

## ARTICLES

### UNSEXING PREGNANCY

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*Because sex does not dictate the capacity to provide care in the home or work in the market, sex-equality law combats harmful sex stereotypes by eliminating statutes and regulations that assign these roles on the basis of sex. When it comes to pregnancy, though, courts and commentators alike chart a very different course. They assume that pregnancy is a biological event that is almost exclusively for women. Thus, equal protection jurisprudence accepts the legal assignment of carework during pregnancy to women, and a range of laws regulating pregnancy carework—from prenatal leave under the Family and Medical Leave Act to health benefits under the Affordable Care Act to employment protections under the Pregnancy Discrimination Act—apply only or mostly to women. Even though the sexed law of pregnancy stands in stark contrast to the unsexed law of parenting, the sexed pregnancy has avoided challenge and largely escaped notice.*

*This Article makes visible the law of the sexed pregnancy, identifies and evaluates the core tension it generates in the law of sex equality, and considers how to unravel this tension. Of course, typically only women can physically carry a child, and therefore some pregnancy regulations are appropriately sex specific. But the nine months of pregnancy encompass a range of carework, much of which has little or nothing to do with the physical fact of pregnancy. Expectant fathers can, for example, buy a carseat, quit smoking, take a childcare class, and choose a pediatrician or daycare center for the child. Given the ability to disaggregate sex from much of the carework of pregnancy, the*

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*law's failure to do so marks women for caregiving and men for breadwinning in the same problematic way that sex-equality law has tried to combat after a child is born. And while pregnancy implicates real concerns about a woman's constitutional right to bodily autonomy, this concern alone cannot justify the failure to scrutinize all sex-based pregnancy regulations, because much prebirth carework does not involve the woman's body at all. After surfacing the law's anomalous sexed treatment of pregnancy, this Article considers how to harmonize the law of sex equality. This effort can advance not only the goal of equality between the sexes, but also equality for lesbian, gay, and transgender parents, while at the same time enhancing women's autonomy.*

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## INTRODUCTION

The hallmark of sex-equality law is the aggressive policing of laws that classify individuals on the basis of sex and that are grounded in mere sex stereotypes. Nowhere have these unsexing efforts been more substantial than in the context of the carework involved in parenting. Because sex rarely if ever dictates one's ability to parent, carework can be and has

been gradually “disaggregated” from sex.<sup>1</sup> Unsexing the law of caregiving has been crucial to dismantling the separate sex-based spheres that pigeonhole women as caregivers and men as breadwinners and that have been so harmful to sex equality. Equal protection doctrine therefore closely scrutinizes sex classifications related to parenting carework,<sup>2</sup> and laws like Title VII and the Family and Medical Leave Act (FMLA) take aim at stereotypes of sex-based caregiving roles.<sup>3</sup> Yet despite this progress, one significant sphere of caregiving has remained immune to these efforts: pregnancy.

Sex-equality law’s pervasive efforts to disaggregate sex from caregiving after birth are in stark contrast to its failure to do so before birth. While typically only women can bear children,<sup>4</sup> an emerging consensus across a variety of scholarly fields recognizes the nine months of pregnancy as much more than a physical fact.<sup>5</sup> Rather, pregnancy involves a wide range of carework—such as quitting smoking, taking a childcare class, and choosing a pediatrician—that has more in common with child-rearing than childbearing.

Despite this, the Supreme Court has decided that pregnancy is an event almost exclusively for women and has therefore assumed that

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1. We borrow this language from Professor Mary Anne Case’s seminal article on the law of sex equality. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *Yale L.J.* 1, 2 (1995) [hereinafter Case, *Disaggregating*].

2. The list of cases engaging in such efforts is long, and these cases are discussed in greater detail in section I.A. These efforts have been so persuasive that in 2017 a *unanimous* Supreme Court (with Justice Gorsuch recused) invalidated a statute in part because of its assumptions that women are caregivers and men are not. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (striking down a sex-differentiated citizenship rule).

3. See *infra* notes 88–92.

4. There is an exception to this deserving greater attention: the still rare but significant reality of the pregnant man. See Mathilde Cohen, *The Lactating Man*, in *Making Milk: The Past, Present, and Future of Our Primary Food* 141, 152–53 (Mathilde Cohen & Yoriko Otomo eds., 2017); Carma Hassan & Dakin Andone, ‘My Body Is Awesome’: Trans Man Expecting First Child, CNN, <http://www.cnn.com/2017/06/08/health/trans-man-pregnant-trnd/index.html> [<https://perma.cc/G3NT-SU4X>] (last updated June 8, 2017); *infra* notes 176–179 and accompanying text.

5. See generally Anna R. Brandon et al., *A History of the Theory of Prenatal Attachment*, 23 *J. Prenatal & Perinatal Psychol. & Health* 201, 202–11 (2009) (discussing the relevant literature on prenatal attachment from both maternal and paternal perspectives). Earlier studies focused only on how behaviors during the pregnancy shaped later carework for women. See, e.g., Reva Rubin, *Maternal Tasks in Pregnancy*, 1 *J. Advanced Nursing* 367, 367–69 (1976) (focusing on how female caregiving affects post-delivery mothering). More recently, scholars have focused on how behaviors by both women and men during the pregnancy shape later caregiving by both. See John T. Condon, *The Parental–Foetal Relationship—a Comparison of Male and Female Expectant Parents*, 4 *J. Psychosomatic Obstetrics & Gynecology* 271, 280–83 (1985) (summarizing the relevant mechanisms and empirical findings).

caregiving during pregnancy is almost exclusively for women too.<sup>6</sup> The result is a wide swath of laws regulating pregnancy—including prenatal leave under the FMLA, essential health benefits under the Affordable Care Act, and employment protections under the Pregnancy Discrimination Act—that apply only or mostly to women. As one of many notable examples, the FMLA provides sex-neutral leave for postbirth caregiving in order to combat sex stereotypes,<sup>7</sup> but it provides leave for prenatal caregiving only to women.<sup>8</sup>

Scholars have likewise argued for pregnancy as a woman's domain.<sup>9</sup> While pregnancy has been central to debates over sex-equality law for decades, all sides assume that pregnancy represents a biological sex difference, and scholars disagree only on whether women should be afforded special treatment *given* this physical difference.<sup>10</sup> Questioning

6. See *infra* notes 127–132 and accompanying text. Perhaps the most widely known—and reviled—of the many cases conflating pregnancy with physical gestation is *Geduldig v. Aiello*, in which the Court denied heightened scrutiny to a pregnancy classification because “pregnancy is an objectively identifiable physical condition with unique characteristics.” 417 U.S. 484, 496 n.20 (1974); see also *Nguyen v. INS*, 533 U.S. 53, 65 (2001) (deciding that mothers are more likely “to develop a real, meaningful relationship” with a newborn because of the “event of birth”); *Lehr v. Robertson*, 463 U.S. 248, 260–62 & n.16 (1983) (deciding that since “[t]he mother carries and bears the child[,] . . . her parental relationship is clear,” while the father must “grasp[] [the] opportunity” to become a parent through postbirth actions (internal quotation marks omitted) (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting))); cf. *Caban*, 441 U.S. at 389 (“Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization . . . would become less acceptable as a basis for legislative distinctions as the age of the child increased.”).

7. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (noting that Congress enacted the FMLA to address the problem that employers “often denied men similar accommodations [to women] or discouraged them from taking leave” because they “regard[ed] the family as the woman’s domain”).

8. See *infra* section II.B.2.a (discussing the relevant statutory language and resulting regulations).

9. See, e.g., Katharine T. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 *Calif. L. Rev.* 1532, 1532 (1974) (“Only women may experience pregnancy . . .”); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 *Colum. L. Rev.* 1118, 1139 (1986) (“[P]regnancy is unique—[in] that it affects only women . . .”); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 *U. Pa. L. Rev.* 955, 1007 (1984) (“[P]regnancy, abortion, reproduction, and creation of another human being are special—very special. Women have these experiences. Men do not.” (emphasis omitted)); Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 *Yale L.J.* 929, 942 (1985) [hereinafter Siegel, *Employment Equality*] (stating that pregnancy is a “biological difference central to the definition of gender roles” affecting women).

10. Compare Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 *Berkeley Women’s L.J.* 1, 1–2 (1985) (advocating for the special-treatment approach and noting that pregnancy is “a condition that only women experience”), with Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 *N.Y.U. Rev. L. & Soc. Change* 325, 327–28 (1984–1985) (advocating for the equal-treatment approach and noting that pregnancy is a “characteristic[] unique to one sex”).

the sexed pregnancy—as this Article does—challenges the very premise of these debates.

This Article renders the law of the sexed pregnancy visible, surfaces a central tension in the law of sex equality that it generates, and considers how to unravel this doctrinal tension. Disaggregating sex from carework at the beginning is important because sex-based caregiving stereotypes—and the sex-discriminatory laws that enforce them—are at the root of so much sex inequality.<sup>11</sup> Dismantling these sex stereotypes after birth is too little because it is too late. Sticky behaviors marking women as caregivers and men as providers emerge during the pregnancy and are difficult to reverse after birth. We will never fully unsex parenting as long as pregnancy is sexed.

The sexed pregnancy is a key roadblock in the path not only to equality between men and women but also to equality for gay, lesbian, and transgender expectant parents. A legal system that enforces sex-based caregiving roles can exclude gay, lesbian, and transgender expectant parents from its protections simply because of their sex and also reinforce sex stereotypes that are especially difficult for nontraditional families. This Article emphasizes the interlocking sex stereotypes of women's and men's respective roles in the family and at work that fuel gendered distributions of caregiving. But, in doing so, the Article also highlights the damaging consequences of the sexed pregnancy for other family configurations. For this reason, when relevant, the Article refers to the nonpregnant expectant parent in sex-neutral terms, rather than to the expectant father.

Constitutional concerns related to women's bodily autonomy that arise uniquely during pregnancy are critical considerations, but they cannot justify the law's wholly distinct treatment of pre- and postbirth carework. Precedents like *Planned Parenthood of Southeastern Pennsylvania v. Casey* do recognize a problem of constitutional magnitude with paternal involvement in pregnancy when it amounts to undue intrusion on the mother's body.<sup>12</sup> But the very circumstance that permits sex to be disaggregated from carework during pregnancy—that much carework during pregnancy is not tied to the physical fact of gestation—also permits paternal involvement in pregnancy in ways that do not involve the mother's body and thus avoid triggering the important red flags that

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11. See, e.g., *Hibbs*, 538 U.S. at 738 (stating that “the faultline between work and family” is “precisely where sex-based overgeneralization has been and remains strongest”); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 *NYU. L. Rev.* 1185, 1204 n.124 (1992) (explaining the argument that sex classifications “enshrining and promoting the woman's ‘natural’ role as selfless homemaker, and correspondingly emphasizing the man's role as provider, . . . impede[] both men and women from pursuit of the opportunities . . . that could enable them to break away from familiar stereotypes”).

12. See 505 U.S. 833, 898 (1992) (invalidating a spousal notification requirement because it gave the husband an “enforceable right to require a wife to advise him before she exercises her personal choices”).

*Casey* raised. Once we recognize that fathers can do prebirth carework without involving the mother's body, the objection from reproductive rights dissipates—although admittedly it does not disappear.

The roots of unraveling this key tension in the law of sex equality lie in the very cases that have constructed this tension in the first place. Several Supreme Court cases that serve as the foundation of the sexed pregnancy need not be overruled but simply revisited. The Supreme Court, in its landmark *Geduldig v. Aiello* decision, determined that the pregnancy classification in that case was not sex discrimination subject to heightened scrutiny under the Fourteenth Amendment.<sup>13</sup> The Court also suggested, however, that under the right circumstances, pregnancy discrimination *could* be the type of sex discrimination that the Equal Protection Clause scrutinizes and rejects.<sup>14</sup> This Article argues that many of the sexed pregnancy regulations identified here are precisely the type of pregnancy regulations that warrant heightened scrutiny and that could wither under its exacting gaze.

Although courts may strike down sex-based pregnancy regulations, this Article considers whether the remedy should be to “level up” by extending some existing laws to nonpregnant expectant parents when physical sex differences do not justify their exclusion.<sup>15</sup> Many pregnancy protections and benefits can be extended to and utilized by those other than the pregnant woman and without meaningfully involving her.<sup>16</sup> Extending these protections and benefits not only bolsters sex equality but can also enhance—rather than infringe on—women's constitutionally guaranteed autonomy. As feminist scholars have articulated, autonomy for caregivers can come from support rather than separateness—and this is precisely what extending pregnancy protections and benefits can help to achieve.<sup>17</sup>

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13. 417 U.S. 484, 494–97, 496 n.20 (1974).

14. See *id.* at 496 n.20 (“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 . . .”); see also *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 135–36 (1976) (stating in an analogous Title VII context that a “distinction which on its face is not sex related might nonetheless violate the Equal Protection Clause if it were in fact a subterfuge to accomplish a forbidden discrimination”); *id.* at 149 (Brennan, J., dissenting) (“*Geduldig's* outcome was qualified by the explicit reservation of a case where it could be demonstrated that a pregnancy-centered differentiation is used as a ‘mere pretext . . . designed to effect an invidious discrimination against the members of one sex . . .’” (alterations in original) (quoting *Geduldig*, 417 U.S. at 496 n.20)).

15. See, e.g., *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) (“[W]hen a statute benefits one class . . . and excludes another[,] . . . [a] court may either . . . order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute . . .” (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979))).

16. See *infra* section II.B.2.

17. See *infra* notes 335–337 and accompanying text.

This Article proceeds in four parts. Parts I and II demonstrate the distinct ways that sex-equality law treats carework after birth as compared with carework before birth. Part III establishes that this is a distinction without a meaningful difference. Sex-based regulations of carework in the prebirth period, like those in the postbirth period, generate and reinforce gendered caregiving distributions that are damaging to the law's sex-equality goals. While pregnancy raises autonomy concerns that are absent in the postbirth period, these alone do not justify the unique treatment of prebirth caregiving, given that many pregnancy regulations do not implicate autonomy concerns. Part IV considers ways to alleviate this key tension in the law of sex equality by showing how this tension is not doctrinally inevitable. Supreme Court precedents can be revisited and reread to relieve the tension, and Part IV fills in the details about how courts could do so.

### I. UNSEXING PARENTING

Sex-equality law in the United States has focused on what this Article calls unsexing. The idea is a simple one: If it is not necessary that sex determine one's capacity because of a real difference between the sexes, then sex should not be made to determine one's capacity by the force of law.<sup>18</sup> In such circumstances, sex can and should be "disaggregated" from capacity.<sup>19</sup> Otherwise, the law creates a self-reinforcing set of sex roles based on stereotypes, and sex will unnecessarily and unfairly limit one's station in life.<sup>20</sup>

One of the most important realms the law has unsexed is carework within the family. Prescribing sex roles in the family generates sex inequality that extends far beyond it, especially into the workplace.<sup>21</sup> The Supreme Court has recognized the important role the law has played in allocating "family duties" on the basis of sex.<sup>22</sup> Applying heightened scrutiny under the Fourteenth Amendment, the Supreme Court has held both (1) that there is no necessary link between the ability to perform these carework duties and the sex of the parent, and (2) that laws relying on such a link reinforce sex stereotypes that limit both women's roles at

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18. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (deciding that physical sex differences may still justify sex classifications under the Equal Protection Clause); *Geduldig*, 417 U.S. at 496 n.20 (1974) (noting that physical differences between the sexes can be the basis for permissible classifications that are effectively sex based).

19. See *Case, Disaggregating*, *supra* note 1, at 2 (arguing that sex can be disaggregated from the performance of certain gender roles).

20. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) ("These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.").

21. See, e.g., *id.* at 738 ("[T]he faultline between work and family[] [is] precisely where sex-based overgeneralization has been and remains strongest . . .").

22. *Id.* at 730.

work and men's roles in the family.<sup>23</sup> Unsexung carework has entailed not only removing sex-based barriers created by legislation through the application of heightened scrutiny but also enacting legislation to create a world where these sex-based limits would no longer apply.<sup>24</sup>

This Part begins by discussing why we unsex carework (that is, the theory of unsexung carework) and then turns to explaining how we unsex postbirth carework (that is, the doctrine of unsexung carework).

#### A. *Why We Unsex Parenting*

The law did not always unsex parenting. For most of American history, the life and law of the sexes were of separate spheres.<sup>25</sup> Carework was presumed to be both aggregated with and distributed by sex. Under this view, as Justice Ginsburg has explained, "It was man's lot, because of his nature, to be breadwinner, head of household, representative of the family outside the home; and it was woman's lot, because of her nature, not only to bear, but also to raise children, and keep the home in order."<sup>26</sup> This breadwinner-homemaker dichotomy served as the foundation for many Supreme Court decisions upholding laws that distinguished roles—especially work and family roles—on the basis of sex.<sup>27</sup> Because such laws were subject only to rational basis review, there was no need to show that men and women were actually different to justify treating them differently. The Court upheld such laws on the basis of "opinion"<sup>28</sup> or

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23. See *infra* note 73 (collecting cases).

24. See *infra* notes 88–93 and accompanying text.

25. See Ruth Bader Ginsburg, Remarks on Women Becoming Part of the Constitution, 6 *Law & Ineq.* 17, 19 (1988) [hereinafter Ginsburg, Remarks]; see also *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1683 (2017) (referencing "an era when the Nation's lawbooks were rife with overbroad generalizations about the way men and women are").

26. Ginsburg, Remarks, *supra* note 25, at 19.

27. See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 58–62 (1961) (upholding a state law providing that women would not be called for jury service unless they specifically volunteered, because women's place was at "the center of home and family life"); *Goesaert v. Cleary*, 335 U.S. 464, 465–67 (1948) (upholding a state law providing that no women, except wives and daughters of male tavern owners, could tend bar); *Muller v. Oregon*, 208 U.S. 412, 416–17, 423 (1908) (upholding a state law limiting the hours women could work); cf. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring in the judgment) ("The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.").

