the 1964 Civil Rights Act, the exclusion of pregnancy from comprehensive disability benefits was not sex-based disparate treatment.<sup>38</sup> Because Title VII not only prohibits disparate treatment but also prohibits practices that have a disparate impact on the Act’s protected classes that is not justified by business necessity, the Court reached this second question and ruled that exclusion of pregnancy from General Electric’s comprehensive disability benefits program did not have a disparate impact on women.<sup>39</sup>

As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme .... For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits,

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35. *Geduldig* is often read to bar claims of pregnancy discrimination under the Equal Protection Clause. See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 982-84 (1984) (observing that “the Court in *Geduldig v. Aiello* finally addressed sex equality claims of pregnant women in 1974, holding that discrimination against pregnant people is not sex-based” (footnote omitted)). I show that this reading is more expansive than the language of the decision supports—and that the Court’s more recent decision in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), holds that equal protection shields women from at least some forms of pregnancy discrimination. See Siegel, *You’ve Come a Long Way, Baby*, *supra* note 5, at 1891-93.

36. The Court’s decision in *Geduldig* seemingly allows government to single out pregnant women without raising equal protection questions. Yet *Geduldig* has not been cited in a majority opinion in over two decades. See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 271 (1993) (citing *Geduldig*, 417 U.S. at 496 n.20). Instead, Justices have only cited *Geduldig* in dissents and concurrences. See, e.g., *Young v. UPS*, 135 S. Ct. 1338, 1363 (2015) (Scalia, J., dissenting) (citing *Geduldig*, 417 U.S. at 494-95); *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 60 n.6 (2012) (Ginsburg, J., dissenting) (citing *Geduldig*, 417 U.S. at 496 n.20); *Hibbs*, 538 U.S. at 751 (Kennedy, J., dissenting) (citing *Geduldig*, 417 U.S. at 496-97). 37. 429 U.S. 125, 133-34 (1976).

38. See *id.* at 135-36.

39. *Id.* at 137-40.

accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks.<sup>40</sup>

Once again comparison framed pregnancy as unique, hence a reasonable ground on which to justify denial of coverage.

### *B. The PDA: Uniqueness Redux?*

Congress swiftly and emphatically rejected the Court's reasoning in *Gilbert* and enacted the Pregnancy Discrimination Act of 1978, which amended the definitional provisions of Title VII to state that:

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.<sup>41</sup>

The text of the PDA tells us that under federal employment discrimination law it is indeed possible to discriminate against women on the basis of pregnancy, and suggests that comparing treatment of the pregnant employee to other employees similar in their ability to work can help identify such discrimination.<sup>42</sup> A comparison of this kind elides the "uniqueness" of pregnancy and emphasizes instead functional ability to perform the job. (As language from the legislative history quoted in this Lecture suggests, the Congress that

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40. *Id.* at 138-39.

41. 42 U.S.C. § 2000e(k) (2012).

42. As the Court subsequently explained:

"When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision." By adding pregnancy to the definition of sex discrimination prohibited by Title VII, the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert*. Rather than imposing a limitation on the remedial purpose of the PDA, we believe that the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.

Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284-85 (1987) (quoting and citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983)).

enacted the PDA rejected the sex-role assumptions guiding employer practices and the Court's decision in *Gilbert*, and reasoned about pregnancy as a normal condition of employment.<sup>43</sup>)

But as we have seen, comparison has no such intrinsic logic. After several early, expansive Supreme Court decisions,<sup>44</sup> judges in the lower federal courts employed the practice of comparison to *limit* the PDA's reach.

By the 1990s, judges had begun to use comparison to deny disparate-impact claims and to limit disparate-treatment claims under the PDA. Plaintiffs objected that inflexible job descriptions and short leave policies had a disparate impact on pregnant employees, but most judges reasoned as Chief Judge Richard Posner did: so long as the employer treated pregnant and nonpregnant employees equally badly, a pregnant woman who lost her job due to an inflexible job description or a short leave policy had no claim of sex discrimination.<sup>45</sup>

Even when an employer offered accommodations to other employees but denied them to pregnant workers, courts often rejected PDA claims of disparate treatment. By the 1990s, the case law took

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43. See *infra* Part II.B.

44. See, e.g., *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (holding that an employer's policy barring all women, except those whose infertility was medically documented, from jobs with potential lead exposure was facially discriminatory); *Cal. Fed.*, 479 U.S. at 285-87 (holding that the PDA did not prohibit employment practices favoring pregnant women and did not preempt a state law requiring leave and reinstatement for pregnant women).

45. See *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) ("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."); see also *Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 584 (7th Cir. 2000) (Posner, C.J.) ("The argument here is not that the employer has adopted rules or practices that arbitrarily exclude pregnant women, but that the employer should be required to excuse pregnant employees from having to satisfy the *legitimate* requirements of their job. It is an argument for subsidizing a class of workers, and the concept of disparate impact does not stretch that far."). As Joanna Grossman and Gillian Thomas suggested, "[C]ourts frequently decr[ie]d the [disparate-impact] model as a backdoor route to 'preferential' or 'special' treatment for pregnant women." Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 *YALE J.L. & FEMINISM* 15, 42 & n.111 (2009). Judges also blocked such claims by reasoning that "employers do not have any responsibility to rectify the burdens that biology has placed uniquely on women." Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 *HARV. C.R.-C.L.L. REV.* 415, 436 (2011).

the shape of a debate over the adequacy of “comparators” that continues to this day.<sup>46</sup> Consider the case of Peggy Young, whose claim against UPS made it all the way to the Supreme Court. Young was a part-time driver for UPS.<sup>47</sup> When she became pregnant, her doctor advised her not to lift more than twenty pounds.<sup>48</sup> UPS, however, required drivers like Young to be able to lift up to seventy pounds,<sup>49</sup> and told Young that she “could not work while under a lifting restriction.”<sup>50</sup>

UPS accommodated some but not all of its workers. The company offered light-duty work to three classes of workers: workers who had been injured on the job, had disabilities covered by the Americans with Disabilities Act of 1990 (ADA), or had lost Department of Transportation (DOT) certifications.<sup>51</sup> Young argued that UPS discriminated against its pregnant employees because it had a light-duty-for-injury policy for numerous “other persons,” but not for pregnant workers.<sup>52</sup> UPS responded that, because Young did not fall within the on-the-job injury, ADA, or DOT categories, the company “had not discriminated against Young on the basis of pregnancy, but had treated her just as it treated all ‘other’ relevant ‘persons.’”<sup>53</sup> The district court ruled “those with whom Young compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as ‘similarly situated

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46. A “comparator” is defined as “someone whose treatment by the employer may be an adequate basis for inferring discrimination against the plaintiff.” Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 193 (2009); see also Brief of the Leadership Conference on Civil and Human Rights as Amicus Curiae in Support of Petitioner at 24, *Young v. UPS*, 135 S. Ct. 1338 (2015) (No. 12-1226) (“The purpose of a comparator is to ‘eliminate confounding variables’ in order to ‘isolate the critical independent variable,’ namely the presence of discrimination.” (quoting *Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 405 (7th Cir. 2007))); Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 574-75 (2017) (describing the role of comparators in proving disparate treatment); Grossman & Thomas, *supra* note 45, at 34-35 (defining comparators, as well as describing some of the inherent problems of this approach in the pregnancy context).