28. *Goesaert*, 335 U.S. at 466–67 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)) ("Since the line [Michigan legislators] have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.").

“widespread belief”<sup>29</sup> that there is “a wide difference in the respective spheres and destinies of man and woman.”<sup>30</sup>

The Court’s rejection of separate spheres through the application of heightened scrutiny was founded on the core equality principle of the Equal Protection Clause: Treat likes alike.<sup>31</sup> The big leap forward was appreciating that men and women were more alike than had previously been thought when it comes to the carework involved in parenting.<sup>32</sup> This progress turned on the judicial recognition of two related principles: (1) that much of the work of parenting was not biologically or otherwise necessarily sexed, and thus (2) that the legal assignment of sex roles in the family was harmful to the cause of sex equality.<sup>33</sup>

As for the first principle, constitutional law has long recognized all of the work that goes into parenting. Domestic responsibilities were seen to include two aspects—“home [life]” and “family life”<sup>34</sup>—with “women’s place at ‘the center’ of both.”<sup>35</sup> The Court has recognized this postbirth carework to encompass a range of responsibilities,<sup>36</sup> from basic physical

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29. *Muller*, 208 U.S. at 420 (opining that the “widespread belief that woman’s physical structure, and the functions she performs in consequence thereof,” justifies legislation limiting women’s work hours). The Court did extensively discuss the evidence of sex differences put forward in the Brandeis brief—his first—to distinguish the case from *Lochner*, which struck down a similar restriction that applied equally to men and women. See *id.* at 419–23; *Lochner v. New York*, 198 U.S. 45, 52, 64–65 (1905). See generally Melvin I. Urofsky, Louis D. Brandeis: A Life 216–19 (2009) (describing the contents of, and the Court’s treatment of, Brandeis’s *Muller* brief).

30. *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring in the judgment) (“Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”).

31. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–42 (1985) (recognizing that the Fourteenth Amendment requires that “all persons similarly situated should be treated alike”).

32. See Ginsburg, Remarks, *supra* note 25, at 21 (noting how women’s increasing presence in the workforce in the 1970s made it more difficult for judges to accept the traditional breadwinner and homemaker stereotypes).

33. See *id.* at 20 (“To turn in a new direction [of sex-equality law], the Court first had to comprehend that legislation apparently designed to benefit or protect women could often, perversely, have the opposite effect.”).

34. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961); see also *Muller*, 208 U.S. at 419–23 & n.1 (upholding a state law limiting the hours women could work and citing as justification, among other reasons, “the rearing . . . of the children,” and “the maintenance of the home” (quoting Brief for Defendant in Error at 97, *Muller*, 208 U.S. 412 (No. 107), 1908 WL 27605)).

35. Ginsburg, Remarks, *supra* note 25, at 19 (quoting *Hoyt*, 368 U.S. at 62) (explaining the dual aspects of women’s domestic responsibilities: “rais[ing] children[] and keep[ing] the home in order”).

36. Other family caregiving, especially for elderly parents, has been recognized as substantial and substantially distributed by sex, although this caregiving falls outside the scope of this Article. See H.R. Rep. No. 103-8, pt. 1, at 24 (1993) (recognizing within the legislative history of the Family and Medical Leave Act that “[t]wo-thirds of the

maintenance and supervision,<sup>37</sup> to moral education,<sup>38</sup> to emotional bonding with the child.<sup>39</sup> In addition, the Court has suggested a managerial role associated with carework, which includes its administrative elements, such as planning meals, making appointments, and keeping the family calendar.<sup>40</sup>

All of this carework that went into maintaining “the domestic sphere” was thought to “properly belong[] to the domain and functions of womanhood.”<sup>41</sup> The Court only later came to appreciate that men and women could do this work equally. *Weinberger v. Wiesenfeld*, described by Justice Ginsburg as the “most critical” of the sex discrimination cases decided by the Court in the 1970s,<sup>42</sup> made clear that carework should be unsexed because there was no reason that only women could fulfill the domestic tasks just described.<sup>43</sup> *Weinberger* involved a provision of the Social Security Act that granted survivors’ benefits upon the death of a husband to his minor children and his surviving wife, but granted the

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nonprofessional caregivers for older, chronically ill, or disabled persons are working women”).

37. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) (discussing the importance of “care” and “custody” of children (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972))); cf. 29 U.S.C. § 2612(a)(1)(A) (2012) (recognizing the need for leave from work “[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter”).

38. See *Muller*, 208 U.S. at 419 n.1 (including within women’s family responsibilities “education of the children” (quoting Brief for Defendant in Error at 97, *Muller*, 208 U.S. 412 (No. 107), 1908 WL 27605)).

39. See *Weinberger*, 420 U.S. at 652 (discussing the “companionship” of children (internal quotation marks omitted) (quoting *Stanley*, 405 U.S. at 651)); *id.* at 655 (Rehnquist, J., concurring in the result) (highlighting the importance of “the personal care and attention” of a parent); cf. 29 C.F.R. § 825.120(2) (2018) (“Both parents are entitled to FMLA leave to *be with* the healthy newborn child (*i.e.*, *bonding* time) during the 12-month period beginning on the date of birth.” (emphases added)).

40. See *Weinberger*, 420 U.S. at 652 (referencing the “management” aspects of parenting (internal quotation marks omitted) (quoting *Stanley*, 405 U.S. at 651)); *Hoyt*, 368 U.S. at 62 (proclaiming women to be the “center of home and family life” and suggesting that they are responsible for running the domestic sphere); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring in the judgment) (referencing the “noble and benign *offices* of wife and mother” and suggesting the administrative aspects of these roles (emphasis added)). See generally Elizabeth F. Emens, *Admin*, 103 *Geo. L.J.* 1409, 1412–17 (2015) (describing the phenomenon of “admin,” which is the “the office-type work that people do to manage their lives,” and its gendered distribution).

41. *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring in the judgment). There was the additional implication that men could work while fulfilling their family responsibilities, whereas women could not. See *id.* (“The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.”).

42. Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 *Harv. J.L. & Pub. Pol’y* 41, 43 (1986).

43. See 420 U.S. at 652.

same benefits upon the death of a wife only to her minor children and not her surviving husband.<sup>44</sup>

In a case decided a few years before *Weinberger*, the Court had explained the need for heightened scrutiny of sex classifications by disaggregating sex from social role: “[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society.”<sup>45</sup> In a unanimous decision in *Weinberger*, the Court applied this reasoning to carework.<sup>46</sup> The purpose of the rule under question was “to permit women to elect not to work and to devote themselves to the care of children” following the death of their husbands.<sup>47</sup> The Court recognized that men and women were similarly situated in their ability to care for their children and that the longstanding presumption otherwise was not based on any necessity.<sup>48</sup> Notably, it did so in the context of a mother who had died in childbirth,<sup>49</sup> therefore recognizing that from the moment of birth fathers are just as capable parents as mothers.

As for the second principle, constitutional law came to recognize that assigning caregiving roles based on sex is not only unnecessary but actually harmful. The harms of treating similarly situated mothers and fathers differently, as the Social Security Act provision discussed in *Weinberger* did, flow from “a much broader pattern of sex-role enforcement that associate[s] men with the marketplace and women with the home.”<sup>50</sup> Legislating on the basis of sex stereotypes is so problematic because it renders these stereotypes self-reinforcing, and nowhere is this truer than in the family. As Justice Ginsburg has explained, sex classifications “enshrining and promoting the woman’s ‘natural’ role as homemaker, and correspondingly emphasizing the man’s role as provider, . . . impeded both men and women from pursuit of the very opportunities that would have enabled them to break away from familiar stereotypes.”<sup>51</sup>

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44. *Id.* at 637–38.

45. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

46. See *Weinberger*, 420 U.S. at 651–53. Justice Douglas did not participate. See *id.* at 653.

47. *Id.* at 648.

48. The decision also acknowledged that men who assumed caregiving responsibilities would face the same challenges in balancing work and family as women. See *id.* at 652 (“[T]o the extent that women who work when they have sole responsibility for children encounter special problems, it would seem that men with sole responsibility for children will encounter the same child-care related problems.”).

49. *Id.* at 639.

50. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 124 (2010); see also *Frontiero*, 411 U.S. at 684 (noting that the “practical effect” of laws based on sex stereotypes was to “put women, not on a pedestal, but in a cage”).

51. Ginsburg, Remarks, *supra* note 25, at 21; see also *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (stating that sex-based classifications reflect and reinforce stereotypes that women’s role is at “the center of home and family life” (internal quotation marks omitted) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 534 n.15 (1975))).

In *Nevada Department of Human Resources v. Hibbs*, for example, the Court identified many laws featuring sex-based classifications premised on the breadwinner–homemaker dichotomy that had pushed women away from work and into the home.<sup>52</sup> State laws, for instance, had prohibited women from working as lawyers<sup>53</sup> or bartenders,<sup>54</sup> or from working more than a certain number of hours per week.<sup>55</sup> By barring women from entering certain professions or limiting the terms on which they could work, these laws not only reflected and reinforced stereotypes that women’s role was at home but also made it far more likely that this was so. Therefore, “the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”<sup>56</sup> In fact, Congress has traced women’s limited work opportunities directly to “the pervasive presumption that women are mothers first, and workers second,” which has led to “discrimination against women when they are mothers or mothers-to-be”<sup>57</sup> and left women with lower pay, less job security, shorter job tenure, and fewer accumulated benefits.<sup>58</sup>

Circumscribing men’s roles through overbroad sex classifications also causes harm.<sup>59</sup> By “presuming a lack of domestic responsibilities for men,” these types of sex classifications not only pigeonhole women into domestic roles but also push men away from those roles and into the workplace.<sup>60</sup> As the Supreme Court recently stated in *Sessions v. Morales-Santana*, “[S]uch laws may disserve men who exercise responsibility for raising their children.”<sup>61</sup> Stereotyping men as breadwinners harms women, too, by pushing them still further into family roles and away

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52. See 538 U.S. 721, 729 (2003).

53. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 131 (1873).

54. See *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948).

55. See *Muller v. Oregon*, 208 U.S. 412, 416–17 (1908).

56. *Hibbs*, 538 U.S. at 728 n.2 (internal quotation marks omitted) (quoting 29 U.S.C. § 2601(a)(5) (2000)).

57. *Id.* at 736 (internal quotation marks omitted) (quoting The Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the Subcomm. on Labor–Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. & Labor, 99th Cong. 100 (1986) (statement of Women’s Legal Defense Fund)); see also *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973) (“[S]tatutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”).

58. See *Califano v. Goldfarb*, 430 U.S. 199, 212 (1977).

59. As Professor Cary Franklin has documented, this recognition was harder to achieve. See Franklin, *supra* note 50, at 106–14 (describing resistance to the recognition that sex stereotypes held men back as well).

60. See *Hibbs*, 538 U.S. at 736 (“Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave.”).

61. 137 S. Ct. 1678, 1693 (2017).

from work<sup>62</sup> and by making sure that these family roles remain undervalued.<sup>63</sup>

Finally, overbroad sex classifications premised on separate spheres “creat[e] a self-fulfilling cycle of discrimination”<sup>64</sup> not only by their impact on the behavior of women and men but also by their impact on third parties. For example, employment statutes relying on overbroad sex classifications can influence employer attitudes and behavior. Congress enacted the FMLA because laws that provided family leave only to women reflected and reinforced “employers’ stereotypical views about women’s commitment to work and their value as employees”<sup>65</sup> and generated “serious potential for encouraging employers to discriminate against [female] employees and applicants.”<sup>66</sup>

#### B. *How We Unsex Parenting*

Once the Court identified why equal protection requires disaggregating sex from carework, it started down the path to achieve this goal. The black letter law of unsexing is intermediate scrutiny, meaning that when a law classifies on the basis of sex, the government must show that it is attempting to further an important government interest by means that are substantially related to that interest.<sup>67</sup> Scholars agree, though, that when it comes to sex discrimination cases, the ball game is about stereotypes, not scrutiny.<sup>68</sup> In 2017, the Supreme Court explained

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62. See *Hibbs*, 538 U.S. at 736 (recognizing that employers’ denial of caregiving leave to men “forced women to continue to assume the role of primary family caregiver”).

63. See Case, Disaggregating, *supra* note 1, at 3 (“So long as stereotypically feminine behavior, from wearing dresses and jewelry to speaking softly or in a high-pitched voice, to nurturing or raising children, is forced into a female ghetto, it may continue to be devalued.”).

64. *Morales-Santana*, 137 S. Ct. at 1693 (alteration in original) (internal quotation marks omitted) (quoting *Hibbs*, 538 U.S. at 736).

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

66. 29 U.S.C. § 2601(a)(6) (2012).

67. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). Intermediate scrutiny has sometimes been stated as requiring an “exceedingly persuasive” justification for the classification. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

68. See Mary Anne Case, “The Very Stereotype the Law Condemns”: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 *Cornell L. Rev.* 1447, 1449 (2000) [hereinafter Case, *Very Stereotype*] (arguing that “the components of the intermediate scrutiny standard . . . have rarely been the moving parts in a Supreme Court sex discrimination decision” and that “the bulk of the work in these decisions . . . [is] the proposition that there are constitutional objections to ‘gross, stereotyped distinctions between the sexes’” (footnote omitted) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973))); Franklin, *supra* note 50, at 138 n.296 (explaining that “[t]he anti-stereotyping principle . . . shap[es] what constitutes an important interest and what means qualify as sufficiently narrowly tailored to serve this interest,” and noting that since the doctrine was first introduced, “the Court has never upheld a sex classification after determining that it reflects or reinforces sex stereotypes”).

without dissent that “[o]verbroad generalizations” about the sexes are problematic, even if these generalizations might be true in “many” situations.<sup>69</sup> As Professor Mary Anne Case has helpfully put it: “[T]he assumption at the root of the sex-respecting rule must be true of either all women or no women or all men or no men; there must be a zero or a hundred on one side of the sex equation or the other.”<sup>70</sup> In effect, this can make the doctrine stricter than strict scrutiny.<sup>71</sup>

Under this analysis, “[p]hysical differences between men and women” are the primary differences that can justify sex-based classification.<sup>72</sup> Sex classifications unjustified by physical differences are impermissible, because there is then no necessary connection between sex and the classification, and thus the classification is an overbroad stereotype.<sup>73</sup>

69. *Morales-Santana*, 137 S. Ct. at 1692–93 (“Overbroad generalizations of that order, the Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives.”); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) (“[G]ender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.”); *Craig*, 429 U.S. at 201–02 (invalidating a sex classification even though the evidence supporting it was “not trivial in a statistical sense” and noting that “prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this”); Case, *Very Stereotype*, supra note 68, at 1450 (“[V]irtually every sex-respecting rule struck down by the Court in the last quarter century embodied a proxy that was overwhelmingly, though not perfectly, accurate.”).

70. Case, *Very Stereotype*, supra note 68, at 1449–50.

71. See *id.* at 1453 (“The perfect proxy test has always had the capacity to be more strict even than strict scrutiny.”).

72. *Virginia*, 518 U.S. at 533. In a handful of cases from decades ago, the Court recognized two other circumstances when sex classifications are justified even if not based in physical differences: (1) when they are “used to compensate women ‘for particular economic disabilities [they have] suffered,’” and (2) when another sex-respecting classification not before the Court creates a perfect proxy between sex and the challenged classification. Case, *Very Stereotype*, supra note 68, at 1457–58 (quoting *Virginia*, 518 U.S. at 533).

73. See, e.g., *Morales-Santana*, 137 S. Ct. at 1700–01 (striking down a sex-differentiated citizenship rule); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152 (1980) (striking down a law that granted automatic workers’ compensation benefits to widows but not to widowers); *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (striking down a law that provided benefits to children of unemployed fathers but not unemployed mothers); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (striking down a law that allowed unwed mothers, but not unwed fathers, to block the adoption of a child by refusing consent); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (striking down a law that provided alimony upon divorce for women but not for men); *Califano v. Goldfarb*, 430 U.S. 199, 216–17 (1977) (striking down a law that provided Social Security benefits to widows automatically but required more to provide benefits to widowers); *Stanton v. Stanton*, 421 U.S. 7, 15–17 (1975) (striking down a law providing different ages of majority for boys and girls and thereby affording boys more years of parental support on the assumption that girls would marry rather than continue their education); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 642–45, 653 (1975) (striking down a categorical ban on Social Security survivors’ benefits for widowers, but not widows, with minor children); *Frontiero*, 411 U.S. at 688–91 (striking down a presumption that wives, but not husbands, of servicemembers were dependent on

Importantly, though, the Equal Protection Clause scrutinizes sex classifications even when physical differences between the sexes matter. In *United States v. Virginia*, the Court considered a challenge to the male-only admissions policy at the Virginia Military Institute (VMI), a state-run military academy requiring “[p]hysical rigor” that men on average could more readily achieve than women on average.<sup>74</sup> The Supreme Court recognized that physical sex differences could in theory justify limiting admissions to men but would not do so in reality unless no women were capable of transcending them.<sup>75</sup> Because *some* women could pass VMI’s admissions bar, only one Justice believed the VMI process to be constitutional.<sup>76</sup>

Under this doctrine of constitutional sex-equality law, parenting has been recognized as perhaps the most critical area to scrutinize because “the faultline between work and family” is “precisely where sex-based overgeneralization has been and remains strongest.”<sup>77</sup> The Court has compared mothers and fathers to assess whether they are similarly situated in performing “family duties”<sup>78</sup> and balancing those duties with work responsibilities.<sup>79</sup> The Court has repeatedly struck down sex classifications in these circumstances as not grounded in any physical differences but reflective of separate-spheres thinking.<sup>80</sup>

By 2003, Republican-appointed Chief Justice Rehnquist—no stalwart of women’s rights<sup>81</sup>—included broad language about the importance of

their spouses); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (striking down a presumption that unwed fathers, but not mothers, were inadequate caregivers for their children).

74. 518 U.S. at 522 (alteration in original) (internal quotation marks omitted) (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)).

75. See *id.* at 533 (“Physical differences between men and women . . . are enduring . . .”).

76. See *id.* at 566–67 (Scalia, J., dissenting). Chief Justice Rehnquist concurred with the majority in a separate opinion. See *id.* at 558 (Rehnquist, C.J., concurring in the judgment). Justice Thomas recused himself because his son was attending VMI. See *id.*

77. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003).

78. *Id.* at 730, 736.

79. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) (“[T]o the extent that women who work when they have sole responsibility for children encounter special problems, it would seem that men with sole responsibility for children will encounter the same child-care related problems.”).

80. See Ginsburg, Remarks, *supra* note 25, at 23–24 (“The framework evolving at the time of the *Wiesenfeld* case persists to this day. It has enabled the Supreme Court effectively to break the hold of the breadwinner–homemaker dichotomy . . .”); *supra* note 73 (listing cases in which the Court struck down statutes based on overbroad stereotypes).

81. See Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 *Stan. L. Rev.* 1871, 1872 (2006) [hereinafter Siegel, *Long Way*] (noting that Rehnquist had been an Equal Rights Amendment opponent and “a vocal critic of the Court’s sex discrimination jurisprudence”); Linda Greenhouse, *The Supreme Court: States’ Rights; Justices, 6-3, Rule Workers Can Sue States over Leave*, *N.Y. Times* (May 28, 2003), <https://www.nytimes.com/2003/05/28/us/supreme-court-states-rights-justices-6-3-rule-workers-can-sue-states-over-leave.html> (on file with the *Columbia Law*

unsexung parenting in a key sex discrimination precedent, *Nevada Department of Human Resources v. Hibbs*.<sup>82</sup> The Court decided that there are no differences between fathers and mothers that would justify granting family leave after birth to mothers and not fathers beyond the “period of physical disability due to pregnancy and childbirth.”<sup>83</sup> Any more extended maternity leave was “not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”<sup>84</sup> So even after birth when there are physical sex differences, equal protection mandates unsexung of any carework unrelated to these differences.

A critical recent pillar in the law’s unsexung of postbirth parenting has been recognizing the right to same-sex marriage.<sup>85</sup> Even while the Constitution policed laws enforcing sex roles in the family, sex-based parenting roles remained a basis for rejecting same-sex marriage.<sup>86</sup> The recognition of a federal right to same-sex marriage rejected the notion that there was anything necessary about having one parent of each sex.<sup>87</sup> The Supreme Court’s recognition that two men or two women can be just as good parents as a man and a woman means that sex has been still further decoupled from parenting as a matter of constitutional law.

Statutes that regulate at the “faultline between work and family” are now aimed at disaggregating sex from carework.<sup>88</sup> Title VII<sup>89</sup> and the Equal Pay Act<sup>90</sup> together prohibit many forms of employment discrimination on

*Review*) (noting the surprising Rehnquist vote and the shift it represented among the conservative Justices).

82. See 538 U.S. at 730–31 (accepting Congress’s finding that the “pervasive sex-role stereotype that caring for family members is women’s work” reinforced gendered binaries). The question in *Hibbs* was whether the FMLA’s abrogation of state sovereignty was valid under Section 5 of the Fourteenth Amendment, thereby allowing a state employee to sue a state employer under the statute. *Id.* at 726. This question required the Court to determine the contours of the Amendment’s first Section, as Congress’s Section 5 enforcement power applies only to laws remedying or deterring conduct that violates Section 1. See *id.* at 727–30 (“[T]he persistence of . . . unconstitutional discrimination by the States justifies Congress’ passage of prophylactic § 5 legislation.”).

83. *Id.* at 731 & n.4 (citing evidence suggesting that the typical medical recovery period for pregnancy lasts four to eight weeks).

84. *Id.* at 731.

85. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

86. Discrimination on the basis of sexual orientation has been rooted in the challenges homosexuality poses to traditional sex roles more broadly. See Case, *Very Stereotype*, *supra* note 68, at 1488 (“[P]rohibitions on homosexuality rely on stereotypes in the sense that they are based on ‘fixed notions concerning the roles and abilities of men and women.’” (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982))).

87. See *Obergefell*, 135 S. Ct. at 2600 (“[M]any same-sex couples provide loving and nurturing homes to their children . . . . Most states have allowed gays and lesbians to adopt . . . . This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.”).

88. *Hibbs*, 538 U.S. at 738.

89. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012).

90. See Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012).

the basis of sex, including when sex stereotypes about family responsibilities lead to discrimination, against either women or men.<sup>91</sup> And when formal equality under these statutes proved too anemic to unsex at the intersection of work and family, Congress acted by taking steps—albeit small ones—in passing the FMLA.<sup>92</sup> As the Supreme Court explained, the FMLA, “[b]y setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, . . . attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.”<sup>93</sup>

## II. SEXING PREGNANCY

Courts and commentators across the jurisprudential spectrum have failed to recognize carework during pregnancy because they view pregnancy as simply a biological event and thus impossible to disaggregate from sex. Cases like *Geduldig v. Aiello* and statutes like the FMLA view pregnancy as a purely physical experience, or a social experience derivative of that physical experience, and scholars largely agree.<sup>94</sup> Constitutional law protecting a woman’s right to choose likewise frames pregnancy as almost exclusively a biological event.<sup>95</sup> Under this view, pregnancy loses its uniqueness only when one understands that men experience conditions that are comparably disabling in the physical limitations they produce and the social reactions they generate from

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91. See EEOC, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, 2 EEOC Compl. Man. (BNA) § 615 (2007), <https://www.eeoc.gov/policy/docs/caregiving.pdf> [<https://perma.cc/5EKK-4U54>] (noting that Title VII outlaws both “sex-based disparate treatment of female caregivers, focusing on sex-based stereotypes,” and “sex-based disparate treatment of male caregivers, such as the denial of childcare leave that is available to female workers”).

92. See *Hibbs*, 538 U.S. at 737–38 (explaining that the affirmative efforts of the FMLA were necessary because formal-equality statutes like Title VII were insufficient to address the inequality that women faced at home and at work).

93. *Id.* at 737.

94. See 417 U.S. 484, 496 n.20 (1974) (“Normal pregnancy is an objectively identifiable physical condition with unique characteristics.”); 29 C.F.R. § 825.120(a)(4) (2018) (“An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work.”); Siegel, Employment Equality, *supra* note 9, at 942 (stating that pregnancy “is a biological difference central to the definition of gender roles, one traditionally believed to render *women* unfit for employment” (emphasis added)).

95. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (identifying “the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty”); *id.* at 896 (“It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s.”); *id.* (“The effect of state regulation on a woman’s protected liberty is doubly deserving of scrutiny . . . , as the State has touched . . . upon . . . the *very bodily integrity* of the pregnant woman.” (emphasis added)).

others—but men experience these conditions only *outside of pregnancy*.<sup>96</sup> The result is a wide swath of facially sex-discriminatory laws regulating “the faultline between work and family”<sup>97</sup> during the pregnancy that have never been noticed or scrutinized, let alone identified as in tension with the doctrine discussed in Part I, which requires disaggregating sex from carework.

This Part first explains *why* we sex pregnancy, unpacking the relevant pregnancy-discrimination jurisprudence and how it sits in tension with the sex-equality jurisprudence of parenting. Pregnancy-discrimination jurisprudence typically does not see the carework that transpires during the pregnancy.<sup>98</sup> Even in those instances when it is identified, the carework of pregnancy is seen as necessarily aggregated with and then assigned by sex, and therefore it necessarily reinforces a domestic role for women.<sup>99</sup> The assumption that pregnancy is only for the pregnant woman not only excludes expectant fathers from pregnancy but sometimes also excludes nonpregnant expectant mothers, including lesbian partners.<sup>100</sup> For gay male couples who engage a surrogate, both expectant parents are excluded from the pregnancy by reason of their sex.<sup>101</sup>

This Part then sets forth *how* we sex pregnancy, cataloguing the range of legal rules that rely on sex classifications during the pregnancy and highlighting how the very same rules are sex neutral after birth. This catalogue does not aspire to be exhaustive but rather highlights some of the most significant rules that generate the law of the sexed pregnancy.

#### A. *Why We Sex Pregnancy*

After birth, the constitutional basis for disaggregating sex from parenting is the recognition of various “family duties” that need not be and thus should not be allocated on the basis of sex.<sup>102</sup> During the nine months of pregnancy, there are substantial analogous “family duties” that have nothing to do with gestation and thus can also be disaggregated from sex.<sup>103</sup> But unlike the postbirth period, this prebirth carework has gone unnoticed by law. This section first provides a typology of the substantial nonbiological carework that goes on before birth that is analogous to the postbirth carework that equal protection doctrine has recognized and required to be unsexed. It then explains the invisibility of this pregnancy carework as a result of the conception of pregnancy as a

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96. See Williams, *supra* note 10, at 326–27.

97. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003).

98. See *infra* notes 127–131 and accompanying text.

99. See *infra* notes 132, 137–138 and accompanying text.

100. See *infra* note 254 and accompanying text.

101. See *infra* note 252 and accompanying text.

102. *Hibbs*, 538 U.S. at 730.

103. See *infra* notes 108–126 and accompanying text.

biological event whose social consequences flow only from this biological phenomenon.

Carework during pregnancy is substantial: Expectant parents of either sex can engage in significant investments before birth, similar to those they engage in after birth, to increase the chances of producing a happy and healthy child.<sup>104</sup> And they do. Every year Americans spend billions of dollars and many hours preparing for the birth of their child.<sup>105</sup> Private firms offer highly valuable employees “parenting coaches” to manage these investments.<sup>106</sup> Books like *Getting Ready for Baby* have sold many copies because of their lists of “things to remember [to do] throughout your pregnancy and in the first months after your baby’s birth.”<sup>107</sup> Pregnancy carework that can be done by either sex falls into three broad categories: physical capital, human capital, and social capital, which are discussed in turn.<sup>108</sup>

First, expectant parents invest in *physical capital* in ways that can be unsexed. Just like being a parent requires acquiring many goods that are needed to care for the child, preparing to parent requires acquiring many goods that are needed either during the pregnancy or after birth.<sup>109</sup> Some of these products will be used exclusively by the pregnant woman during the pregnancy (for example, back pillow<sup>110</sup>) or after the

104. See Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 Fla. St. U. L. Rev. 645, 681 (2014) (listing examples of “prebirth parental labor” that can be separated from the gestational labor of pregnancy).

105. See Elisabeth Rosenthal, *American Way of Birth, Costliest in the World*, N.Y. Times (June 30, 2013), <https://www.nytimes.com/2013/07/01/health/american-way-of-birth-costliest-in-the-world.html> (on file with the *Columbia Law Review*).

106. See Tara Siegel Bernard, *Why Companies Have Started to Coach New Parents*, N.Y. Times (July 22, 2016), <https://www.nytimes.com/2016/07/23/your-money/why-companies-have-started-to-coach-new-parents.html> (on file with the *Columbia Law Review*) (describing parenting programs that begin during pregnancy and “are providing employees with coaching sessions” that are “often available to new fathers”).

107. H el ene Tragos Stelian, *Getting Ready for Baby: The Practical Parent’s Organizer* 19 (2014).

108. While this Article focuses on the various ways that pregnancy carework entails acquiring capital, sometimes expectant parents will also simply have to do administrative work to prepare for the child, such as making arrangements for health insurance coverage, and either parent can invest in this nonphysical capital. See Ester Bloom, *The Unconscionable Difficulty of Getting Health Insurance for a Newborn*, Atlantic (June 20, 2016), <https://www.theatlantic.com/business/archive/2016/06/difficulty-of-getting-health-insurance-for-a-newborn/484568> [<https://perma.cc/P7X3-XNHG>] (discussing the difficulty of planning to get health insurance coverage for a newborn).

109. Many parents borrow, rent, or are given these products rather than purchase them. Even the process of identifying used products requires an investment of resources that can be unsexed.

110. See Jess Miller, *Best Pregnancy Pillow: An Expert Buyers Guide to Maternity Pillows*, Parent.Guide, <http://parent.guide/pregnancy-pillows> [<https://perma.cc/NE7P-6NRR>] (last updated Oct. 31, 2018) (“As your pregnancy progresses, you will notice your that [sic] tummy will continue to expand . . . . Your new size will bring with it a whole new

pregnancy (for example, breastpump). Other products can be used by either expectant parent during the pregnancy, such as the *Getting Ready for Baby* book mentioned above. And still other products can be used by either expectant parent after the child is born<sup>111</sup> but are substantially more useful if purchased during the pregnancy. State laws require that expectant parents must have a carseat before they depart from a hospital in a vehicle with their newborn.<sup>112</sup> The early days of a newborn involve hundreds of diapers and little time to purchase them.<sup>113</sup> Only about one in four parents “always” or “almost always” sleeps with their newborn, meaning that expectant parents usually need a bassinet or crib.<sup>114</sup> Regardless of which parent will use these products, any expectant parent can research the products and acquire them.

Second, expectant parents invest in *human capital* in ways that can be unsexed. Parents learn how to assemble toys, respond to the unique emotional composition of a child, and complete tasks more efficiently due to the time constraints of parenthood. Likewise, the pregnancy is a nine-month period to acquire the motivation and knowledge that will improve one’s performance as a parent.<sup>115</sup> The Supreme Court has noted the importance of the nine-month period for generating one’s identity as a future parent,<sup>116</sup> and research has found that developing this capacity to care can occur regardless of sex.<sup>117</sup>

Consider, also, the example of attending a newborn-care class. Expectant parents learn basic physical maintenance, such as changing

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set of challenges, one of which is sleeping comfortably. A pregnancy pillow is just the product you need to get a super comfortable sleep . . .”).

111. Even products that seem inherently sexed may not be. For example, a breastfeeding pillow can be used not only by the woman while breastfeeding but also by either parent when giving the baby a bottle. See How to Use a Breast Feeding Pillow, wikiHow, <https://www.wikihow.com/Use-a-Breast-Feeding-Pillow> [https://perma.cc/Y4B2-B4LN] (last visited Oct. 9, 2018).

112. See Child Passenger Safety, Governors Highway Safety Ass’n, [http://www.ghsa.org/html/stateinfo/laws/childsafety\\_laws.html](http://www.ghsa.org/html/stateinfo/laws/childsafety_laws.html) [https://perma.cc/836D-DJQ5] (last visited Oct. 9, 2018) (explaining that “[a]ll states and territories require child safety seats for infants and children fitting specific criteria” based on age, weight, and height).

113. See Newborn Checklist: Everything You Need Before Your Baby Arrives, Today’s Parent (Apr. 1, 2018), <http://www.todayparent.com/checklists/newborn-checklist> [https://perma.cc/3EV2-JK8C].

114. See William Sears et al., *The Baby Sleep Book* 107 (2005) (citing a survey by the National Center for Health Statistics).

115. Evolutionary biologists have theorized that the nine months of pregnancy were necessary precisely for expectant parents to learn the many skills needed to become productive parents. See Alison Gopnik, *The Gardener and the Carpenter: What the New Science of Child Development Tells Us About the Relationship Between Parents and Children* 52–60 (2016) (summarizing the literature).

116. See *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983) (“The mother carries and bears the child, and in this sense her parental relationship is clear.” (internal quotation marks omitted) (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting))).

117. See Brandon et al., *supra* note 5, at 202–11.

diapers; health and safety measures, such as ensuring that newborns do not sleep on their backs to reduce the risks of Sudden Infant Death Syndrome; and even infant first aid and CPR.<sup>118</sup> Expectant parents can also learn more generally about different approaches to parenting in ways that can positively inform their parenting forever.

Investments in human capital can also take the form of behavior modifications. Some behavioral changes, such as reducing caffeine consumption or avoiding sushi, are for the pregnant person.<sup>119</sup> Other behavioral changes, such as quitting smoking, are important for all expectant parents so long as the expectant parent will be present during the pregnancy.<sup>120</sup> Quitting smoking during pregnancy is important not only because of the health risks of prenatal smoking but also because it prepares expectant parents to remain smoke-free after birth.<sup>121</sup> Other behavioral changes during the pregnancy are specifically targeted at preparing to parent. For example, expectant parents—either mothers or fathers—may begin a workout regimen that will prepare them to lift an infant regularly without injury. Or expectant parents might try to adopt a host of behaviors to improve themselves—eating healthier, for example, or communicating better—to serve as good role models to their children. It is important to begin such behavioral changes during pregnancy because it takes time for new habits to form,<sup>122</sup> and few parents of an infant have the time and energy necessary to form new habits.

Third, expectant parents invest in *social capital* in ways that can be unsexed. Parents rely on relationships in their communities and their

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118. See Parent Education Classes & Support Groups, NYU Langone Health, <https://nyulangone.org/patient-family-support/for-new-expecting-parents/parent-education-classes-support-groups> [<https://perma.cc/Y88R-9WLM>] (last visited Nov. 1, 2018) (providing an overview of various classes for new parents).

119. The expectant father might choose to similarly restrict his diet or increase his caloric intake out of solidarity with the pregnant partner. See Lisa Belkin, Men Gain Weight During Pregnancy, *N.Y. Times: Motherlode* (June 2, 2009), <https://parenting.blogs.nytimes.com/2009/06/02/men-who-swell-with-pregnancy> [<https://perma.cc/4URK-BCXH>] (citing research “that the average weight gained during pregnancy is 14 pounds—and that’s by the babies’ fathers”).