47. See *Young v. UPS*, 135 S. Ct. 1338, 1344 (2015).

48. See *id.*

49. See *id.*

50. *Id.*

51. See *id.*

52. See *id.* at 1346-47.

53. See *id.* at 1344.

comparator[s].”<sup>54</sup> The Fourth Circuit agreed that “these accommodations were created by a neutral, pregnancy-blind policy.”<sup>55</sup> It reasoned that:

[A] pregnant worker subject to a temporary lifting restriction is not similar in her “ability or inability to work” to an employee disabled within the meaning of the ADA or an employee either prevented from operating a vehicle as a result of losing her DOT certification or injured on the job.<sup>56</sup>

“Rather, Young more closely resembled ‘an employee who injured his back while picking up his infant child or ... an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter,’ neither of whom would have been eligible for accommodation under UPS’ policies.”<sup>57</sup>

In this way, accounts of pregnancy as “different” and “unique” resurfaced within the PDA comparator cases. By looking to the *source* of a work disability as well as to its effects, judges deciding PDA cases emphasized the difference of pregnancy much as the Court in *Muller*, *Geduldig*, and *Gilbert* had.<sup>58</sup> Driving this emphasis on pregnancy as “different” was a resistance to discrimination claims that judges assumed unfairly saddled an employer with costs the worker should bear.<sup>59</sup>

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54. *Id.* at 1347 (alteration in original) (quoting *Young v. UPS, Inc.*, No. DKC 08-2586, 2011 WL 665321, at \*14 (D. Md. Feb. 14, 2011)).

55. *Young v. UPS*, 707 F.3d 437, 450 (4th Cir. 2013), *vacated*, 135 S. Ct. 1338 (2015).

56. *Id.*

57. *Young*, 135 S. Ct. at 1348 (quoting *Young*, 707 F.3d at 448).

58. *Compare Young*, 707 F.3d at 450 (distinguishing a pregnant employee from an employee who had an off-the-job back injury), *with Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 139 (1976) (noting that disabilities associated with pregnancy are a “risk, unique to women”), *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (noting that physical differences between the sexes could justify different treatment), *and Muller v. Oregon*, 208 U.S. 412, 422-23 (1908) (comparing reproductive systems of men and women to justify discrimination).

59. Judges’ willingness to find that the circumstances of the pregnant employee differed from other comparators often reflects concern about imposing costs on employers, as *Latowski v. Northwoods Nursing Center*, 549 F. App’x 478, 482 (6th Cir. 2013), illustrates. There, a nurse’s aide with a demanding job alleged disparate treatment based on the denial of a light-duty accommodation offered to employees injured on the job. *See id.* at 481-83. The court reasoned that the employer’s “economics-based policy of refusing to accommodate restrictions arising from injuries incurred outside the workplace” was “legitimate” and “nondiscriminatory.” *Id.* at 484. (The plaintiff, however, pointed to her manager’s comments to prove the cost justification was pretextual. *Id.* at 484-86.) In *Seiter v. DHL Worldwide Express*, the court



Perhaps judges channeled considerations of costs into arguments about the (dis)similarity of comparators because judges appreciated that the Court has rejected cost-based justifications for disparate treatment. In *City of Los Angeles Department of Water & Power v. Manhart*, for example, the Supreme Court rejected a cost-based justification for an employment policy requiring female employees, who had on average longer life expectancies than male employees, to make larger contributions to a pension fund<sup>60</sup>: “That argument might prevail if Title VII contained a cost-justification defense comparable to the affirmative defense available in a price discrimination suit. But neither Congress nor the courts have recognized such a defense under Title VII.”<sup>61</sup> Eight years later in *United Automobile Workers v. Johnson Controls, Inc.*, the Court applied this same basic principle to a case arising under the PDA.<sup>62</sup>

The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender. Indeed, in passing the PDA, Congress considered at length the considerable cost of providing equal treatment of pregnancy and related conditions, but made the “decision to forbid special treatment of pregnancy despite the social costs associated therewith.”<sup>63</sup>

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accepted as valid the following explanation:

DHL has legitimate nondiscriminatory reasons for distinguishing between employees injured on the job and those who were not. Among other things, under workers’ compensation, individuals who have work-related injuries are entitled to compensation, whether or not they work. Therefore, allowing those employees who are eligible for workers’ compensation to perform some light-duty work has a clear economic benefit.

No. 05-13-DLB, 2006 WL 2457985, at \*5 (E.D. Ky. Aug. 22, 2006).

For related considerations in a case decided after the Court’s decision in *Young*, see *Legg v. Ulster County*, 820 F.3d 67, 78 (2d Cir. 2016) (“[W]hile the cost of adding pregnant workers to an otherwise expansive program of accommodation cannot justify their exclusion, a policy is not necessarily doomed by the fact that it was partially motivated by cost. After all, if cost were not a factor, employers would have little reason not to accommodate everyone, and the cost of adopting such a policy is presumably always a factor in limiting accommodations to those injured on the job.”).

60. See 435 U.S. 702, 705, 716-18 (1978).

61. *Id.* at 716-17 (footnote omitted).

62. See 499 U.S. 187, 198-99, 208 (1991).

63. *Id.* at 210 (citation omitted) (quoting *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1084 n.14 (1983) (Marshall, J.)).

Despite the express decisions of the Supreme Court, the legislative history of the PDA,<sup>64</sup> and a body of scholarship demonstrating that disparate treatment cases barring customer preference as a justification for discrimination regularly shift costs onto employers,<sup>65</sup> judges deciding pregnancy-discrimination cases arising under the PDA narrowly construed the statute in the apparent belief that it was unfair to ask employers to bear the costs of accommodating pregnant workers.<sup>66</sup>

After decades of silence, the Supreme Court finally intervened. In 2015, the Court rejected the Fourth Circuit's reasoning in *Young* by a vote of six to three, but did so without embracing *Young*'s argument that she was entitled to any accommodation that the employer provided to others in the workplace.<sup>67</sup> As one commentator summarized *Young*, "[T]he Court rejected the notion that pregnant women have a right to the accommodations extended to *any* other worker, but also the notion that the right is *only* triggered by an accommodation extended to *all* other workers."<sup>68</sup>

Before examining the Court's holding in *Young*, I consider competing conceptions of pregnancy discrimination, in order to provide a basis for understanding and evaluating the Court's decision.

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64. See *infra* Part II.B.