120. There are dozens of studies with these empirical findings. For a recent and notable example, see Julian Laubenthal et al., Cigarette Smoke-Induced Transgenerational Alterations in Genome Stability in Cord Blood of Human F1 Offspring, 26 *FASEB J.* 3946, 3953–55 (2012).

121. Again, studies on the harms of postnatal parental smoking are too numerous to list, but some good examples include C.M. Blackburn et al., Parental Smoking and Passive Smoking in Infants: Fathers Matter Too, 20 *Health Educ. Res.* 185, 190–93 (2005); Katherine King et al., Family Composition and Children’s Exposure to Adult Smokers in Their Homes, 123 *Pediatrics* 559, 562–63 (2009).

122. See Lisa Buckingham, How to Make Exercise a Habit, *Guardian* (Feb. 8, 2015), <https://www.theguardian.com/lifeandstyle/2015/feb/08/get-habit-exercise-getting-fitter-new-year-resolutions> [<https://perma.cc/J4V6-CUP8>] (citing a study concluding that it takes sixty-six days to form a new habit).

workplaces to support their efforts.<sup>123</sup> Through the course of the nine months, expectant parents likewise develop relationships with persons who help to care for the pregnancy or the resulting child: the obstetrician or midwife, the doula, and the pediatrician.<sup>124</sup> Expectant parents also find it useful to develop relationships with others who are going through the experience of expecting a child. These relationships may grow out of human capital investments—you meet people at a childbirth class. These relationships may also be in service of acquiring knowledge and skills—you turn to these persons for advice on matters of expecting a child, for instance.<sup>125</sup> All expectant parents can form these relationships, regardless of sex. Even when it comes to relationships that are thought to run primarily to the pregnant woman—such as the obstetrician, midwife, and doula—any expectant parent can play a key role in forming, maintaining, and deepening these relationships.<sup>126</sup>

The presence of carework during the pregnancy that is analogous to carework after the pregnancy has escaped notice because sex-equality law has viewed pregnancy solely as a biological event. If pregnancy is only a matter of gestation, then there is no other carework to identify to ensure that it is not impermissibly allocated on the basis of sex. Take the Supreme Court's 1974 decision in *Geduldig v. Aiello*, which rejected a constitutional sex discrimination challenge to a California disability insurance law that exempted certain pregnancy-related disabilities from its coverage.<sup>127</sup> The women challenging the law under the Fourteenth Amendment focused on pregnancy as a “physical” experience that is therefore “unique to one sex.”<sup>128</sup> The State of California accepted this

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123. See generally Laura Rosenbury, *Between Home and School*, 155 U. Pa. L. Rev. 833 (2007) (identifying sites of childrearing beyond the home and the school and exploring how law might recognize these sites).

124. See Naomi Schoenbaum, *The Law of Intimate Work*, 90 Wash. L. Rev. 1167, 1174–85 (2015) (describing the close relationships that arise between consumers and providers of “intimate work,” including home health aides and medical workers).

125. See Rosario Ceballo & Vonnice C. McLoyd, *Social Support and Parenting in Poor, Dangerous Neighborhoods*, 73 Child Dev. 1310, 1311 (2002) (“[S]ocial networks and support may prevent or alleviate a number of potential familial problems.”); Carolyn Webster-Stratton, *From Parent Training to Community Building*, 78 Families Soc’y 156, 158–60 (1997) (discussing the need for more community networks and social support for good parenting outcomes, especially in low-income families).

126. See Carrie Murphy, *What Dads Need to Know About Doulas*, Parents.com, <https://www.parents.com/pregnancy/giving-birth/doula/what-dads-need-to-know-about-doulas> [https://perma.cc/EVH3-U8G4] (last visited Oct. 10, 2018) (explaining that “doulas aren’t there only for moms-to-be” and that “[t]hey also play a key role in helping their partners, offering them invaluable emotional and practical support during the overwhelming experience of childbirth”).

127. 417 U.S. 484, 496–97 (1974). The law originally excluded all disabilities “caused by or arising in connection with pregnancy” but was revised to exclude only disability associated with normal pregnancy. *Id.* at 490 n.15 (quoting the revised law); *Aiello v. Hansen*, 359 F. Supp. 792, 793 n.1 (N.D. Cal. 1973) (quoting the original law).

128. See Brief for Appellees at 28–47, *Geduldig*, 417 U.S. 484 (No. 73-640), 1974 WL 185752.

characterization of pregnancy, arguing that men could be compared to pregnant women only “for *other* physical or mental reasons.”<sup>129</sup> The parties disagreed about whether it is unconstitutional sex discrimination to single out a physical experience that is necessarily sexed—pregnancy—for unique treatment. But their disagreement was grounded in a critical premise on which both sides agreed: Pregnancy is a necessarily sexed experience unique to women. The Court in *Geduldig* embraced this framing of pregnancy as necessarily sexed, describing pregnancy as “an objectively identifiable physical condition with unique characteristics.”<sup>130</sup> So neither the parties nor the Court recognized the nonbiological carework that pregnancy generates.<sup>131</sup>

Even when the Court has recognized the social impact of pregnancy, it has still viewed this social impact as flowing only from the physical experience of being pregnant and thus not involving the type of carework that can be disaggregated from sex. For example, across many areas of law, the Supreme Court has referred to emotional bonding that transpires during the pregnancy, but it has assumed that this emotional bonding happens only as a result of the experience of gestation and is thus experienced by the mother alone.<sup>132</sup> The Court has never recognized any forms of carework done during the pregnancy that would produce emotional bonding by *either* the mother or father.

Even scholars who acknowledge certain social aspects of pregnancy have likewise missed the pregnancy carework that can be disaggregated

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129. See Brief for Appellant at 19, *Geduldig*, 417 U.S. 484 (No. 73-640), 1974 WL 185750 (emphasis added).

130. *Geduldig*, 417 U.S. at 496 n.20. To the extent that the Court suggested otherwise in a notorious footnote that distinguished “pregnant women” from “nonpregnant persons,” *id.*, that suggestion has been almost universally reviled. See, e.g., Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 *Geo. L.J.* 567, 599 n.171 (2010) (“[*Geduldig*] has been rightly lampooned for its reasoning, which is essentially the same as holding that a law that discriminates against bachelors does not discriminate on the basis of sex.”); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 *Harv. L. Rev.* 1, 54 n.304 (1977) (“[T]he constitutional sport of [*Geduldig*] . . . with [its] Alice-in-Wonderland view of pregnancy as a sex-neutral phenomenon, [is a] good candidate[] for early retirement.”); Law, *supra* note 9, at 983 (“Criticizing *Geduldig* has since become a cottage industry. Over two dozen law review articles have condemned both the Court’s approach and the result.”). Given that the Court treated pregnancy as a purely physical condition unique to women, its later disentanglement of pregnancy from sex went entirely unjustified.

131. Two years later, when the Court decided in *General Electric Co. v. Gilbert* that pregnancy discrimination was not sex discrimination for purposes of Title VII, carework was likewise nowhere mentioned. See 429 U.S. 125, 133–37 (1976) (considering the sex-equality arguments related to pregnancy and referencing arguments by counsel for both sides).

132. See *supra* note 6; see also *Michael M. v. Superior Court*, 450 U.S. 464, 467–72 (1981) (plurality opinion) (Rehnquist, J.) (upholding a statutory rape law applying only to female victims in part because “[o]nly women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity”).

from sex.<sup>133</sup> Scholars such as Professor Reva Siegel and then-Judge Ginsburg have argued that the focus on pregnancy as a physical experience is excessive.<sup>134</sup> To these scholars, pregnancy is also a moment defining the social roles of expectant mothers—but only expectant mothers. Because pregnancy “is a biological difference”<sup>135</sup> that “women[] distinctively”<sup>136</sup> experience, it defines social roles for women and not for men. The reason is that the social impact of pregnancy flows only from physical fact of gestation, not from the carework that pregnancy generates.<sup>137</sup> For these scholars, recognizing the social impact of pregnancy expands not the class of relevant stakeholders in the pregnancy but the class of relevant stakes that expectant mothers—and expectant mothers alone—face during the pregnancy. So the only role that men play is as comparators in discrimination claims: Men experience conditions that are comparably disabling in their physical limitations and the social reactions they generate from others as pregnancy—but men experience these conditions only *outside of pregnancy*.<sup>138</sup>

#### B. *How We Sex Pregnancy*

Because the law treats pregnancy as a physical experience primarily for women, a law of pregnancy has developed that is sexed across a range of doctrines. Constitutional law sexes pregnancy by failing to treat women and men who can engage in the same carework during pregnancy as similarly situated. Instead, decisions presume a pregnancy in

133. But see Purvis, *supra* note 104, at 681 (recognizing pregnancy carework that can be disaggregated from sex for the purpose of establishing parental rights).

134. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 386 (1985) (“Overall, the Court’s *Roe* position is weakened, I believe, by the opinion’s concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective.”); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 274 (1992) [hereinafter Siegel, *Reasoning*] (“Because *Roe* and its progeny treat pregnancy as a physiological problem, they obscure the extent to which . . . [it] impose[s] material deprivations and dignitary injuries on those who perform its work.”).

135. Siegel, *Employment Equality*, *supra* note 9, at 942 (stating that pregnancy is “a biological difference central to the definition of gender roles, one traditionally believed to render women unfit for employment”).

136. Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 2–3 (1988).

137. See Siegel, *Reasoning*, *supra* note 134, at 267 (recognizing that “[s]ocial forces play a powerful part in shaping the process of reproduction” but nonetheless limiting the recognition of these social forces to how they act on the pregnant women, such as “[s]ocial forces determin[ing] the quality of health care available to a woman during pregnancy”).

138. See Williams, *supra* note 10, at 327–28, 359 n.130 (explaining how nonpregnant but similarly disabled men can serve as comparators to support pregnancy-discrimination claims but rejecting the idea that a “man w[ould] ever need a pregnancy-related leave” as implausible (alteration in original) (quoting Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women’s Equality*, 13 Golden Gate U. L. Rev. 513, 532 (1983))).

which women do all of the work—whether biological or not. Robust scholarly debates around these decisions have missed this and have thus only reinforced an inherently sexed conception of pregnancy. And even if equal protection scrutiny were otherwise recognized to apply to pregnancy, constitutional law might *still* prevent this under a reading of reproductive rights jurisprudence that raises concerns about *any* male involvement in pregnancy. In the wake of this constitutional treatment, a host of facially sex-discriminatory laws, including those assigning workplace rights, remain in the context of pregnancy, even though analogous laws have long been eradicated after birth.

1. *Constitutional Law*. — Sex-equality law—like so much of anti-discrimination law—is defined by comparisons.<sup>139</sup> After birth, equal protection cases examine whether federal and state laws “presume[] . . . [that] the mother is the ‘center of home and family life’”<sup>140</sup> by comparing what care- and market-work the law expects of mothers and fathers.<sup>141</sup> Before birth, though, equal protection cases reflect and reinforce the breadwinner–homemaker divide by not comparing the capacity of expectant mothers and expectant fathers to engage in care- and market-work. Courts and commentators across the jurisprudential spectrum agree that *if* there is an equal protection claim in the context of pregnancy, it is because of a comparison between a pregnant woman and a man facing a similar physical complication, not because of a comparison between a pregnant woman and an expectant father.<sup>142</sup>

Consider, again, the Court’s decision in *Geduldig v. Aiello*.<sup>143</sup> Counsel for both sides—as well as the majority and dissenting Justices—agreed that the relevant comparison for constitutional purposes would be between pregnant women and similarly situated physically limited employees (both male and female).<sup>144</sup> The plaintiffs suggested that the only male workers similarly situated to the pregnant plaintiffs were those at risk of heart attacks or facing other physically disabling conditions.<sup>145</sup>

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139. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 *Yale L.J.* 728, 731, 748 (2011) (“Comparators become relevant to the analysis . . . because they help expose . . . that ‘likes’ have been treated in an ‘unlike’ fashion and give rise to the inference [of] discrimination . . .”).

140. *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 534 n.15 (1975)).

141. See *supra* note 48.

142. See *supra* note 138 and accompanying text (describing similar scholarly views).

143. 417 U.S. 484 (1974).

144. See *id.* at 496–97 (“There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”).

145. See Brief for Appellees, *supra* note 128, at 58–71 (arguing that disabilities caused by pregnancy are “similar in all relevant respects to disabilities now compensated” by California’s disability-benefits program).

Justice Ginsburg has been critical of *Geduldig*.<sup>146</sup> Yet she has argued that the problem with *Geduldig* is that it has authorized “discrimination against women,” without recognizing that this is in part because of how pregnancy regulations stereotype both women and men.<sup>147</sup> As Ginsburg herself argued as an advocate, “Fair and equal treatment for women means fair and equal treatment for members of both sexes.”<sup>148</sup> Even though *Geduldig* dealt with healthcare benefits, it is telling nonetheless that women’s rights advocates presented pregnancy in these purely biological terms.<sup>149</sup>

Most notable is that women’s rights advocates, like Ginsburg, who were adamant about challenging laws based on stereotyped thinking about postbirth carework<sup>150</sup> did not raise these same arguments in the prebirth period. Consider *California Federal Savings & Loan Ass’n v. Guerra*, a case deciding whether Title VII’s ban on pregnancy discrimination preempted a state law granting unique workplace benefits to pregnant women.<sup>151</sup> The plaintiff’s lawyer in *Geduldig*, Wendy Williams, submitted an amicus brief in *California Federal* arguing against special treatment of pregnant women because it would stereotype women as workers facing a unique physical disability, even though men faced analogous physical disabilities.<sup>152</sup> In contrast to their litigation strategy in the

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146. See *Coleman v. Court of Appeals*, 566 U.S. 30, 54 (2012) (Ginsburg, J., dissenting) (“[T]his case is a fit occasion to revisit that conclusion.”).

147. *Id.* at 56 (Ginsburg, J., dissenting) (emphasis added); see also *id.* (“[C]hildbearing is not only a biological function unique to women. It is also inextricably intertwined with employers’ ‘stereotypical views about women’s commitment to work and their value as employees.’” (emphasis added) (quoting *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003))).

148. Brief for Petitioner-Appellant at 20, *Moritz v. Comm’r*, 469 F.2d 466 (10th Cir. 1971) (No. 71-1127) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 5, Folder: *Moritz v. Comm’r* (1971)).

149. This is not because they were seeking special legal treatment for pregnancy. In fact, in later litigation, the same advocate who represented the plaintiffs in *Geduldig*, Wendy Williams, was firmly opposed to any unique benefits being afforded to pregnancy out of concern that this would negatively stereotype women as facing a unique physical disability. See Brief Amici Curiae for the National Organization for Women et al. in Support of Neither Party at \*5 n.10, *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987) (No. 85-494), 1986 WL 728368 [hereinafter *Williams Amicus Brief, California Federal*] (comparing pregnancy to other situations involving “extended physical health problems”).

150. See Franklin, *supra* note 50, at 89–90 (noting how Ginsburg and others pressed the arguments “that laws that steer men out of traditionally female [caregiving] roles effectively require women to assume those roles” and persuaded the Court to interpret the Equal Protection Clause “as a bar to such ‘role-typing’” (quoting *Stanton v. Stanton*, 421 U.S. 7, 15 (1975))).

151. 479 U.S. at 274–75.

152. *Williams Amicus Brief, California Federal*, *supra* note 149, at \*14–17 (endorsing Congress’s view that “viewing pregnancy as *sui generis* has historically resulted in widespread and serious harm to pregnant workers” and noting that special treatment of pregnant women may lead to employer backlash).

postbirth period, antistereotyping advocates never mentioned how the law would enforce stereotypical sex roles by presuming that pregnancy had no carework impact on expectant men.<sup>153</sup>

Even laws that classify on the basis of sex but relate to pregnancy are treated more deferentially than laws that make other sex-based classifications because of the assumption that pregnancy is necessarily sexed. In contrast to the postbirth period, the Court unquestionably accepts a variety of sex-specific consequences beyond the physical that are seen to flow inevitably from the biological difference of pregnancy. For example, in *Michael M. v. Superior Court*, the Court upheld a statutory rape law that only men could violate, on the basis of gendered physical difference.<sup>154</sup> The Court justified the law “by the immutable physiological fact that it is the female exclusively who can become pregnant.”<sup>155</sup> These physical differences also generated social consequences that applied uniquely to women: “Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity.”<sup>156</sup>

Constitutional law sexes pregnancy not just by failing to scrutinize sexed law under the Equal Protection Clause but also by potentially *requiring* that pregnancy be sexed because of constitutional reproductive rights. Typically, formal equality under the Equal Protection Clause presents no independent constitutional problem. If a university admissions policy is invalidated for discriminating on the basis of race, there is no constitutional problem with a race-neutral remedy (unless there is some remedial obligation to have a race-conscious program).<sup>157</sup> If men and women are treated similarly during pregnancy, though, this could be seen to undermine the woman’s right to choose whether to carry the pregnancy to term. For now it is worth noting that the sexed pregnancy is overlooked because of both the absence of scrutiny *and* the perceived demands of a constitutional right. This Article explains in later Parts why these interpretations—a complete absence of heightened scrutiny for pregnancy regulations and a constitutional mandate for a universally sexed pregnancy—are misguided.

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153. See generally *id.* (mentioning men in several contexts but failing to acknowledge the carework of expectant men).

154. See 450 U.S. 464, 472–73 (1981).

155. *Id.* at 467 (internal quotation marks omitted) (quoting *Michael M. v. Superior Court*, 601 P.2d 572, 574 (Cal. 1979)).

156. *Id.* at 471.

157. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (“[T]he rule against race-conscious remedies is already less than an absolute one, for that relief may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause.”).

## 2. *Statutes and Regulations*

a. *Workplace Leave.* — Postbirth-leave protections for providing care are almost entirely sex neutral.<sup>158</sup> Women and men are equally able to take time away from work to attend important appointments with the pediatrician after birth.<sup>159</sup> Women and men are equally able to use leaves to find childcare once they return to work.<sup>160</sup>

By contrast, prebirth-leave protections are chock-full of sex classifications that protect pregnant women's carework but not analogous carework by expectant fathers. When it comes to prenatal leave, the FMLA is facially sex discriminatory. FMLA regulations provide only "mother[s]" with "FMLA leave . . . for prenatal care."<sup>161</sup> The FMLA drafters mentioned "attending appointments" and "obtaining essential knowledge about how to care for a newborn" as categories of "prenatal care" that could qualify for job-protected leave for only "expectant mothers" under the FMLA.<sup>162</sup> If an expectant father wants job-protected leave to attend a prenatal appointment to view the ultrasound and bond with the child, this is not covered by the FMLA.<sup>163</sup>

Expectant fathers can take prenatal FMLA leave, but only in a secondary capacity, to "care for" the expectant mother when she is "incapacitated" or if such spousal support is "needed to care for her during her prenatal care."<sup>164</sup> After birth, the FMLA does not condition the father's ability to pick up a prescription for his child on the condition of the mother.<sup>165</sup> Before birth, the expectant father can pick up a prescription

158. The Equal Protection Clause would presumably allow a leave policy for the period of physical recovery from childbirth to be granted only to women who have given birth. See *supra* notes 72, 82–84 and accompanying text (discussing how the doctrine permits distinctions based on these types of physical sex differences).

159. See, e.g., S. Rep. No. 103-3, at 11–12 (1993) (listing this example as part of what the FMLA would cover). Regulations implementing the FMLA make this same promise—a promise unfulfilled in the prenatal context. See 29 C.F.R. § 825.112(b) (2018) ("The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.").

160. See 29 C.F.R. § 825.126(b)(3).

161. 29 C.F.R. § 825.120(a)(4).

162. *Id.* ("The expectant mother is entitled to FMLA leave . . . for prenatal care.").

163. See *id.*

164. Compare *id.* § 825.120(a)(5) ("A *spouse* is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated or if needed to care for her during her prenatal care . . ." (emphasis added)), with *id.* § 825.202(b)(1) ("A *pregnant employee* may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness." (emphasis added)).

165. See *id.* § 825.112(a)(1), (3) (granting leave for either a mother or father "to care for [a] newborn child" or "[t]o care for" a "son" or "daughter . . . with a serious health condition").

for the expectant mother *only* if she is “incapacitated” and cannot travel herself.<sup>166</sup>

Otherwise, expectant fathers are entitled to FMLA leave only to the same extent as any other eligible employee. Typically, the FMLA requires employees to have a “serious health condition” to take self-care leave.<sup>167</sup> This would require an expectant father to have “an illness, injury, impairment, or physical or mental condition that involves . . . inpatient care in a hospital, hospice, or residential medical care facility,” or “continuing treatment by a health care provider.”<sup>168</sup> By contrast, the FMLA lowers the bar for pregnant women, who can take leave for “[a]ny period of incapacity due to pregnancy,” regardless of whether her condition is “serious.”<sup>169</sup> So a pregnant woman who is experiencing antenatal depression due to worries about being a mother is entitled to FMLA leave if her depression crosses the threshold of “incapacity.” An expectant father who is suffering from antenatal depression—which researchers estimate happens to approximately ten percent of expectant fathers<sup>170</sup>—is not entitled to leave unless his depression reaches a higher bar. Likewise, a father is entitled to take leave, including to “provid[e] psychological comfort and reassurance” to the pregnant mother if she is incapacitated,<sup>171</sup> but she can take leave to care for him only when he has a serious health condition.<sup>172</sup>

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166. Id. § 825.120(a)(5); see also Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,950 (Nov. 17, 2008) (explaining that “a husband is entitled to FMLA-protected leave if he is needed to care for his spouse who is incapacitated due to her pregnancy (e.g., if the pregnant spouse is unable to transport herself to a doctor’s appointment”).

167. 29 U.S.C. § 2612(a)(1)(D) (2012) (providing leave “[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee”).

168. Id. § 2611(11).

169. 29 C.F.R. § 825.102 (allowing leave for “[a]ny period of incapacity due to pregnancy”); id. § 825.120(a)(4) (“The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days.”).

170. See James F. Paulson & Sharnail D. Bazemore, Prenatal and Postnatal Depression in Fathers and Its Association with Maternal Depression: A Meta-Analysis, 303 JAMA 1961, 1967 fig.2 (2010). There is a broader condition called “couvade” that describes “[w]hen pregnancy symptoms such as nausea, weight gain, mood swings and bloating occur in men.” See Katherine E. Wynne-Edwards, Why Do Some Men Experience Pregnancy Symptoms Such as Vomiting and Nausea when Their Wives Are Pregnant?, Sci. Am., <https://www.scientificamerican.com/article/why-do-some-men-experienc> [https://perma.cc/7ZKT-5E7Q] (last visited Oct. 10, 2018) (“[E]stimates of the frequency [of couvade] in modern Western populations range from under 20 percent to more than 80 percent of expectant fathers.”); see also Hillary Klein, Couvade Syndrome: Male Counterpart to Pregnancy, 21 Int’l J. Psychiatry Med. 57, 57 (1991).

171. See 29 C.F.R. § 825.120(a)(5); Family and Medical Leave Act of 1993, 73 Fed. Reg. at 67,950.

172. See 29 U.S.C. § 2612(a)(1)(C) (providing leave “to care for the spouse . . . if such spouse . . . has a serious health condition”).

Still further, the FMLA provides pregnancy-related benefits to an expectant father only when necessary “to care for a pregnant spouse.”<sup>173</sup> This means that it is not actually the expectant father who is entitled to any pregnancy-related leave under the FMLA but rather the pregnant woman’s *husband*, regardless of whether that person is the expectant parent. When the father of the child is not married to the mother, he is entitled to no pregnancy-specific FMLA leave even though the pregnant woman is. The restriction of leave to spouses is significant not only for denigrating the father’s role in the pregnancy but also for its practical consequences. Recent data suggest that forty percent of births are to unmarried mothers.<sup>174</sup> In those situations, mothers receive their FMLA benefits, and single fathers do not receive even the minimal benefits that married fathers receive.

Because these laws generally refer to “expectant mothers,” all expectant fathers, including gay men who have engaged a surrogate, will be excluded, meaning that no one in their families will be eligible for any prenatal FMLA benefits. On the flip side, precisely because the laws refer to “expectant mothers”<sup>175</sup> rather than “pregnant women,” they might be read to cover nonpregnant expectant mothers, including lesbian partners. The FMLA’s limitation of prenatal leave to “expectant mothers” also has implications for transgender men. There is the rare but real phenomenon of the pregnant man.<sup>176</sup> Female-to-male transgender persons can become pregnant.<sup>177</sup> In some states, a pregnant man could be legally male, rendering him ineligible for sex-based pregnancy benefits like those provided by the FMLA.<sup>178</sup> This requires a transgender man to choose between his identified gender and legal benefits.<sup>179</sup>

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173. 29 C.F.R. § 825.120(a)(5).

174. Unmarried Childbearing, CDC, <http://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> [<https://perma.cc/98RR-ZFWX>] (last updated Mar. 31, 2017).

175. 29 C.F.R. § 825.120(a)(4).

176. The pregnant transgender man troubles the perfect identification of sex with the physical effects of pregnancy that some have assumed and relied on to argue for heightened scrutiny of pregnancy regulations. See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 323 n.20, 327 (1993) (Stevens, J., dissenting) (“As the capacity to become pregnant is a characteristic necessarily associated with one sex, a classification based on the capacity to become pregnant is a classification based on sex.”); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 *Colum. L. Rev.* 1, 32–33 (1992) (arguing that abortion restrictions should be seen as sex discrimination because pregnancy is a “defining characteristic or biological correlate of being female”).

177. See *supra* note 4 and accompanying text.

178. See *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, Lambda Legal, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> [<https://perma.cc/P8VD-KPSN>] (last updated Sept. 17, 2018) (summarizing states’ procedures for amending a sex designation on a birth certificate).

179. This concern will only grow as America’s transgender population continues to increase. See Andrew R. Flores et al., *Williams Inst., How Many Adults Identify as*

b. *Workplace Rights.* — Workplace law also grants pregnant women accommodations and protections against discrimination for carework they perform during the pregnancy while excluding expectant fathers in similar caregiving situations. Many states now mandate reasonable workplace accommodations on the basis of pregnancy.<sup>180</sup> These state laws, though, echo the FMLA’s prebirth exclusion of fathers by providing workplace accommodations only to pregnant women. For example, New Jersey requires that employers “of an employee who is a *woman* affected by pregnancy shall make available to the employee reasonable accommodation in the workplace . . . for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation.”<sup>181</sup> This means that a pregnant woman who needs a workplace accommodation for antenatal depression or to attend a prenatal appointment is entitled to one under these laws, while a father who needs the same accommodation for antenatal depression or to attend a prenatal appointment is not.

Expectant fathers can also be punished and even terminated from employment for pregnancy-related caregiving behaviors. The FMLA prohibits punishment or termination of both mothers and fathers for parenting behavior after birth.<sup>182</sup> By contrast, the Pregnancy Discrimination Act (PDA), amending Title VII to protect against pregnancy discrimination, by its own terms covers only “women.”<sup>183</sup> This assumes that only women face adverse consequences at work due to pregnancy and excludes fathers from protection. A man who attends a prenatal obstetrician appointment and is fired by his employer for being seen as more committed to family than work has no cause of action under the PDA, even though such a termination is premised on the very

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Transgender in the United States? 2–3 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [<https://perma.cc/38WB-DGV2>] (noting that America’s transgender population has reached 1.4 million people).

180. See, e.g., Cal. Gov’t Code § 12945(a)(3)(A) (2018) (making it unlawful “[f]or an employer to refuse to provide reasonable accommodation for an employee for a condition related to pregnancy”); Conn. Gen. Stat. § 46a-60(b)(7)(G) (2018) (requiring that employers create “reasonable” workplace accommodations for “an employee or person seeking employment due to her pregnancy, unless the employer can demonstrate” undue hardship). See generally Nat’l P’ship for Women & Families, Reasonable Accommodations for Pregnant Workers: State and Local Laws (2018) [hereinafter Nat’l P’ship, Reasonable Accommodations], <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf> [<https://perma.cc/EY6M-XQU2>] (collecting the pregnancy accommodation laws of twenty-three states, four cities, and the District of Columbia).

181. N.J. Stat. Ann. § 10:5-12(s) (West 2018) (emphasis added).

182. See 29 C.F.R. § 825.112(a)(6) (2018).

183. 42 U.S.C. § 2000e(k) (2012) (“The terms ‘because of sex’ or ‘on the basis of sex’ include . . . because of or on the basis of pregnancy . . . ; and *women* affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability . . . to work . . .” (emphasis added)).

type of sex stereotype that Title VII was meant to eradicate. If a woman is terminated for attending such an appointment, this may give rise to an inference of impermissible pregnancy discrimination.<sup>184</sup> The PDA has become an increasingly litigated area of federal law, with more judicial resources being funneled into developing a body of law that protects only expectant mothers.<sup>185</sup>

If an employer generally allowed women but not men to attend prenatal appointments, a man might have a claim for *sex* discrimination under Title VII. But the right that the PDA grants—to be treated the same as other nonpregnant but similarly situated employees—would not protect him.<sup>186</sup> And even a sex discrimination claim might be doomed by employers defending on the ground that they granted the pregnant woman leave only because they were legally mandated to do so under either the FMLA or the PDA, neither of which extends its protections to expectant fathers.

Note also the intersection between the facial sex classification of the PDA and sexual orientation and transgender discrimination. The sex-discriminatory language of the PDA may permit discrimination between expectant fathers and lesbian expectant (but nonpregnant) mothers, who arguably could be covered by the term “women affected by pregnancy.”<sup>187</sup> And the PDA, which by its terms applies to pregnant “women,” would, like the FMLA, deny protection to the pregnant transgender man.<sup>188</sup>

c. *Workplace Subsidies.* — Federal law requires employers to provide equal health benefits to mothers and fathers after birth.<sup>189</sup> Before birth, by contrast, federal law permits employers to provide benefits only to women. For example, the Medicare Prescription Drug, Improvement, and Modernization Act (also called the Medicare Modernization Act) created modern health savings accounts (HSAs).<sup>190</sup> HSAs, like Flexible Spending Arrangements (FSAs), allow many employees to set aside

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184. See, e.g., *Peralta v. Roros 940, Inc.*, 72 F. Supp. 3d 385, 394 (E.D.N.Y. 2014) (finding an inference of pregnancy discrimination when the defendant manager openly disapproved of the plaintiff mother’s attendance at prenatal appointments).

185. See Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 *Yale J.L. & Feminism* 15, 17 n.3 (2009) (“The EEOC reports a forty percent increase in charges related to pregnancy between 1997 and 2007 . . .”).

186. See *supra* note 183 and accompanying text.

187. 42 U.S.C. § 2000e(k).

188. *Id.*; see also *supra* notes 175–179 and accompanying text.

189. For a general discussion of the sex-neutral approach to health benefits after birth reflected in the Patient Protection and Affordable Care Act, see Danielle Garrett et al., *Nat’l Women’s Law Ctr., Turning to Fairness: Insurance Discrimination Against Women Today and the Affordable Care Act 3–4* (2012), [https://nwlc.org/wp-content/uploads/2015/08/nwlc\\_2012\\_turningtofairness\\_report.pdf](https://nwlc.org/wp-content/uploads/2015/08/nwlc_2012_turningtofairness_report.pdf) [<https://perma.cc/GQ5Z-KR9N>].

190. For the relevant history, see Alyssa A. DiRusso, *Charity at Work: Proposing a Charitable Flexible Spending Account*, 2014 *Utah L. Rev.* 281, 307–14 & n.164.

pretax wages in a separate account created by their employer to pay for eligible healthcare expenses.<sup>191</sup> Which healthcare expenses qualify for this special treatment is a matter of federal law.<sup>192</sup>

Federal law allows mothers and fathers to use FSAs on equal terms for the expenses of postbirth carework (for example, to attend a parenting class or purchase diapers).<sup>193</sup> Before birth, only expenses that relate to the woman's physical experience of being pregnant or being a mother, such as those for pregnancy-support clothing or learning nursing techniques, are covered.<sup>194</sup> Other expenses that are not related to the physical experience of pregnancy but are related to *analogous* prebirth carework, like strengthening one's core muscles to prepare for carrying a baby or learning bottle-feeding techniques,<sup>195</sup> are not covered.<sup>196</sup> So the only way an expectant father can take advantage of these types of benefits is to pay for the pregnant woman's eligible expenses.<sup>197</sup>

The Patient Protection and Affordable Care Act (ACA) generally requires health plans to offer benefits to new mothers and fathers on

191. See *id.* at 307–09; Louise Norris, What Is the Difference Between a Medical FSA and an HSA?, [healthinsurance.org](https://www.healthinsurance.org/faqs/what-is-the-difference-between-a-medical-fsa-and-an-hsa/) (May 8, 2018), <https://www.healthinsurance.org/faqs/what-is-the-difference-between-a-medical-fsa-and-an-hsa/> [<https://perma.cc/S8A9-974H>].

192. The most relevant rules derive from the Internal Revenue Code as well as regulations issued by the Department of Treasury. For the various terms, see I.R.C. §§ 67(b)(5), 68(c)(1), 213(a) (2012); Treas. Reg. § 1.213-1(a), (e)(1) (as amended in 1979).

193. See DiRusso, *supra* note 190, at 312–13 (noting the Code's authorization of dependent-care assistance, which extends care benefits to family members, including newborns).

194. See ADP, Spending Account Eligible Expense Guide 9 (2013), [https://www.nafhealthplans.com/files/1614/7282/0926/FSA-AF\\_Spending\\_Account\\_Eligible\\_Expense\\_Guide.pdf](https://www.nafhealthplans.com/files/1614/7282/0926/FSA-AF_Spending_Account_Eligible_Expense_Guide.pdf) [<https://perma.cc/ZTQ8-CJT8>] (noting that maternity girdles, special support hose, and lactation consultants are covered but that “[n]ew parents, newborn childcare classes, or sibling classes are *not* eligible”). Note how Cigna, a major insurance company, summarized the situation:

Childbirth classes—Expenses for childbirth classes are reimbursable, but are limited to expenses incurred by the mother-to-be. Expenses incurred by a “coach”—even if that is the father-to-be—are not reimbursable. To qualify as medical care, the classes must address specific medical issues, such as labor, delivery procedures, breathing techniques and nursing.

Which Expenses Are Eligible for HSA, FSA and HRA Reimbursement?, Cigna, <http://www.cigna.com/qualified-health-care-expenses> [<https://perma.cc/4CR2-SAF6>] (last visited Oct. 10, 2018).

195. There are even classes for partners to learn how to support breastfeeding. See Classes for Expectant Parents, Breastfeeding Ctr., <http://breastfeedingcenter.org/classes/classes-for-expectant-parents> [<https://perma.cc/ZX8F-DJPP>] (last visited Oct. 10, 2018) (“Breastfeeding for Fathers and Partners[:] . . . This much loved class reviews the basics of breastfeeding and discusses how to support the breastfeeding mother. Questions are encouraged! No mothers allowed! This class is intended for fathers, partners and other support persons of the breastfeeding mother.”).