65. See Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 760 (1991) (explaining that antidiscrimination law can impose costs because "[t]he incorporation of racist or sexist preferences is efficient, if the efficiency criterion is based on private willingness to pay; the same applies with profit-maximizing reactions to the desires of third parties and with statistical discrimination" (footnote omitted)); see also Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 865-68 (2003) (presenting a normative account to challenge the redistributive theory distinguishing antidiscrimination from accommodation). See generally Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001) (showing how antidiscrimination mandates overlap with accommodation mandates and demonstrating that both impose costs).

66. See *supra* note 59 and accompanying text.

67. See *Young v. UPS*, 135 S. Ct. 1338, 1344, 1349 (2015); see also Petitioner's Brief at 21, *Young*, 135 S. Ct. 1338 (No. 12-1226) ("[T]he plain statutory text requires [an employer] to provide the same light-duty work to pregnant workers who are similarly unable to perform those duties [as the pregnant worker].").

68. Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 IDAHO L. REV. 825, 856 (2016) (emphasis added).

## II. COMPARATIVE AND ROLE-BASED CONCEPTIONS OF DISCRIMINATION

To this point, we have seen that practices of comparison have played a key part in justifying differential treatment of pregnant workers. In what follows, I show that other forms of reasoning often drive practices of comparison, whether expressly or implicitly. Judgments about social roles may unconsciously or quite consciously orient practices of comparison. Comparative and role-based conceptions of discrimination complement and supplement one another across discrimination law.

Liberals and conservatives alike appeal to understandings about social roles in debating the proper application of antidiscrimination law. Reasoning about social roles recurs in Title VII case law.<sup>69</sup> Crucially, for present purposes, I demonstrate that reasoning about social roles is common in the legislative history of the PDA, and in the Supreme Court cases enforcing it.<sup>70</sup>

Reviewing the discussion of social roles in the legislative history of the PDA, and in the Supreme Court cases enforcing it, helps clarify the statute's aims. In enacting the PDA, Congress repudiated employment practices premised on the view that motherhood is the end of women's labor force participation, and affirmed a world in which women as well as men would combine work and family—a world in which pregnancy would be a normal condition of employment. I conclude by considering some ways in which the social-roles account illuminates the dynamics of pregnancy discrimination, observing how it can coordinate with comparative analysis, identify implicit bias, and contribute to an analysis of the costs of accommodation.<sup>71</sup>

### *A. Two Conceptions of Discrimination*

I begin by distinguishing two conceptions of discrimination that circulate in our law outside and inside the pregnancy cases. One is

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69. See *infra* Part II.A.

70. See *infra* Part II.B.

71. See *infra* Part II.C.

comparative, and the other is role based. The comparative conception is perhaps the dominant conception of discrimination, certainly in PDA case law.<sup>72</sup> On this view, discrimination occurs when (and only when) the discriminator distinguishes between similarly situated individuals who differ with respect to a trait we deem irrelevant to an individual's ability to perform or contribute, such as eye color, race, or sex. On this view, the goal of antidiscrimination law is race- or sex-blind social ordering.

I contrast this comparative and trait-focused account of discrimination with a view of discrimination I term the social-roles account. On this account, determining whether a practice discriminates requires a judgment about the social relations the practice promotes.

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.<sup>73</sup> Comparison may help identify discriminatory judgments or acts, without defining the essence of discrimination.

In debates over race, the role-based conception of discrimination is associated with liberal positions on affirmative action and disparate impact, with substantive rather than formal understandings of discrimination, and with antisubordination or antistereotyping understandings of equal protection.<sup>74</sup> We see role-based reasoning at work in harassment law,<sup>75</sup> and many branches of disparate-treatment law under Title VII.<sup>76</sup>

But it is not only liberals who employ social-role based reasoning about discrimination. Even those who subscribe to equal treatment models of discrimination make substantive judgments about the social relations a challenged practice promotes. They must decide

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72. See *supra* note 46 and accompanying text.

73. See sources cited *supra* note 18.

74. See Siegel, *Equality Talk*, *supra* note 18, at 1534-44; Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 5-10 (2013).

75. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19, 22-23 (1993) (holding that gender-role-based insults such as, “[y]ou’re a woman, what do you know,” and “[w]e need a man as the rental manager,” contributed to creating a hostile work environment).

76. See, e.g., *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 122 (2d Cir. 2004) (“[S]tereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.”).

whether distinguishing by sex is relevant in deciding who can marry<sup>77</sup> or use a bathroom.<sup>78</sup> Can a society recognize women's equality while preserving marriage with "dual gender" parenting, and bathrooms with a modicum of privacy? Here, advocates of equal treatment make substantive judgments about which kinds of sex distinctions are sex discriminatory.

In yet other contexts, conservatives argue that laws providing *equal treatment* are discriminatory. Although conservatives have long opposed race-based claims of disparate impact as licensing preferential treatment,<sup>79</sup> conservatives mobilizing under the banner of religious freedom object to laws of general application that burden religious conscience under the Religious Freedom Restoration Act,<sup>80</sup> terming failure to accommodate religious conscience "discrimination."<sup>81</sup> As these examples illustrate, for conservatives as

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77. See, e.g., Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment at 63, *Goodridge v. Dep't of Pub. Health*, 14 Mass. L. Rptr. 591 (Super. Ct. 2002) (No. 01-1647-A), 2001 WL 35920960 ("In addition to their primary purpose of fostering procreation per se, the marriage statutes were intended to ensure that children would not only be born in wedlock but also reared by their mothers and fathers in one self-sufficient family unit with specialized roles for wives and husbands."); see also Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 489-92 (2007) (discussing the appearance of arguments for different-gender role models in state court opinions and amicus briefs).

78. Some conservative commentators have employed social-role-based reasoning to justify sex-segregated bathrooms:

Would we really be treating men and women equally in anything but an artificial way if we forced men and women, boys and girls, to undress in front of each other?

....

...[P]olicymakers did not consider sex-specific intimate facilities as discriminatory in the first place, and laws explicitly reflected that commonsense understanding while rightly declaring racially segregated facilities to be unlawful.

The lesson here is that not all distinctions in fact should be deemed unlawful discrimination.

Ryan T. Anderson, *Just Because Liberals Call Something "Discrimination" Doesn't Mean It Actually Is*, HERITAGE FOUND. (Mar. 2, 2017), <http://www.heritage.org/gender/commentary/just-because-liberals-call-something-discrimination-doesnt-mean-it-actually> [<https://perma.cc/GCK6-AQ9A>]. Social conservatives have long sought to limit the application of antidiscrimination principles to relations between the sexes. See Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1324-25, 1331-32 (2012).

79. See Siegel, *supra* note 74, at 55.

80. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997).

81. See, e.g., Linda McClain, *Conscience Protection and Discrimination in the Republican*

well as liberals, comparison helps identify discrimination, but does not define it.