196. ADP, *supra* note 194, at 9.

197. See *id.*

equal footing.<sup>198</sup> By contrast, in many contexts the ACA requires covered employers to provide coverage for prenatal benefits only to pregnant women.<sup>199</sup> While the specific required prenatal benefits were to be determined later by an expert panel,<sup>200</sup> the ACA itself suggests that the mandate was to increase pregnancy-related benefits only “with respect to women.”<sup>201</sup> Eventual regulations mandated that covered employers offer insurance plans providing a host of pregnancy-related benefits, such as breastfeeding pumps, counseling for tobacco users, and prenatal education interventions, but only for pregnant women.<sup>202</sup> Employer-offered insurance plans need not provide comparable benefits to expectant fathers.

While some of these benefits are properly sex specific, others are not. Take the counseling for tobacco users. Fathers who smoke during a pregnancy and are around the pregnant woman (“passive smoking”) can generate negative outcomes comparable in frequency and magnitude to expectant mothers who themselves smoke.<sup>203</sup> Yet the ACA requires insurance plans to provide support only for pregnant women to quit smoking.<sup>204</sup> Still further, the limitation of these benefits to “pregnant women” again excludes transgender pregnant men, as well as nonpregnant expectant mothers.

### III. SEXING PARENTING BY SEXING PREGNANCY

The unsexed law of postbirth carework and the sexed law of prebirth carework present a deep tension in sex-equality law. Of course, not all of pregnancy can or should be unsexed. However, like the postbirth period,

198. See Garrett et al., *supra* note 189, at 4 (noting the ACA’s prohibition on sex discrimination in insurance company–provided health plans).

199. Patient Protection and Affordable Care Act § 2713(a), 42 U.S.C. § 300gg-13 (2012).

200. See *id.* § 300gg-13(a)(4) (requiring that insurance plans provide “such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph”).

201. *Id.*

202. See *id.* § 1396d(bb)(1) (requiring coverage only “for cessation of tobacco use by pregnant *women*” (emphasis added)); *id.* § 1396o(a)(2)(B) (requiring coverage and barring cost sharing for, among other things, “services furnished to pregnant *women*, if such services relate to the pregnancy or to any other medical condition which may complicate the pregnancy, and counseling and pharmacotherapy for cessation of tobacco use by pregnant *women*” (emphases added)); The Henry J. Kaiser Family Found., Preventive Services Covered by Private Health Plans Under the Affordable Care Act tbl.1 (2015), <http://files.kff.org/attachment/preventive-services-covered-by-private-health-plans-under-the-affordable-care-act-fact-sheet> [<https://perma.cc/4X8V-2BL5>].

203. See Esther M. John et al., Prenatal Exposure to Parents’ Smoking and Childhood Cancer, 133 *Am. J. Epidemiology* 123, 127–29 (1991); David H. Rubin et al., Effect of Passive Smoking on Birth-Weight, 328 *Lancet* 415, 417 (1986).

204. See *supra* note 202.

the prebirth period involves carework that can be disaggregated from sex.

This Part makes the case that carework in the pre- and postbirth contexts are ripe for comparison and should be treated consistently. It first explains how the two circumstances are worthy of comparison because they both shape a common and core concern of sex-equality law: the sexed distributions of care- and market-work. Both the pregnancy and the period immediately after birth are foundational moments that shape actual investments at home and in the market, as well as employers' expectations of these investments. The failure to unsex pregnancy therefore undermines legal efforts to unsex parenting. And it does so by its effects not only on heterosexual couples but also on other parenting configurations. The sexed pregnancy privileges different-sex over same-sex couples by denying many benefits when both expectant parents are male and reinforces notions of sexed caregiving by how it distributes benefits to gay, lesbian, and transgender expectant parents.

This Part then discusses how the concern about intrusion on women's bodily autonomy does not justify wholly distinct treatment of sexed carework in the prebirth period. Carework during pregnancy—whether done by the woman or the man—often does not involve the woman's body, and in these circumstances it can be appropriately compared to carework after birth.

#### A. *Pregnancy as Parenting*

Doctrinal differences within sex-equality law before and after birth generate tension because these two areas of doctrine regulate similar social realities. These two periods define how sex operates at the “fault-line between work and family.”<sup>205</sup> Laws regulating pregnancy that presume that the “mother is the “center of home and family life”<sup>206</sup> start in motion “a . . . cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver, and foster[s] employers' stereotypical views about women's commitment to work and their value as employees.”<sup>207</sup>

Before proceeding further, it is important to note that the comparison between the doctrine of pregnancy and the doctrine of parenting is anything but perfect. Due to meaningful differences between pre- and postbirth carework, the law need not treat “the allocation of family duties”<sup>208</sup> identically before and after birth. The Supreme Court has said that “[p]hysical differences between men and women” are “enduring”

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205. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003).

206. *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 534 n.15 (1975)).

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

208. *Id.* at 730.

and that these differences can justify sex-based classification.<sup>209</sup> There are more physical differences based on sex before birth than after birth, justifying more sex-based distinctions during the pregnancy.

It is simply impossible to unsex many physical aspects of pregnancy. Only the pregnant woman carries the fetus. Only she constantly feels the fetus and experiences the emotional connection this generates.<sup>210</sup> Only she experiences many of the physical manifestations of pregnancy, including suffering morning sickness and the other health risks associated with pregnancy.<sup>211</sup> Only she endures the stares from others.<sup>212</sup> Only she will have the many colleagues, friends, and strangers approach her with desired and undesired pregnancy advice and with a request to touch her burgeoning belly.<sup>213</sup> Only she decides whether to continue the pregnancy.<sup>214</sup> This dimension of the pregnant woman's experience runs

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209. *United States v. Virginia*, 518 U.S. 515, 533 (1996); see also *Hibbs*, 538 U.S. at 731 (suggesting that the “differential physical needs of men and women” could justify differential treatment); *Geduldig v. Aiello*, 417 U.S. 484, 494–97 (1974) (noting that physical differences between the sexes can be the basis for permissible sex-based classifications).

210. The studies about the expectant mother feeling the fetus suggest that fetal movement can create higher maternal–fetal attachment. See Susan M. Heidrich & Mecca S. Cranley, *Effect of Fetal Movement, Ultrasound Scans, and Amniocentesis on Maternal–Fetal Attachment*, 38 *Nursing Res.* 81, 83 (1989); see also *Nguyen v. INS*, 533 U.S. 53, 65 (2001) (“The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship.”); *Caban v. Mohammed*, 441 U.S. 380, 405 & n.10 (1979) (Stevens, J., dissenting) (“During that [pregnancy] period, the mother and child are together . . . . The father, on the other hand, may or may not be present . . . .”).

211. See, e.g., *Dormeyer v. Comerica Bank–Ill.*, 223 F.3d 579, 583 (7th Cir. 2000) (discussing physical complications of pregnancy, including morning sickness); *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 735 (7th Cir. 1994) (same); Haywood L. Brown, *Physical Changes During Pregnancy*, Merck Manual, <https://www.merckmanuals.com/home/women-s-health-issues/normal-pregnancy/physical-changes-during-pregnancy> [<https://perma.cc/4TTP-TK24>] (last updated Nov. 2016) (discussing both normal and more troubling physical consequences of pregnancy, including chronic fatigue, headaches, bleeding, shortness of breath, and constipation); Feras H. Khan, *Hyperemesis Gravidarum in Emergency Medicine*, Medscape, <https://emedicine.medscape.com/article/796564-overview> [<https://perma.cc/P5TK-Z27K>] (last updated Jan. 8, 2016) (discussing morning sickness, which can create constant and durable nausea and vomiting). But see *supra* note 170 (discussing *couvade*, a condition in which men experience physical symptoms of a partner's pregnancy).

212. See Siegel, *Reasoning*, *supra* note 134, at 374–75 (“A woman may find that pregnancy comes to embody her social identity to others, who may treat her with love and respect or, alternatively, abuse her as a burden, scorn her as unwed, or judge her as unfit for employment.” (footnotes omitted)).

213. See *id.* (discussing the social aspects of pregnancy).

214. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 896–98 (1992) (invalidating a spousal notification requirement because it gave the husband an “enforceable right to require a wife to advise him before she exercises her personal choices”).

in the other direction too: Only her behaviors affect the fetus on a constant basis.<sup>215</sup>

While these physical differences mean that laws regulating pregnancy can be *more* sexed than those regulating parenting after birth, it does not render these areas of law entirely distinct. The goal of sex-equality law is to—as the Court put it in *Hibbs*—eliminate “the pervasive sex-role stereotype that caring for family members is women’s work.”<sup>216</sup> The law of the sexed pregnancy encourages pregnant women to make investments in caregiving during the pregnancy and discourages expectant fathers from doing so in a way that persists after birth, regardless of efforts to unsex after birth. The law of the sexed pregnancy also encourages employers to stereotype women as committed to care and men as committed to career in a way that persists after birth, regardless of any efforts to unsex after birth.

The Court in *Hibbs* recognized the foundational importance of the moments after birth for developing caregiving identities and attachments.<sup>217</sup> The moments before birth are equally important. An entire field of “prenatal attachment studies” has shown that it is during the pregnancy that expectant parents first start to love their future child “both as an extension of self and as an independent object.”<sup>218</sup> The attachments generated—or not generated—during the pregnancy predict later parental identity and involvement. If an expectant parent approaches the pregnancy without any change in self-conception or social role, this predicts lesser involvement after birth.<sup>219</sup> If, on the other hand, an expectant parent begins to think of herself or himself as a parent during the pregnancy, that predicts greater involvement after birth.<sup>220</sup>

Engaging in prebirth carework is especially important for this identity shift in expectant fathers precisely because they do not experience the physical aspects of pregnancy that help generate this identity shift in

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215. For the best overview of the scientific literature on this point, see generally Annie Murphy Paul, *Origins: How the Nine Months Before Birth Shape the Rest of Our Lives* (2010) (exploring the burgeoning field of “fetal origins,” which studies how influences outside the womb during pregnancy can shape the physical, mental, and emotional well-being of the developing fetus for the rest of its life).

216. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003); see also *id.* at 734 (“Congress could reasonably conclude that such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees that Congress sought to eliminate.”).

217. See *supra* notes 81–84 and accompanying text.

218. See Brandon et al., *supra* note 5, at 202–03.

219. See Condon, *supra* note 5, at 280–82 (speculating that an expectant parent’s noninvolvement with the fetus could lead to deliberate avoidance of active parenting in the postnatal period).

220. See *id.*

pregnant women.<sup>221</sup> A range of prebirth carework that can involve the expectant father, such as attending the first ultrasound, selecting a crib, or finding a childcare center, may be significant motivating experiences.<sup>222</sup>

While cases like *Hibbs* identified the importance of unsexing carework to combat stereotypes after birth, these efforts are undermined by a sexed law of pregnancy that provides pregnant women with greater incentives than expectant fathers to invest in carework during the pregnancy.<sup>223</sup> Federal and state laws protect pregnant women but not expectant fathers from risking their job or other work penalties for tending to prenatal matters.<sup>224</sup> Federal law reduces the cost of engaging in prebirth carework for pregnant women but not expectant fathers.<sup>225</sup>

The absence of any meaningful legal recognition of the idea that the expectant father should engage in the pregnancy has an even deeper and more pervasive cost. The idea that the expectant father should participate substantially in the pregnancy is considered “off-the-wall.”<sup>226</sup> Because such an idea is nowhere in law, it is (almost) nowhere in social life either.<sup>227</sup> This means that an expectant father who does participate in the pregnancy can risk severe stigma.<sup>228</sup> So not only does the law fail to disrupt this stigma, but it might be held responsible for it.

When laws do try to encourage father involvement during the pregnancy, they do so in a way that reflects and reinforces the separate-spheres mentality. The FMLA, for instance, justifies limiting most prenatal leave to the expectant mother by stating that it is the expectant father’s role to “care for” the pregnant woman.<sup>229</sup> This is reflective of

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221. See *Nguyen v. INS*, 533 U.S. 53, 65 (2001) (stating that mothers are more likely “to develop a real, meaningful relationship” with a newborn because of their physical experience of being pregnant).

222. Cf. Brandon et al., *supra* note 5, at 206 (summarizing a study finding that lack of interest on the part of husbands can delay expectant mothers’ feelings of attachment for their unborn child).

223. See *supra* section II.B.2.

224. See *supra* sections II.B.2.a–b.

225. See *supra* section II.B.2.c.

226. See generally Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 *Suffolk U. L. Rev.* 27, 52 (2005) (noting how certain legal claims are considered so outside of the jurisprudential mainstream as to be considered “off-the-wall”).

227. One can find stray discussions, see, e.g., Renee Bacher, *Prenatal Visits: Should Dads Go Too?*, Parenting.com, <https://www.parenting.com/article/prenatal-visits-should-dads-go-too> [<https://perma.cc/AMW3-2MHR>] (last visited Oct. 10, 2018), but not the type of major public focus that paternal involvement in postbirth caregiving has received.

228. See Joan C. Williams et al., *Cultural Schemas, Social Class, and the Flexibility Stigma*, 69 *J. Soc. Issues* 209, 220–21 (2013) (discussing the stigma men face from their employers when they are involved in postbirth caregiving and have acted counter to gender-role expectations).

229. 29 C.F.R. § 825.120(a)(5) (2018) (“A spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated or if needed to care for her during her

outdated sex stereotypes envisioning a pregnant woman dependent on her male partner, and the male partner himself without need for support.<sup>230</sup> The FMLA does include “psychological comfort and reassurance” within the support men can provide.<sup>231</sup> But, critically, the expectant father himself is not identified as needing this same comfort and reassurance in return.<sup>232</sup> The expectant father envisioned by the FMLA is the old-fashioned masculine man that Professor Case identified in her seminal article: the man who does not need emotional support from other people.<sup>233</sup> While this view of the father may seem outdated, the law of the sexed pregnancy helps ensure that it will live on.<sup>234</sup>

The sexed law of pregnancy also undermines sex equality by sending powerful messages to third parties. The law generates the impression in employers that women will invest relatively more in the home and relatively less in work than men, fueling statistical discrimination against women at work.<sup>235</sup> Even before a woman is visibly pregnant, she will often face employer discrimination because she is of an age or in a life situation (for example, recently married) suggesting that she will imminently become pregnant.<sup>236</sup> Once an employer knows that a woman is pregnant, the employer will presume that she has substantial obligations that will reduce her investment in work. In addition to the physical fact of

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prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition.”).

230. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (striking down a sex classification for perpetuating the harmful stereotype that wives were dependent on husbands but husbands were not dependent on wives); *Schlesinger v. Ballard*, 419 U.S. 498, 507 (1975) (“In *Frontiero*, the assumption . . . was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.”).

231. 29 C.F.R. § 825.124(a).

232. See *supra* notes 171–172 and accompanying text.

233. See Case, *Disaggregating*, *supra* note 1, at 12 (discussing the adjectives that are conventionally associated with masculinity, including “independent,” “individualistic,” and “self-sufficient”).

234. See *supra* notes 50–66 and accompanying text (discussing the self-reinforcing nature of sex-stereotypical laws).

235. See Gillian Lester, *A Defense of Paid Family Leave*, 28 *Harv. J.L. & Gender* 1, 24 (2005) (“The fact that women in this age group are more likely than their male counterparts to interrupt work for caregiving purposes may serve as a proxy for an actual finding of a weak work commitment of a particular worker.”).

236. See Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 *N.C. L. Rev.* 707, 735 (2000) (“[T]he patterns [of exiting the labor force] for women differ significantly from those of men, and employers may be taking these differences into account in their employment decisions.”). For this reason, women may conceal their pregnancies or their marital status during job interviews. See *Lysak v. Seiler Corp.*, 614 N.E.2d 991, 992–93 (Mass. 1993) (holding that an employer’s termination of an employee for lying about her pregnancy during a job interview did not violate a state pregnancy-discrimination law); Alissa Quart, *Opinion, Why Women Hide Their Pregnancies*, *N.Y. Times* (Oct. 6, 2012), <https://www.nytimes.com/2012/10/07/opinion/sunday/why-women-hide-their-pregnancies.html> (on file with the *Columbia Law Review*).

pregnancy, this discrimination is based in the belief that prebirth carework—visiting childcare centers, attending childbirth classes, and the like—is the responsibility of the mother.<sup>237</sup> Laws such as the FMLA that facially discriminate during the pregnancy by giving women more benefits than men only make women more expensive to hire<sup>238</sup>—exactly the opposite of the FMLA’s goal.<sup>239</sup>

On the flip side, employers view pregnancy as imposing no burdens on an expectant father’s work. Indeed, there is a “fatherhood premium” that expectant fathers start to enjoy during the pregnancy.<sup>240</sup> Employers may actually *prefer* expectant fathers as compared to men not expecting children because they assume that expectant fathers will intensify their breadwinning efforts<sup>241</sup>—but only if they conform to this expected sex role. If the expectant father takes on too much carework, he is likely to experience a “flexibility stigma.”<sup>242</sup> Researchers have found that expectant fathers are less likely to take parental leave when they work in male-dominated workplaces or workplaces in which other fathers have

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237. Cf. Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 *J. Organizational Behav.* 649, 655 (1993) (finding that employers discriminate against pregnant women not only because they view them as “physically limited,” “overly emotional,” and “often irrational” but also because they view them as “less than committed to their jobs” and not “dependable employees”).

238. See Christine Jolls, *Accommodation Mandates*, 53 *Stan. L. Rev.* 223, 264 (2000) (“[T]he Family and Medical Leave Act (FMLA) increases the average cost of employing disabled and female employees . . .”); Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 *Wis. L. Rev.* 69, 91–98 [hereinafter Schoenbaum, *Case for Symmetry*] (arguing that this perverse statistical-discrimination effect is one of the reasons that symmetrical laws are so important).