Why focus attention on the role-based judgments that thread their way through discrimination law—undergirding even the application of equal treatment frameworks? The social-roles inquiry enlarges our frame of reference, tying questions of pregnancy discrimination to larger questions of sex discrimination of which they are a part. As the Court explained in upholding the Family and Medical Leave Act as an exercise of Congress’s power to remedy violations of equal protection<sup>82</sup>: “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. This prevailing ideology about women’s roles has in turn justified discrimination against women when they are mothers or mothers-to-be”<sup>83</sup>—incorporating into equal protection an understanding of the relationship between sex discrimination and pregnancy growing out of decades of litigation under the PDA.<sup>84</sup>

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*Party Platform and Mississippi’s H.B. 1523*, RELIGIOUS FREEDOM INST.: CORNERSTONE (July 30, 2016), <https://www.religiousfreedominstitute.org/cornerstone/2016/7/30/conscience-protection-and-discrimination-in-the-republican-party-platform-and-mississippi-hb-1523> [<https://perma.cc/2FEY-TAJU>] (“[C]alls for protecting religious liberty and conscience increasingly employ the language of protection against ‘discrimination,’ as is illustrated in the recently-enjoined Mississippi law, H.B. 1523.”). Mississippi has enacted a law allowing persons to assert certain faith-based objections to complying with laws of general application, and the state titled the law “Protecting Freedom of Conscience from Government Discrimination Act.” MISS. CODE ANN. §§ 11-62-1 to -19 (2017). For similar reasons, laws requiring religiously objecting health care professionals to provide patient care can also be described as “discrimination.” Brief of *Amici Curiae* Am. College of Pediatricians et al. in Support of Petitioners, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111 (U.S. Sept. 7, 2017) (observing that “the Federal Government and the States passed large numbers of ‘right of conscience laws’ in the wake of *Roe v. Wade* to protect medical professionals against coercion or discrimination”).

82. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737-40 (2003).

83. *Id.* at 736 (quoting *The Parental and Medical Leave Act of 1986: J. Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. & Labor*, 99th Cong. 100 (1986)).

84. The Court continued:

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

*B. Authority for the Social-Roles Inquiry Under the PDA*

The social-roles inquiry has deep roots in the legislative history of the PDA. In enacting the PDA, Congress sought to challenge traditional sex-role expectations that limited the careers of working women.<sup>85</sup> As the *House Report* observed, “[T]he 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.”<sup>86</sup> Congress emphasized that “the assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace.”<sup>87</sup> By clarifying that Title VII’s prohibition on sex discrimination “includes discrimination ‘on the basis of pregnancy, childbirth or related medical conditions,’” a House Representative explained, Congress sought to “assure that women who work ... are not penalized for having a family,” and to “put an end to an unrealistic and unfair system that forces women to choose between family and career.”<sup>88</sup>

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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.

*Id.* For an account of how litigation under the PDA shaped understandings of equal protection, see Siegel, *You’ve Come a Long Way, Baby*, *supra* note 5, at 1891-94.

85. *See, e.g.*, 123 CONG. REC. 29,387 (1977) (floor remarks by Sen. Jacob Javits), *reprinted in* S. COMM. ON LABOR & HUMAN RES., 96TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 67 (1980) [hereinafter LEGISLATIVE HISTORY] (“[W]e 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.”). For a discussion of the interaction of comparative and role-based reasoning, see *infra* Part II.C.

86. H.R. REP. NO. 95-948, at 3 (1978) (testimony of Rep. Carl Dewey Perkins, Comm. on Educ. & Labor), *reprinted in* LEGISLATIVE HISTORY, *supra* note 85, at 149; *see* 123 CONG. REC. 29,385 (floor remark of Sen. Harrison Williams) (“Because of their capacity to become pregnant, women have been viewed as marginal workers not deserving the full benefits of compensation and advancement granted to other workers.”), *reprinted in* LEGISLATIVE HISTORY, *supra* note 85, at 61.

87. S. REP. NO. 95-331, at 3 (1977) (report from Sen. Harrison Williams, Comm. on Human Res.), *reprinted in* LEGISLATIVE HISTORY, *supra* note 85, at 40; 123 CONG. REC. 29,662 (1977) (statement of Sen. Cranston), *reprinted in* LEGISLATIVE HISTORY, *supra* note 85, at 129.

88. 124 CONG. REC. 21,442 (1978) (remarks of Rep. Paul Tsongas), *reprinted in* LEGISLATIVE HISTORY, *supra* note 85, at 185; *see also* Cal. Fed. Sav. & Loan Ass’n v. Guerra,

Early cases interpreting the PDA emphasized these same role-based themes. In *United Automobile Workers v. Johnson Controls*, the Court held that the PDA prohibited an employer from restricting the employment of fertile women but not fertile men: “[W]omen as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.”<sup>89</sup> In *California Federal Savings & Loan Ass’n v. Guerra*, the Court drew on role-based reasoning to explain why the PDA did not preempt a California statute that required employers to accommodate pregnant workers to the extent consistent with business necessity.<sup>90</sup> The Court explained that some forms of dissimilar treatment were permissible under the equality statute: “Congress intended the PDA to be ‘a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.’”<sup>91</sup>

Rather than limiting existing Title VII principles and objectives, the PDA extends them to cover pregnancy. As Senator Williams, a sponsor of the Act, stated: “The entire thrust ... behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”<sup>92</sup>

The Court reasoned that “Title VII, as amended by the PDA, and California’s pregnancy disability leave statute share a common goal,” and, quoting *Griggs v. Duke Power Co.*, the first case recognizing disparate-impact liability under Title VII, the Court observed, “[t]he purpose of Title VII is ‘to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of ... employees over other employees.’”<sup>93</sup> Even as the Court read the PDA to allow states to provide pregnant employees with accommodations not provided to workers seeking them for other reasons,<sup>94</sup> the Court emphasized that the PDA was

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479 U.S. 272, 286 n.19 (1987) (quoting Rep. Tsongas’s remarks).

89. 499 U.S. 187, 204 (1991).

90. 479 U.S. at 288-90.

91. *Id.* at 285 (quoting *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

92. *Id.* at 288-89 (footnote omitted) (quoting 123 CONG. REC. 29,658 (1977)).

93. *Id.* at 288 (quoting 401 U.S. 424, 429-30 (1971)).

94. *See id.* at 284-90.



premised on different sex-role understandings than traditional sex-based protective labor legislation:

The statute is 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.<sup>95</sup>

### *C. How the Social-Roles Framework Helps Identify Pregnancy Discrimination*

It is by now well-established that in embracing norms of sex equality, the nation repudiated centuries of laws and practices that defined men as breadwinners and women as caregivers.<sup>96</sup> The PDA grows out of this same role-based sex equality, as our brief review of the legislative history of the PDA and the Supreme Court cases enforcing the statute shows. In enacting the PDA, Congress repudiated employment practices premised on the view that motherhood is the end of women's labor force participation, and affirmed a world in which women as well as men would combine work and family—a world in which pregnancy would be a normal condition of employment.

Before turning back to the Court's decision in *Young*, it is worth pausing to consider how this understanding of social roles can orient antidiscrimination law. On this social-roles account, antidiscrimination law is not solely reliant on techniques of comparison. Antidiscrimination law can ask: To which social world do employment practices belong? Does the employer interact with pregnant employees on the understanding that pregnancy is a normal phase of

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95. *Id.* at 290 (footnote omitted).

96. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 651-53 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (plurality opinion). See generally 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, 1984-2004 (2003) (offering a short history of the feminist movement claims and congressional enactments that changed work-family relations in the 1970s and ensuing decades).

an employee's life, like eating, resting, sleeping, and occasionally falling ill, or does the employer treat pregnancy as auguring a decline in the worker's competence or fidelity to her job, and her withdrawal from the workforce? Has the employer organized work on the understanding that women will combine employment and motherhood, or does an employer treat new motherhood as the end of a woman's employment?

Of course, antidiscrimination law may still draw on techniques of comparison. Techniques of comparison are often quite helpful in answering questions about roles. For example, in determining whether the employer treats pregnancy as a normal condition of employment or the end of women's employment, it helps to know whether the employer treats the pregnant employee like, or worse than, other employees. Yet we can also answer these questions by drawing on other, noncomparative evidence where there are multiple, or even missing, comparators.<sup>97</sup> Even without comparative evidence, "stereotyped remarks can certainly be evidence that gender played a part' in an adverse employment decision."<sup>98</sup> In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court discussed in some detail the stereotypes about domestic roles that shape judgments about the accommodation of mothers and mothers-to-be in the workplace and foster "employers' stereotypical views about women's commitment to work and their value as employees."<sup>99</sup>

As importantly, the social-roles framework can help identify stereotypical or status-based reasoning in employment decision-making, affecting judgments about cost and other aspects of the business case for retaining pregnant workers. It is commonly assumed that employers make employment decisions on the basis of economic self-interest. It is commonly assumed that pregnant

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97. See *infra* Part III.

98. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119-22 (2d Cir. 2004) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)) (reasoning about the claims of a new mother who was fired after her supervisors had warned her not to become pregnant and had questioned the ability of a mother to perform effectively in the job; and drawing on *Price Waterhouse* and *Hibbs* to hold that stereotyped remarks can supply evidence of purposeful disparate treatment, even in the absence of comparative evidence).

99. 538 U.S. 721, 736 (2003).

workers threaten employers with extra cost.<sup>100</sup> Yet these assumptions may be wrong, distorted by stereotypical bias.

As the race- and sex-discrimination cases so richly illustrate, stereotypical or status-based reasoning can shape market relations. In *Price Waterhouse v. Hopkins*, an accounting firm refused to promote a woman associate to partner, even though she secured more major contracts for the firm than all other partnership candidates.<sup>101</sup> Employers may fire pregnant employees, even when retaining pregnant employees will save them money. The social-roles account of pregnancy discrimination can identify reasons why employers may exclude employees who are perfectly able to do the job, and reasons why employers may fail to accommodate pregnant employees even if it may be in the employer's business interest to do so. Implicit bias may distort economically self-interested judgments.<sup>102</sup>

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100. For an illustration of these assumptions in action, see *Troupe v. May Department Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (Posner, C.J.) (“We must imagine a hypothetical Mr. Troupe, who is as tardy as Ms. Troupe was, also because of health problems, and who is about to take a protracted sick leave growing out of those problems at an expense to Lord & Taylor equal to that of Ms. Troupe’s maternity leave. If Lord & Taylor would have fired our hypothetical Mr. Troupe, this implies that it fired Ms. Troupe not because she was pregnant but because she cost the company more than she was worth to it.”).

101. 490 U.S. 228, 223-34 (1989). To achieve partnership, the plaintiff was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* at 235 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

102. See, e.g., Jennifer Cunningham & Therese Macan, *Effects of Applicant Pregnancy on Hiring Decisions and Interview Ratings*, 57 SEX ROLES 497, 504 (2007) (observing that when presented with the resumes of equally qualified pregnant and nonpregnant candidates, evaluators were significantly less likely to hire the pregnant candidate).

Some social scientists propose that motherhood is a “status characteristic,” a phenomenon that occurs when “widely-held cultural beliefs associate greater status worthiness and competence with one category of the distinction (e.g., nonmothers) than another (e.g., mothers ...).” Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood as a Status Characteristic*, 60 J. SOC. ISSUES 683, 684 (2004). As a disfavored status group in the workplace, mothers are evaluated more strictly and perceived as less competent and less committed than nonmothers. Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIOLOGY 1297, 1301 (2007). Cultural beliefs that both ideal mothers and ideal employees should be singularly devoted to their respective roles further drive perceptions that mothers are less committed and less competent workers. See generally MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES* 96-99, 102-06 (2003); CYNTHIA THOMAS CALVERT, GARY PHELAN, & JOAN C. WILLIAMS, *FAMILY RESPONSIBILITIES DISCRIMINATION* (2014); Joan C. Williams, *Written Testimony of Joan Williams*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm> [<https://perma.cc/DB3Y-2NVX>] (“Maternal wall bias against mothers is an order of magnitude larger than glass ceiling bias against women in general.”).

Even when employer judgments are not affected by implicit bias, they may rest on faulty predictions about employee conduct at a time when social norms are in flux, and in these or other ways they may perpetuate judgments about the organization of work that originated in a social order we have now repudiated. The application of antidiscrimination law to school athletics richly demonstrates how equality law can break down barriers and allow new norms and forms of social coordination to flourish among actors freed from constraints of sex discrimination.<sup>103</sup>

For these various reasons, it is crucial to consider the social-roles account when evaluating the distributive considerations that pregnancy discrimination claims present. The social-roles account makes clear that when employment discrimination law requires employers to accommodate pregnant employees, the law may save employers money rather than imposing costs on them. (The efficiency case for antidiscrimination law dates back to passage of the 1964 Civil

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103. Title IX has been “widely credited with shaping new norms” about women’s sports. See Dionne L. Koller, *How the Expressive Power of Title IX Dilutes Its Promise*, 3 HARV. J. SPORTS & ENT. L. 103, 103 (2012). Instead of tying standards of equality to expressions of aptitude and interest formed under sex discrimination, Title IX required schools to take more affirmative steps to facilitate women’s “developing” athletic interests and abilities until they had “been fully and effectively accommodated.” See Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 47-48 (2001).

Enforcement of Title IX led to dramatic and unpredicted changes in both women’s athletic abilities and spectator interest. Since Title IX’s enactment, high school sports participation by women has increased from 7 to 42 percent, and the 2015 Women’s World Cup in soccer was the most-watched soccer game—either men’s or women’s—in U.S. history. See NAT’L FED’N OF STATE HIGH SCH. ASS’NS, 2014-15 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 55 (2015), [http://www.nfhs.org/ParticipationStatics/PDF/2014-15\\_Participation\\_Survey\\_Results.pdf](http://www.nfhs.org/ParticipationStatics/PDF/2014-15_Participation_Survey_Results.pdf) [<https://perma.cc/PG9X-PHKY>]; Richard Sandomir, *Women’s World Cup Final Was Most-Watched Soccer Game in United States History*, N.Y. TIMES (July 6, 2015), <https://www.nytimes.com/2015/07/07/sports/soccer/womens-world-cup-final-was-most-watched-soccer-game-in-united-states-history.html> [<https://perma.cc/4ERL-5PVM>]. Team USA touts Title IX as the reason American women now not only out-medal American men at the Olympics, but also consistently beat competitors from other countries. See Karen Price, *Impact of Title IX Still Felt by Team USA Athletes Today*, TEAM USA (June 22, 2017, 1:30 PM), <https://www.teamusa.org/News/2017/June/22/Impacts-Of-Title-IX-Still-Felt-By-Team-USA-Athletes-Today> [<https://perma.cc/6P8M-8DHW>]; see also Jennifer Rubin, *U.S. Women’s Olympic Dominance Is Not a Fluke*, WASH. POST. (Aug. 22, 2016), [https://www.washingtonpost.com/blogs/right-turn/wp/2016/08/22/u-s-womens-olympic-dominance-is-not-a-fluke/?utm\\_term=.d48bc94b7a5d](https://www.washingtonpost.com/blogs/right-turn/wp/2016/08/22/u-s-womens-olympic-dominance-is-not-a-fluke/?utm_term=.d48bc94b7a5d) [<https://perma.cc/5VHT-LD7K>] (“Overall, it’s the success of women who have made the United States so dominant at the Olympics .... If you counted U.S. women alone, they’d have out-ranked nearly every other country.”).

Rights Act.<sup>104</sup>) That said, employment discrimination law *can* redistribute costs. It is sometimes supposed that accommodation mandates shift costs, while antidiscrimination mandates condemn only economically irrational discrimination. In fact, antidiscrimination law can impose costs on employers, as case law—including the Court’s recent decision in *Young*—and commentary make clear.<sup>105</sup>

Locating pregnancy discrimination in social context makes the underlying logic of these employment practices legible. Once we begin to identify the kinds of decision-making that has structured the workplace in which a pregnant employee finds herself, we can ask a different set of questions about the role antidiscrimination law can properly play in promoting change. Law that prohibits race and sex discrimination has shaped norms and shifted costs in a wide variety of ways,<sup>106</sup> even if, in the end, its role has been limited.<sup>107</sup> The question we now face is how the Court’s decision in *Young* strikes that balance.

### III. YOUNG V. UPS

To recall, the PDA provides that:

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

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104. See, e.g., GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 11-12 (2d ed. 1971); see also John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1427 (1986) (arguing Title VII is an efficient intervention in labor markets); Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 514 (1987) (“By adding a legal penalty to the market penalty for discrimination, Title VII accelerates the movement toward the day when discrimination has been squeezed out of markets and the gains from trade have thereby been maximized.”).

105. See *Young v. UPS*, 135 S. Ct. 1338, 1354 (2015); Dinner, *supra* note 45, at 420-21; Samuel Issacharoff & Erin Scharff, *Antidiscrimination in Employment: The Simple, the Complex, and the Paradoxical*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW* 385, 385-86 (Cynthia L. Estlund & Michael L. Wachter eds., 2012); Jolls, *supra* note 65, at 684-95.

106. See Donohue, *supra* note 104, at 1423-30.

107. See *id.*

persons not so affected but similar in their ability or inability to work.<sup>108</sup>

The controversy in *Young* concerned the application of the PDA to an employment policy that accommodated certain classes of workers—those who were injured on the job, who were covered by the ADA, or who lost their driver’s license for various reasons—but that refused to accommodate other classes of workers, including pregnant workers such as the plaintiff.<sup>109</sup> *Young* argued that the second clause of the PDA “requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work.”<sup>110</sup> UPS disagreed, arguing that it could accommodate the three other classes of workers without accommodating pregnant employees, so long as the company’s treatment of the pregnant worker could be assimilated to some other facially neutral category.<sup>111</sup> The policy was “pregnancy neutral”<sup>112</sup> because *Young* was treated as or like an employee who incurred an off-the-job injury.<sup>113</sup> In seeking an accommodation, UPS argued, “*Young* in effect claims that she should have been treated *better* than non-pregnant employees with off-the-job injuries and illnesses,” but the PDA “does not entitle a pregnant employee to preferential treatment; to the contrary, ‘[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees.’”<sup>114</sup>

The Court’s decision in *Young* resolved this conflict in ways that disrupt distributive and comparative reasoning about the PDA that had prevailed for years in the lower courts.<sup>115</sup> Especially noteworthy is the blend of comparative and noncomparative reasoning that the majority employed to make sense of disparate-treatment and disparate-impact claims under the PDA.

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108. Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k) (2012).

109. See *Young*, 135 S. Ct. at 1343-45.

110. Petitioner’s Brief, *supra* note 67, at 23.

111. See Brief for Respondent at 27-28, *Young*, 135 S. Ct. 1338 (2015) (No. 12-1226).

112. Brief of Appellee at 36, *Young v. UPS*, 707 F.3d 437 (4th Cir. 2013) (No. 11-2078).

113. See Brief for Respondent, *supra* note 111, at 28.

114. Brief of Appellee, *supra* note 112, at 40-41 (alteration in original) (footnote omitted) (quoting *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994)).

115. See *supra* note 45 and accompanying text.

The Supreme Court's decision in *Young* makes no reference to social-roles analysis. Yet Justice Stephen Breyer's opinion for the Court can be read in a social-roles framework, and doing so focuses our attention on features of the Supreme Court's decision absent from the lower court judgments. *Young* breaks from a rigid comparative framework, rejects reflexive cost justifications, and reasons more flexibly about disparate treatment and disparate impact claims of pregnancy discrimination.<sup>116</sup> The Court reasons about the accommodation of pregnancy in ways that may well be informed by the adoption of pregnant worker fairness acts in nearly half the states of the nation.<sup>117</sup>

### A. *The Court's Decision*

Writing for the majority in *Young*, Justice Breyer rejected both the plaintiff's and the defendant's arguments.<sup>118</sup> Young's approach would "grant[ ] pregnant workers a 'most-favored-nation' status," he objected.<sup>119</sup>

As long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55—then it must provide similar accommodations to *all* pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria.<sup>120</sup>

At the same time, the majority observed that UPS's argument would have restricted the PDA to cases in which pregnancy was the only condition an employer refused to accommodate—effectively requiring a showing of animus and nullifying the statute's second clause.<sup>121</sup>

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116. See *infra* Part III.B.

117. See *supra* notes 14, 23-26 and accompanying text.

118. See *Young v. UPS*, 135 S. Ct. 1338, 1348-49 (2015).

119. *Id.* at 1349.

120. *Id.* at 1349-50.

121. See *id.* at 1352-53.

The majority then offered Young a different framework for challenging the employer's selective accommodation as disparate treatment under the Pregnancy Discrimination Act.<sup>122</sup> (Perhaps anticipating judicial hostility to claims of accommodation, Young had failed to plead disparate impact.<sup>123</sup>) To build this framework, the majority adapted to the pregnancy discrimination context the Title VII *McDonnell Douglas* standard for proving disparate treatment.<sup>124</sup> The plaintiff would show "that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"<sup>125</sup> The employer could then "justify its refusal to accommodate the plaintiff by relying on 'legitimate, nondiscriminatory' reasons for denying her accommodation."<sup>126</sup> Here, the majority imposed a crucial limitation on what can count as a legitimate nondiscriminatory reason for refusing to accommodate a pregnant employee, observing that:

[C]onsistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ("similar in their ability or inability to work") whom the employer accommodates. After all, the employer in *Gilbert* could in all likelihood have made just such a claim.<sup>127</sup>

The plaintiff could in turn show that even this reason was pretextual by demonstrating "that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination."<sup>128</sup> Justice Breyer observed:

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122. *See id.* at 1353-54.

123. When Young sought to amend her complaint to add a distinct disparate impact claim, the district court denied her motion. The Fourth Circuit upheld the denial. *See Young v. UPS*, 707 F.3d 437, 442 n.6 (4th Cir. 2013), *vacated*, 135 S. Ct. 1338 (2015).

124. *See Young*, 135 S. Ct. at 1353-54 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

125. *Id.* at 1354.

126. *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 802).

127. *Id.* (emphasis added) (referencing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)).

128. *Id.*



[T]he fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.<sup>129</sup>

The framework the majority announced for evaluating selective-accommodation claims like *Young*'s blends comparison and balancing in hybrid forms that are unconventional in PDA and in disparate-treatment law.<sup>130</sup> The unusual features of the decision suggest it was some form of compromise, at least partly successful in attracting liberal and conservative votes. Chief Justice John Roberts and the three other liberal Justices joined Justice Breyer's opinion for the Court; Justice Samuel Alito concurred in the result.<sup>131</sup>

The majority opinion provoked an outraged dissent by Justice Antonin Scalia, joined by Justices Clarence Thomas and Anthony Kennedy.<sup>132</sup> Justice Scalia fumed that the majority

craft[ed] ... a new law that is splendidly unconnected with the text and even the legislative history of the Act....

....

How we got here from the same-treatment clause is anyone's guess. There is no way to read "shall be treated the same"—or indeed anything else in the clause—to mean that courts must balance the significance of the burden on pregnant workers against the strength of the employer's justification for the policy....

The fun does not stop there. Having ignored the terms of the same-treatment clause, the Court proceeds to bungle the dichotomy between claims of disparate treatment and claims of disparate impact.<sup>133</sup>

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129. *Id.* at 1354-55.

130. *Cf. supra* notes 45-46 and accompanying text.

131. *See Young*, 135 S. Ct. at 1356 (Alito, J., concurring).

132. *See id.* at 1361 (Scalia, J., dissenting).

133. *Id.* at 1361, 1364-65.

In a separate dissent, Justice Kennedy expressed sympathy for the plaintiff as a working mother, and suggested that she should have brought a disparate-impact claim of pregnancy discrimination.<sup>134</sup> His separate dissent urging that, properly understood, the plaintiff had a viable disparate-impact claim was especially noteworthy, given that, during the same Term, he would write a much-awaited majority opinion upholding, over conservative objection, disparate-impact claims of race discrimination under the Fair Housing Act, in an opinion emphasizing that the disparate-impact framework provides a vehicle for challenging hidden, unconscious, and structural forms of discrimination.<sup>135</sup>

### *B. The Court's Decision in Context*

There is much to be said about what is old, new, and absent in *Young*. Unlike the Congress that enacted the PDA and unlike the Court's earlier decisions interpreting the PDA in *California Federal Savings & Loan Ass'n* and in *Johnson Controls*, the Court that decided *Young* did not connect pregnancy discrimination to other forms of sex discrimination or reflect on the sex-role understandings the statute repudiates and affirms.<sup>136</sup> The Justices argued about pregnancy discrimination across many pages and many opinions, debating the meaning of the PDA's first and second clause, without ever taking a step back to ask what pregnancy discrimination is and why we care about it. Nothing intrinsic to the law required technical reason of this kind to monopolize an opinion in this way. The Congress that enacted the PDA and the Court that initially interpreted it located pregnancy discrimination in larger social context. They talked about the roots and consequences of pregnancy discrimination; they reasoned about sex roles and not only comparators.<sup>137</sup> This anchor to social roles and social context is missing in *Young*, and with critical consequences.

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134. *See id.* at 1366-68 (Kennedy, J., dissenting) (explaining that women in the workforce "confront a serious disadvantage after becoming pregnant" due to stereotyping, despite laws aimed at ameliorating pregnancy discrimination, and noting that the majority opinion "addresses only one" of the possible claims that could be brought under the PDA).

135. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

136. *Cf. supra* Part II.B.

137. *See supra* Part II.B.

Though the Court took no note of it, women delivery drivers at UPS work in traditionally male jobs. Apparently, many UPS drivers work through their pregnancies.<sup>138</sup> But if a pregnant employee needs an accommodation, she is out of work.<sup>139</sup> The employer provides light-duty accommodations for several classes of workers, but refuses accommodations for “any employee, male or female, who has any medical condition not related to work, pregnancy included.”<sup>140</sup> A pregnant employee who needs an accommodation at work, however modest, is out of work, even as the company provided for the accommodation, not only of those injured on the job, but also for those who are ADA eligible, or those who lost their driving licenses for a wide range of reasons including diagnoses of high blood pressure and sleep apnea, as well as DUI convictions.<sup>141</sup> What story about the workplace does UPS’s policy of selective accommodation tell? This is *not* a workplace in which pregnancy is a normal condition of employment. Oddly enough, Justice Kennedy’s dissent arguing that *Young* should have brought a disparate impact claim comes closest to acknowledging, and affirming, her quest to combine motherhood and employment.<sup>142</sup>

Yet, Justice Breyer’s opinion for the Court can be read in a social-roles framework, and doing so brings important features of the decision into light. Consider how the Supreme Court’s decision in *Young* departed from the Fourth Circuit’s judgment below.

The Fourth Circuit characterized UPS’s policy of accommodating many classes of workers—but not pregnant workers—as “a neutral, pregnancy-blind policy.”<sup>143</sup> The Supreme Court rejected this framework. The Supreme Court’s decision in *Young* did not interpret the PDA as mandating blindness, nor did it define equality exclusively in comparative terms.<sup>144</sup>

In *Young*, comparison is no longer the sole determinant of pregnancy discrimination; comparison is now an aid to identifying pregnancy discrimination, part of a larger inquiry that invites the trier

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138. See *Young v. UPS*, No. DKC 08-2586, 2011 WL 665321, at \*2-3 (D. Md. Feb. 14, 2011), *aff’d*, 707 F.3d 437 (4th Cir. 2013), *vacated*, 135 S. Ct. 1338 (2015).

139. See *id.* at \*2.

140. *Id.*

141. See *id.* at \*2-3.

142. See *Young v. UPS*, 135 S. Ct. 1338, 1367 (2015) (Kennedy, J., dissenting).

143. *Young v. UPS*, 707 F.3d 487, 450 (4th Cir. 2013), *vacated*, 135 S. Ct. 1338 (2015).

144. See *Young*, 135 S. Ct. at 1349-50.

of fact to weigh the employer's justification for selective accommodation against the burden on pregnant employees denied accommodations.<sup>145</sup> Probing an employer's reasons in a balancing framework of this kind may bring to light implicit biases: the employer's judgment that pregnant workers are not worth even modest accommodations may reveal hidden judgments about the competence or commitment of new mothers in the workplace.<sup>146</sup>

As importantly, the *Young* majority explicitly restricted the role that cost and convenience may play in justifying an employer's refusal to accommodate a pregnant worker at the same time the employer is accommodating others.<sup>147</sup> As Justice Breyer pointed out,<sup>148</sup> Congress reversed the *Gilbert* decisions, despite cost objections; courts have long denied customer-preference and other cost-based justifications for race and sex discrimination.<sup>149</sup> In so reasoning, the majority rehabilitated the legislative history of the statute and reaffirmed PDA and Title VII case law that recognizes that cost justification is not a defense for disparate treatment.<sup>150</sup>

Last, but by no means least, both the majority<sup>151</sup> and the dissents<sup>152</sup> 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.

After decades in which courts evinced unremitting hostility to disparate-impact claims generally and in the pregnancy context in particular,<sup>153</sup> *Young* may well have reopened the door, just a notch. As Justice Scalia observed, the majority's disparate-treatment analysis involved balancing burdens on plaintiffs against the employer's justifications, much as a *disparate-impact* inquiry involves

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145. *See id.* at 1350, 1353.

146. *See supra* notes 101-03 and accompanying text.

147. *See Young*, 135 S. Ct. at 1354.

148. *Id.* at 1355.

149. *See supra* notes 61-65 and accompanying text.

150. *See supra* note 93 and accompanying text.

151. *Young*, 135 S. Ct. at 1355.

152. *Id.* at 1361-1365 (Scalia, J., dissenting); *id.* at 1368 (Kennedy, J., dissenting).

153. *See supra* notes 44-45 and accompanying text.

balancing burdens on plaintiffs against the employer's justifications.<sup>154</sup> All the opinions in *Young* discussed disparate impact under the PDA. Disparate impact was the focal point of the dissent by Justice Kennedy, the author of *Inclusive Communities*, the 2015 decision reaffirming the disparate-impact cause of action under the Fair Housing Act.<sup>155</sup> As Justice Kennedy pointed out in *Inclusive Communities*, the disparate-impact cause of action overlaps with disparate treatment as a tool for challenging hidden and unconscious bias, as well as structural discrimination.<sup>156</sup>

The disparate claim of pregnancy discrimination has been available since the Act's passage,<sup>157</sup> but the claim's reaffirmation in *Young* may be one of the most consequential features of the decision.<sup>158</sup>

#### CONCLUSION: NEW SUPPORT FOR THE PDA AT FORTY

Looking beyond Title VII, there are signs of change afoot—signs that American workers are impatient with federal courts' narrow

154. See *Young*, 135 S. Ct. at 1365 (Scalia, J., dissenting).

155. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) ("Much progress remains to be made in our Nation's continuing struggle against racial isolation.... The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.' The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society." (citing *Parents Involved in Cmty. Sch. Dist. No. 1*, 551 U.S. 701, 797 (Kennedy, J., concurring in part and concurring in the judgment); and then quoting U.S. KERNER COMM'N, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968))).

156. See *id.*; see also Reva Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 657-59 (2015) (explaining that judges and commentators understand disparate impact liability to redress three kinds of discrimination: covert intentional discrimination, implicit or unconscious bias, and structural discrimination).

157. See Siegel Note, *supra* note 5 (arguing that comparable treatment does not exhaust the PDA's requirements, demonstrating that the PDA authorizes both disparate-treatment and disparate-impact claims, and analyzing disparate impact pregnancy accommodation claims that employees might bring).

158. See, e.g., Brake, *supra* note 46, at 561-62 (arguing that *Young* blurred the distinction between disparate treatment and impact claims because doing so "is more suitable for capturing unconscious or implicit bias than one limited to employer actions based on a deliberate intent to discriminate"). See generally L. Camille Hébert, *Disparate Impact and Pregnancy: Title VII's Other Accommodation Requirement*, 24 AM. U. J. GENDER SOC. POL'Y & L. 107 (2015).

interpretation of the PDA.<sup>159</sup> Nearly half the states—twenty-two states, the District of Columbia, and four cities—have enacted some form of a pregnant worker fairness act that mandates the reasonable accommodation of pregnancy unless the accommodation imposes an undue hardship on an employer's business.<sup>160</sup> These states include red states, Louisiana, Nebraska, and Utah, as well as blue states, California, Connecticut, and New Jersey. However weak or strong their enforcement may be, the statutes signal the growing belief that working women have a right to hang onto their jobs when they become mothers, and that their income is crucial to a family's survival. No doubt, more vigorous enforcement of the PDA will spur passage and enforcement of these acts, as the acts will spur more vigorous enforcement of the PDA. That is as it should be, as the PDA turns forty.

These developments suggest that accommodating working parents could emerge as a bridge issue, with power to move people across the political spectrum, even in these polarized times. In the United States, there is growing talk of affordable child care and paid family leave.<sup>161</sup> But we are a long way from realizing that promise. Job retention matters—until we enact paid leave, and after. Under the PDA, disparate treatment and disparate impact law mandate modest accommodations that help pregnant women hang on to their jobs—and forge a more gender-equal workplace in the process.

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159. See *supra* note 23 and accompanying text.

160. See *supra* note 14 and accompanying text.

161. See, e.g., Steven Findlay, *Paid Parental Leave May Be the Idea that Transcends Politics*, USA TODAY (July 23, 2017, 11:20 AM), <https://www.usatoday.com/story/news/nation/2017/07/22/paid-parental-leave-idea-could-transcend-politics/501967001/> [<https://perma.cc/DJX6-U4CP>].