239. See 29 U.S.C. § 2601(a)(6) (2012) (finding that sex-specific family leave policies generated “serious potential for encouraging employers to discriminate against [women] employees and applicants”); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (explaining that Congress enacted the FMLA because laws that provided family leave only to women reflected and reinforced “employers’ stereotypical views about women’s commitment to work and their value as employees”).

240. See Jane Waldfogel, *Understanding the “Family Gap” in Pay for Women with Children*, 12 *J. Econ. Persp.* 137, 143 (1998) (explaining that while women with children earn less than other women in the United States, “[t]here is no such family penalty for men” and in fact “married men, most of whom have children, earn more than other men”).

241. See Shelly Lundberg & Elaina Rose, *Parenthood and the Earnings of Married Men and Women*, 7 *Lab. Econ.* 689, 705–06 (2000) (“Fatherhood leads to a 9% increase in wages for men . . .”).

242. See, e.g., Jennifer J. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 *J. Soc. Issues* 341, 345–48 (2013) (examining how employers punish “conspicuous” fathers); Melissa J. Hodges & Michelle J. Budig, *Who Gets the Daddy Bonus? Organizational Hegemonic Masculinity and the Impact of Fatherhood on Earnings*, 24 *Gender & Soc.* 717, 740–42 (2010) (measuring who gets the fatherhood premium).

tended not to take parental leave.<sup>243</sup> The sexed law of pregnancy plays a key role in this. The expectant father who asks for prenatal accommodations is asking for something excessive under current law, which does not require such accommodation and renders even discretionary accommodations for expectant fathers off the wall.

State interventions to remedy sex inequalities after birth will inevitably be too little because they are too late. Patterns of gendered behavior develop during the pregnancy that are hard to reverse. This is because individuals struggle to learn new skills when they are exhausted and overwhelmed.<sup>244</sup> Add to that the likelihood that the pregnant woman probably already has some of these skills,<sup>245</sup> as well as the substantial transaction costs involved in teaching these skills to the expectant father,<sup>246</sup> and it is clear that asking a new father to reconceive his domestic role during the first few months with a newborn is a difficult proposition.

These mechanisms of sex inequality during pregnancy have consequences for market work. Because pregnant women invest relatively more in caregiving than expectant fathers from the beginning of the pregnancy, they invest relatively less in market work during this time. It is not surprising, then, that the motherhood penalty women face at work starts to accumulate *during* the pregnancy, rather than *after* the birth of the child.<sup>247</sup> The contrast with men is significant. Men start to work longer hours during the pregnancy.<sup>248</sup> By the time the child is born, then, women have already lowered their market wages relative to men. As a

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243. See Magnus Bygren & Ann-Zofie Duvander, Parents' Workplace Situation and Fathers' Parental Leave Use, 68 J. Marriage & Fam. 363, 368–70 (2006) (reporting data on how features of a father's workplace may affect the length of his parental leave).

244. See Lee Anne Fennell, Willpower Taxes, 99 Geo. L.J. 1371, 1390 (2011) (citing studies that conclude that "willpower works like a muscle that can become fatigued with use").

245. Expectant mothers are more likely to have caregiving experience than expectant fathers. See Olga Khazan, Even in Babysitting, Men Make More than Women, Atlantic (Mar. 14, 2014), <https://www.theatlantic.com/business/archive/2014/03/even-in-babysitting-men-make-more-than-women/284426> [<https://perma.cc/GL54-2U22>].

246. For the seminal treatment, see generally R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 15–19 (1960) (discussing the importance of transaction costs in studying legal systems).

247. See Charles L. Baum, The Effect of Work Interruptions on Women's Wages, 16 Labour 1, 25–30 (2002) (describing how the expectant mother might switch firms and sacrifice her firm-specific human capital); Lester, *supra* note 235, at 22–25 (identifying mechanisms generating inequality, including "foregone work experience, as well as depreciation of accumulated skills during the periods of [work] interruption"); Jennifer Bennett Shinall, The Pregnancy Penalty, 103 Minn. L. Rev. 749, 787–803 (2018) (presenting empirical evidence that pregnant women suffer a greater penalty on the labor market than mothers do). See generally Joni Hersch & Leslie S. Stratton, Housework, Wages, and the Division of Housework Time for Employed Spouses, 84 Am. Econ. Rev. 120, 124 (1994) (noting the "vicious cycle" by which women's increased investment in domestic work increases the earnings differential between the sexes).

248. See Lundberg & Rose, *supra* note 241, at 705–06.

result, fathers face a higher opportunity cost for spending time with their children than mothers do.<sup>249</sup>

The sexed pregnancy undermines legal efforts to unsex parenting not only by its effects on heterosexual couples but also by its effects on gay, lesbian, and transgender expectant parents. In *Obergefell v. Hodges*, the Supreme Court decided that it was unconstitutional to privilege different-sex over same-sex couples when it comes to many of the most important parts of parenting.<sup>250</sup> For instance, the Court listed “birth . . . certificates[] . . . and child custody, support, and visitation” as “aspects of marital status” that needed to be open equally to different- and same-sex parents.<sup>251</sup> The constitutional mandate to equalize different- and same-sex parents in the period after birth presumably extends in substantial part to the period before birth as well.

The sexed pregnancy’s focus on the pregnant woman as the holder of benefits and protections violates this mandate. Sexed pregnancy regulations exclude all gay men expecting children because of their sex. So whereas the law of the sexed pregnancy grants protections and benefits to one expectant parent in heterosexual couples, it affords these same privileges to no one in gay-male couples. Under the sexed pregnancy, gay-male couples are inadequate parents, not only because of their sexual orientation, but also because their family is missing an appropriate caregiver—a woman. This reinforces the constitutionally suspect stereotype that caring is women’s work, while also reinforcing the constitutionally suspect second-class status of same-sex families.<sup>252</sup> And by excluding the transgender pregnant man from its benefits and protections, the sexed pregnancy rejects the idea of men as caregivers, even when they are situated in precisely the same circumstance as women.<sup>253</sup>

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249. See Christine A. Littleton, Does It Still Make Sense to Talk About “Women”?, 1 UCLA Women’s L.J. 15, 36 (1991) (“Because men’s wages continue to be significantly higher than women’s, it would be economically rational for a married woman to take the leave alone, as she would forgo a smaller income than her husband would, and his larger income would continue.”).

250. 135 S. Ct. 2584, 2600–01 (2015); see also *Pavan v. Smith*, 137 S. Ct. 2075, 2077–79 (2017) (invalidating a state law treating birth certificates differently for different-sex as compared with same-sex married couples).

251. *Obergefell*, 135 S. Ct. at 2601; see also *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 504 (N.Y. 2016) (Pigott, J., concurring) (“Same-sex couples are now afforded the same legal rights as heterosexual couples and are no longer barred from establishing the types of legal parent–child relationships that the law had previously disallowed.”).

252. See *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (noting the importance of ensuring recognition for same-sex parents because their families must “understand the integrity and closeness of their own family and its concord with other families in their community”).

253. See generally *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (noting that equal protection requires “that all persons similarly situated should be treated alike”).

As for lesbian women, some of the laws discussed apply only to the pregnant woman herself, excluding nonpregnant expectant women just like they exclude expectant fathers. Other laws, according to their language, could be read to apply to nonpregnant expectant women.<sup>254</sup> To the extent that any of these laws cover nonpregnant expectant mothers but not nonpregnant expectant fathers, they treat persons differently solely on the basis of sex, even when they are similarly situated. In so doing, they reinforce the constitutionally infirm notion that caring is a woman's domain.

#### B. *Pregnancy and Autonomy*

Another fundamental consideration is present before birth that is not present after birth: the sex-equality implications of reproductive rights.<sup>255</sup> While this Article's earlier discussions focused on how sex equality can be undermined by too *little* parental involvement during the pregnancy, reproductive rights jurisprudence has focused on how sex equality can be undermined by too *much* involvement.<sup>256</sup> Men's involvement in pregnancy so starkly raises concerns about interference with women's autonomy, and thus equality, due to one of the basic facts of pregnancy: It occurs in the woman's body.<sup>257</sup>

Do the two different regulatory regimes identified in the first two Parts present a doctrinal distinction with a difference because of this? This section argues that carework before and after birth can be compared because sex can be disaggregated from pregnancy (like sex can be disaggregated from parenting). Disaggregating sex from pregnancy involves recognizing the range of caregiving tasks that expectant fathers can perform that do not compel the expectant mother to do anything at all, let alone anything related to her body.

Reproductive rights jurisprudence can certainly be understood to mean that deciding whether to carry a pregnancy to term is the defining sex-equality consideration during pregnancy. Because giving birth involves a woman's body, and because it defines her for the rest of her life,<sup>258</sup> it could raise sex-equality considerations different from those after birth. The Supreme Court has indicated that reproductive rights are

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254. See, e.g., *supra* note 187 and accompanying text (noting ambiguity about whether laws that grant rights to "expectant mothers" or "women affected by pregnancy" would apply in these situations).

255. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895–96 (1992) ("If these cases concerned a State's ability to require the mother to notify the father before taking some action with respect to a living child . . . , it would be reasonable to conclude . . . that the father's interest in the welfare of the child and the mother's interest are equal.").

256. See *id.* at 869 (identifying "the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty").

257. See *supra* note 95 and accompanying text.

258. See *Casey*, 505 U.S. at 869 (noting how reproductive rights give a pregnant woman control "over her destiny").

particularly important rights for gender equality.<sup>259</sup> If the woman's right to choose is a trump card during the pregnancy period, then any sex-equality benefits of encouraging paternal involvement in the pregnancy must give way to the woman's overriding reproductive rights.

Concededly, this is a plausible reading of the doctrine; it is not, however, the best reading. Since *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the test for protecting women's reproductive autonomy has been whether the government's actions in purpose or effect place an "undue burden" on the woman's right to choose whether to carry a pregnancy to term.<sup>260</sup> This is true regardless of the law's goal.<sup>261</sup> The "purpose"<sup>262</sup> of unsexing the social experience of pregnancy is to benefit pregnant women by creating a more equal distribution of carework. The next question under *Casey* is whether the "effect" of the policy is substantially burdensome on the expectant mother.<sup>263</sup> But the primary reason for—and likely effect of—unsexing the social experience of pregnancy is to reduce the burden on pregnant women.<sup>264</sup>

In *Casey* and other cases, the Court has also considered—even more directly—when third-party involvement in pregnancy interferes with reproductive rights.<sup>265</sup> In *Casey*, the Court considered the constitutionality of a Pennsylvania statute providing that "except in cases of medical emergency, . . . no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion."<sup>266</sup> The

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259. See *id.* at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

260. See *id.* at 878 ("Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.").

261. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) ("The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."); see also Linda Greenhouse & Reva B. Siegel, *Casey* and the Clinic Closings: When "Protecting Health" Obstructs Choice, 125 Yale L.J. 1428, 1432–33 (2016) ("We argue that *Casey* requires scrutiny of health-justified restrictions to ensure that they actually and effectively advance health-related ends and do not protect potential life in a manner the Constitution prohibits. . . . The undue burden framework is the gateway for making these determinations.").

262. See *Casey*, 505 U.S. at 878 (noting that part of the doctrinal test involves an examination of the "purpose" of the law).

263. *Id.*

264. See *supra* notes 244–249 and accompanying text (describing the mechanisms by which the sexed pregnancy contributes to sex inequality).

265. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 642–43 (1979) (holding that if a state requires parental consent for minors seeking abortion, it must also provide an alternative procedure for authorizing an abortion); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (striking down a blanket ban on abortion for unmarried minors during the first twelve weeks of pregnancy absent parental consent).

266. *Casey*, 505 U.S. at 887.

Court invalidated spousal notification because it gave the expectant father “dominion over his wife.”<sup>267</sup> Note that after *Obergefell* this concern and the constitutional right that protects against such spousal control could eventually extend to all spouses, regardless of sex.<sup>268</sup>

*Casey* might be read to distinguish paternal involvement in the pre- and postbirth period because of the concern about bodily autonomy. The Court states that if it were considering a law that

require[d] the mother to notify the father before taking some action with respect to a living child raised by both, . . . it would be reasonable to conclude as a general matter that the father’s interest in the welfare of the child and the mother’s interest are equal.

Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s.<sup>269</sup>

A closer reading reveals that the concern the Court had about paternal involvement in pregnancy is not about paternal involvement in pregnancy per se. Indeed, the Court suggests the importance of paternal involvement even during the pregnancy.<sup>270</sup> Not all paternal involvement raises the same concerns as the spousal-notification provision in *Casey*. The statute there gave the expectant father a right to compel the expectant mother to do something—notify the husband of her situation<sup>271</sup>—and to do something related to her body.<sup>272</sup> Disaggregating sex from pregnancy involves recognizing that the expectant father can participate in the pregnancy independently of the pregnant woman in a

267. *Id.* at 898.

268. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015). Admittedly, there are features of *Casey* suggesting that fathers pose unique risks to women’s autonomy because of the prevalence of domestic violence and because of the problematic history of husbands’ authority over wives. See *Casey*, 505 U.S. at 891 (noting the risks posed by “male partners”); *id.* at 898 (noting the “troubling degree of authority over his wife” that husbands enjoyed at common law).

269. *Casey*, 505 U.S. at 895–96.

270. See *id.* at 895 (recognizing “that a husband has a ‘deep and proper concern and interest . . . in his wife’s pregnancy and in the growth and development of the fetus she is carrying’” (quoting *Danforth*, 428 U.S. at 69)).

271. See *id.* at 898 (noting that the problem is that the statute gives the husband an “enforceable right to require a wife to advise him before she exercises her personal choices”).

272. See *id.* at 896 (indicating concern when paternal involvement implicates “the very bodily integrity of the pregnant woman”); *id.* at 898 (arguing that if the law were upheld, it could also permit the state to “require a married woman to notify her husband before she uses a postfertilization contraceptive” or “before drinking alcohol or smoking”); see also *Danforth*, 428 U.S. at 71 (“[W]hen the wife and the husband disagree on [a pregnancy] decision, . . . only one . . . can prevail. Inasmuch as it is the *woman who physically bears the child* and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.” (emphasis added)).

variety of ways, including buying a carseat, selecting a pediatrician, and visiting a childcare center. Once we disaggregate sex from pregnancy, we can recognize the host of ways that paternal involvement in pregnancy has nothing to do with the woman's body, thus rendering carework in the pre- and postbirth periods ripe for comparison. To the extent that paternal involvement during pregnancy does implicate the woman's body, such as attending a prenatal appointment, the doctrine appropriately circumscribes his involvement such that it does not trouble *Casey* or the right to autonomy, as discussed in the next Part.

#### IV. UNSEXING PREGNANCY

The first three Parts of this Article identified a substantial tension in sex-equality law. Courts and commentators have focused significant attention on disaggregating sex from parenting because no physical sex differences dictate sex roles in parenting. But they have failed to do so during pregnancy, even though there are many facets of getting ready to parent during pregnancy that have nothing to do with physical sex differences. This Part considers what a doctrine unraveling this tension would look like. It also considers how sex-equality law could unsex pregnancy to make the law of pregnancy consistent with the law of parenting. This Part focuses on doctrinal reconstruction, considering how existing sex-equality law already relies on unsexing arguments and how these jurisprudential structures can construct a sex-equality law that unsexes pregnancy.

This Part first considers how sex-equality law can extend heightened scrutiny for sex classifications to the pregnancy period. Cases like *Geduldig v. Aiello*<sup>273</sup> do not close the doctrinal door on this; rather, the argument is that cases like *Geduldig* opened the door to closer scrutiny of precisely the sort of invidious discrimination involved in sexing pregnancy. This Part then considers how unsexing pregnancy could enhance sex equality *and* autonomy rights—consistent with reproductive rights jurisprudence—rather than force doctrine to choose between the two.

##### A. *Scrutinizing Pregnancy*

The doctrinal tension this Article has identified in the law of sex equality is a lack of comparable scrutiny of sex classifications regulating parenting in the pre- and postbirth periods. Sex-equality law could invalidate regulations in the pregnancy period that are based on “invidious” sex stereotypes related to parenting, like the one struck down in *Weinberger v. Wiesenfeld*.<sup>274</sup> An even-handed application of equal protection in the

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273. 417 U.S. 484 (1974).

274. See 420 U.S. 636, 651–53 (1975) (invalidating a provision of the Social Security Act permitting widows but not widowers to collect certain benefits).

pre- and postbirth periods would achieve the goals of unsexing parenting by freeing both women and men from the “very stereotype the law condemns.”<sup>275</sup> Cases like *Hibbs* have already started to move equal protection doctrine in this direction after birth. Cases like *Geduldig* should be read to mean not that pregnancy discrimination *cannot* be sex discrimination but that pregnancy discrimination constitutes sex discrimination *only* when founded on sex stereotypes.

1. *Constructing Scrutiny*. — Scrutinizing sex classifications has resulted in substantial progress in undoing separate-spheres thinking regarding women’s and men’s roles in the family and the market *after* a child is born by ridding the law of sex classifications that are not based in physical sex differences. Applying heightened scrutiny to sex classifications in the pregnancy period could achieve the same success. Extending scrutiny to the context of pregnancy would require courts to distinguish between when sex classifications constitutionally regulate on the basis of physical sex differences and when they unconstitutionally regulate on the basis of sex stereotypes. The law would consider who is similarly situated with regard to pregnancy in light of the goals of the regulation, regardless of sex.<sup>276</sup> The question would essentially be one of means–ends fit. The classification would have to be “substantially related” to the physical difference.<sup>277</sup> If the classification were extended beyond what is needed to address the physical difference, it would be “irrational” and therefore an unconstitutional sex stereotype.<sup>278</sup>

This doctrinal approach is consistent with postbirth jurisprudential trends that scrutinize sex discrimination even in the face of physical differences. The unsexing project made a big leap forward with the Court’s recognition in *United States v. Virginia* that sex classifications can be unconstitutional even when based on valid physical differences.<sup>279</sup> Before this, the equal protection treatment of sex classifications had been either–or: If there were a physical difference related to the law, it would justify the classification; there was no need to resort to a

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275. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138 (1991) (internal quotation marks omitted) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

276. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (explaining that the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike”).

277. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (stating that sex classifications must “serve[] important governmental objectives” and “the discriminatory means employed [must be] substantially related to the achievement of those objectives” (internal quotation marks omitted) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

278. See *Nguyen v. INS*, 533 U.S. 53, 68 (2001) (“[T]he difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis.”).

279. See Franklin, *supra* note 50, at 145–46 (explaining that *Virginia*’s “brand of analysis was familiar” but that “the Court’s treatment of the issue of ‘real’ differences marked a new departure for constitutional sex discrimination doctrine”).

stereotyping analysis.<sup>280</sup> In *Virginia*, even though physical differences between the sexes were relevant to the training afforded by the Virginia Military Institute, this did not end the matter. Instead, the Justices still assessed whether the sex classification was based in an “overbroad generalization[.]”<sup>281</sup> So whereas “real’ differences [once] served as a check on the reach of anti-stereotyping doctrine,” after *Virginia*, the “anti-stereotyping doctrine serves as a check on the state’s regulation of ‘real’ differences.”<sup>282</sup>

*Hibbs* extended this doctrinal innovation to the context of a physical sex difference that arises out of women’s capacity to become pregnant and bear children.<sup>283</sup> Even though there are physical differences between the sexes when it comes to recovery from childbirth, the Court still carefully scrutinized parental leave policies to ensure that any sex classification was fully supported by this difference and not sex stereotypes.<sup>284</sup> Unsexing pregnancy at the level of constitutional doctrine would require extending this recognition to the period of pregnancy itself: Laws that classify on the basis of sex might actually be based in stereotypes rather than physical differences between the sexes.

Although *Hibbs* marks progress toward recognizing heightened scrutiny for sex stereotypes in the presence of physical sex differences, it did not go as far as it should—that is, to apply such scrutiny during the pregnancy itself. Some have argued to the contrary—that *Hibbs* marks the first time the Court has recognized that pregnancy regulations can violate the Equal Protection Clause.<sup>285</sup> For Professor Siegel, the Court’s recognition in *Hibbs* that laws granting maternity leave beyond the period of physical disability after childbirth were constitutionally suspect was an instance of the Court treating a pregnancy regulation as unconstitutional sex discrimination.<sup>286</sup> But *Hibbs* did not address sex roles *during* pregnancy. In assessing the constitutional status of sex-differentiated postbirth leave policies (that is, maternity leave and paternity leave), *Hibbs* applied the already-established principle that laws may not prescribe sex roles *after* a

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280. *Id.*

281. *Virginia*, 518 U.S. at 533.

282. Franklin, *supra* note 50, at 145–46.

283. See *id.* at 149–54.

284. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730, 733 n.6 (2003) (“States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States’ gender discrimination in this area.”).

285. See Franklin, *supra* note 50, at 154 (“*Hibbs* teaches that pregnancy discrimination can constitute sex discrimination in instances in which it reflects and reinforces traditional conceptions of women’s sex and family roles.”); Siegel, Long Way, *supra* note 81, at 1873 (proclaiming *Hibbs* “the first Supreme Court opinion to recognize that laws regulating pregnant women can enforce unconstitutional sex stereotypes”).

286. See Siegel, Long Way, *supra* note 81, at 1891–92 (arguing that *Hibbs* makes clear that pregnancy regulations could amount to an unconstitutional sex classification under certain circumstances).

child is born when these roles are not justified by physical sex differences.<sup>287</sup> This narrower interpretation of *Hibbs* is only strengthened by the fact that, several years after *Hibbs*, the Court affirmed a federal statute featuring sex-role stereotypes related to pregnancy.<sup>288</sup>

Importantly, too, approaching the Equal Protection Clause in the manner advocated here is not foreclosed by *Geduldig* and is even suggested by it. Courts and scholars disagree about the holding of *Geduldig*. Some have read the case to categorically exclude pregnancy classifications from ever being sex classifications that would be subject to heightened scrutiny under the Fourteenth Amendment.<sup>289</sup> Others have read the case more narrowly, as leaving open the possibility that pregnancy regulations could be sex regulations that would receive heightened scrutiny.<sup>290</sup>

The text of the opinion itself makes quite clear that *Geduldig* held only that the pregnancy regulation under consideration there was not an impermissible sex classification, not that a pregnancy regulation could *never* be an impermissible sex classification.<sup>291</sup> Moreover, *Geduldig* states

287. The fact that it applied this scrutiny from the moment of birth is no advance over *Weinberger*. See *supra* note 49 and accompanying text. And even when it came to the period immediately following birth, the Court stopped short of its standard treatment of sex classifications. The Court suggested that medical evidence showing that women on average need four to eight weeks to recover from childbirth would justify granting this amount of leave to women as a class, even though some women in the class would not need this much leave. See *Hibbs*, 538 U.S. at 731 & n.4. This violates the perfect proxy rule since only some but not all women need even four weeks to recover from pregnancy. See *supra* notes 68–71 and accompanying text; see also Case, *Very Stereotype*, *supra* note 68, at 1450 (“[V]irtually every sex-respecting rule struck down by the Court in the last quarter century embodied a proxy that was overwhelmingly, though not perfectly, accurate.”). Given that administrative convenience cannot justify sex discrimination, a policy granting all women postbirth leave based on the average amount of recovery time women need should fail under heightened scrutiny. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973) (collecting cases on this point and holding that a law treating men and women differently “for the sole purpose of achieving administrative convenience” must fail).

288. See *Nguyen v. INS*, 533 U.S. 53, 68 (2001). There, the Court upheld a law that treated mothers and fathers differently with regard to conferring citizenship on their children born abroad because “recognition that at the moment of birth . . . the mother’s knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father . . . is not a stereotype.” See *id.*

289. See Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, in *The Legacy of Ruth Bader Ginsburg* (Scott Dodson ed., 2015) (“*Geduldig* is commonly read as holding that discrimination against pregnant women can never be sex discrimination.”).

290. See, e.g., *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 327 (1993) (Stevens, J., dissenting) (“Nor should *Geduldig* be understood as holding that, as a matter of law, pregnancy-based classifications never violate the Equal Protection Clause.”).

291. See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (“[N]ot . . . every legislative classification concerning pregnancy is a sex-based classification . . .”); see also *Bray*, 506 U.S. at 327 (“In fact, as the language of the opinion makes clear, what *Geduldig* held was that not every legislative classification based on pregnancy was equivalent, for equal

that under certain circumstances pregnancy classifications could be pretexts to effect invidious sex discrimination, and that in such circumstances pregnancy classifications could be invalidated.<sup>292</sup> The Court affirmed this limited reading of *Geduldig* two years later in *General Electric Co. v. Gilbert*, which considered whether pregnancy discrimination could be impermissible sex discrimination under Title VII.<sup>293</sup>

Even those commentators who have read *Geduldig* to leave open the possibility of invalidating pregnancy regulations as impermissible sex-based classifications have struggled to provide examples of such regulations. In holding that the pregnancy classification at issue there did not amount to unconstitutional sex discrimination, *Geduldig* distinguished *Frontiero v. Richardson*, which invalidated a law that granted residential and medical benefits to wives of male servicemembers automatically but granted these same benefits to husbands of female servicemembers only upon a showing of economic dependence.<sup>294</sup> *Frontiero* was explicit about extinguishing sex stereotypes that make up the homemaker–breadwinner dichotomy, because “the sex characteristic frequently bears no relation to ability to perform or contribute to society.”<sup>295</sup> Therefore, when *Geduldig* refers to “invidious discrimination” during the pregnancy that would be struck down like the “sex-based classification . . . considered in . . . *Frontiero*,”<sup>296</sup> it should be read to mean laws that enforce sex-stereotypical roles in the family without any necessary connection to physical sex differences.

2. *Deploying Scrutiny.* — Applying heightened scrutiny to pregnancy would allow courts to classify pregnancy regulations into one of three types: (1) those regulations that do not implicate physical sex differences, (2) those regulations that implicate physical sex differences and are justified by them, and (3) those regulations that implicate physical sex differences but are not justified by them. The remainder of this subsection discusses these three types of pregnancy regulations in turn,

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protection purposes, to the explicitly gender-based distinctions struck down in *Frontiero v. Richardson* and *Reed v. Reed*” (citation omitted)).

292. *Geduldig*, 417 U.S. at 496 n.20 (“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 . . .”).

293. See 429 U.S. 125, 135–36 (1976) (“[A] distinction which on its face is not sex related might nonetheless violate the Equal Protection Clause if it were in fact a subterfuge to accomplish a forbidden discrimination.”); *id.* at 149 (Brennan, J., dissenting) (“*Geduldig*’s outcome was qualified by the explicit reservation of a case where it could be demonstrated that a pregnancy-centered differentiation is used as a ‘mere pretext . . . designed to effect an invidious discrimination against the members of one sex . . .’” (quoting *Geduldig*, 417 U.S. at 496 n.20)).

294. See 411 U.S. 677, 678–79, 688 (1973) (explicitly applying heightened scrutiny to a sex classification for the first time).

295. *Id.* at 686.

296. *Geduldig*, 417 U.S. at 496 n.20.

as well as the implications for sex equality and for equality for gay and lesbian parents—a critical part of unsexing parenting under *Obergefell*.<sup>297</sup>

The first type of regulation—those not based in any physical differences—would be impermissible. For example, laws that provide support only for pregnant women to attend newborn care classes covering diapering, sleep, and the like would be automatically suspect.<sup>298</sup> Unsexing pregnancy requires a doctrine far more skeptical of sex classifications based in assumptions that expectant fathers cannot or will not prepare for or bond with the expected child during the course of the pregnancy.<sup>299</sup>

The second and third types of cases—those based in physical differences—are harder to distinguish. As in *Virginia* and *Hibbs*, a physical difference would not itself resolve the constitutionality of a sex-based pregnancy regulation.<sup>300</sup> Courts would instead consider whether men and women are “similarly situated” with regard to the regulation, regardless of any physical sex differences.<sup>301</sup> This would require courts to consider the purpose of the sex classification (whether it is sufficiently “important”) and also whether the sex classification actually serves that purpose (whether it is “substantially related” to achieving the purpose).<sup>302</sup> In practice, sex must serve as a “perfect proxy” for the law’s objective.<sup>303</sup> If the sex classification extends beyond what is needed to achieve the law’s aim, it will be an unconstitutional “overbroad generalization” premised on sex stereotypes.<sup>304</sup>

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297. See supra notes 250–255 and accompanying text.

298. See supra section II.B.2 (discussing how federal law grants mothers but not fathers the right to use pretax dollars to pay for some types of prenatal education classes).

299. See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (“Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men.”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) (“It is no less important for a child to be cared for by its . . . parent when that parent is male rather than female.”).

300. See supra notes 279–284 and accompanying text.

301. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (explaining that the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike”); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (explaining that heightened scrutiny of sex classifications under the Fourteenth Amendment is meant to ensure that “similarly situated” men and women are treated the same (internal quotation marks omitted) (quoting *Reed v. Reed*, 404 U.S. 71, 77 (1971))).

302. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (stating that the sex “classification [must] serve[] important governmental objectives and that the discriminatory means employed [must be] substantially related to the achievement of those objectives” (internal quotation marks omitted) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

303. See supra notes 70–71 and accompanying text.

304. *Virginia*, 518 U.S. at 533–34 (striking down the male-only admissions policy to a military institute as an “overbroad generalization” based in and furthering harmful sex stereotypes, despite the relevance of physical sex differences, because some women could meet the admissions standard).

Applying heightened scrutiny to pregnancy in this way would of course still leave certain sex classifications intact. There are some products that could be provided only to pregnant women without raising constitutional concerns.<sup>305</sup> A back-support pillow designed for pregnancy is one such product.<sup>306</sup> The benefits of such a product are derived only based on the physical difference of carrying the pregnancy, and a non-pregnant person would derive no benefit from the product.<sup>307</sup>

Even in these instances, the law should classify on the basis of pregnant as compared with nonpregnant persons, rather than on the basis of sex, to account for pregnant transgender men.<sup>308</sup> So a regulation granting support that would benefit only those physically carrying a child should still grant such support in a sex-neutral way, to the pregnant person, not to the “wom[a]n affected by pregnancy”<sup>309</sup> or “expectant mother,”<sup>310</sup> as current law sometimes does.

But even when pregnancy regulations relate to physical differences between the sexes, these differences may not always be sufficiently related to achieving the purpose of the law to justify a sex classification. Take laws that aim to promote the health of the expected child by promoting a healthier fetal environment. The Affordable Care Act, for example, requires insurers to provide support for pregnant women to quit smoking and engage in other behaviors to advance fetal health.<sup>311</sup> Despite physical differences, such laws should be constitutionally suspect. Some studies have found that fetal exposure to secondhand smoke has negative consequences for the fetus, even in the absence of smoking by the pregnant woman.<sup>312</sup> Therefore, even if a physical sex difference

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305. The state might also decide what pregnancy-related products health insurers have to cover and for whom. See *supra* notes 198–202 and accompanying text for a discussion of how the ACA does this.

306. See *supra* note 110 and accompanying text.

307. But cf. *supra* note 111 (noting that seemingly sexed products like a breastfeeding pillow might be used by expectant parents of either sex).

308. See *supra* notes 176–179 and accompanying text. In a rare set of cases, it might be sex rather than pregnancy that dictates the need for pregnancy-related support. Women can take drugs to stimulate lactation even in the absence of a prior pregnancy. Elizabeth LaFleur, *Infant and Toddler Health*, Mayo Clinic (Jan. 20, 2016), <http://www.mayoclinic.org/healthy-lifestyle/infant-and-toddler-health/expert-answers/induced-lactation/faq-20058403> [<https://perma.cc/B7ZF-K883>]. Therefore, the provision of support to learn how to breastfeed and devices aimed at supporting breastfeeding might be needed even by some subset of women who did not give birth.

309. 42 U.S.C. § 2000e(k) (2012) (protecting from employment discrimination only “women affected by pregnancy, childbirth, or related medical conditions”).

310. 29 C.F.R. § 825.120(a)(4) (2018) (“An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work.”).

311. See 42 U.S.C. § 1396d(bb). Another similar example would be programs aimed at reducing stress in the environment.

312. See John et al., *supra* note 203, at 128 (describing the results of a study suggesting a correlation between childhood cancer and exposure to a father’s secondhand smoke);

means that secondhand smoking by expectant fathers harms fetuses through a different physical mechanism than smoking by pregnant women, the exclusion of men cannot be justified.<sup>313</sup> Some studies show that paternal smoking has a substantial fetal impact but a lesser impact than maternal smoking.<sup>314</sup> Even then, the complete exclusion of expectant fathers may not be justified. While “the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all,”<sup>315</sup> the lesser impact of paternal smoking—and not stereotypical views of the relative importance of pregnant women and expectant fathers—must have been the actual reason for the law’s reliance on sex.<sup>316</sup>

Biological sex differences during the pregnancy become still less persuasive justifications for sex classifications given that pregnancy regulations may be aimed not only at changing the fetal environment but also at setting up parental habits for *after* the child is born, when physical sex differences are irrelevant. In the smoking cessation example, encouraging a pregnant woman or an expectant father to quit smoking during the pregnancy matters both for its impact during pregnancy and for its impact on the environment in which the child is raised. An equal protection doctrine that disaggregates sex from pregnancy would recognize that pregnancy regulations matter for how they set up path-dependent behaviors for the postbirth period and thereby undermine sex equality not only during the pregnancy period but far beyond it.<sup>317</sup> Once this is recognized, the exclusion of expectant fathers will often become harder to justify, regardless of physical differences.

Applying heightened scrutiny to disaggregate sex from pregnancy in this way has important implications not only for heterosexual couples but also for gay, lesbian, and transgender expectant parents. By disaggregating sex from pregnancy, the law not only decouples sex from the role of the pregnant partner but also decouples sex from the role of the nonpregnant partner. In other words, it is not only that expectant fathers can serve in the capacity that has been traditionally reserved for pregnant women but also that women can serve in the capacity that has been traditionally reserved for expectant fathers. Lesbian couples benefit from the

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Rubin et al., *supra* note 203, at 415 (“Exposure to smoking by the mother was found to reduce birth-weight, and indirect or passive exposure to smoking by the father had nearly as large . . . an effect.”).

313. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696–97 (2017) (“It will not do to ‘hypothesiz[e] or inven[t]’ governmental purposes for gender classifications ‘*post hoc* in response to litigation.’” (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996))); *Frontiero v. Richardson*, 411 U.S. 677, 689 (1973) (requiring the government to put forward evidence that the sex classification serves its claimed objective).

314. See, e.g., Rubin et al., *supra* note 203, at 417 (documenting one such study).

315. *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970).

316. See *Morales-Santana*, 137 S. Ct. at 1696–98 (holding a sex classification unconstitutional because it was premised on a stereotypical view of the mother’s role as a caretaker).

317. See *supra* section III.A.

recognition that the partner of the pregnant woman could be a woman.<sup>318</sup> Recognizing that women can be either the pregnant partner *or* the nonpregnant expectant partner furthers the goals of unsexing parenting by combatting sex stereotypes about who plays which roles in the family from *both* sides.<sup>319</sup>

B. *Protecting Autonomy Rights*

If applying heightened scrutiny under our rereading of *Geduldig* renders a sex classification during pregnancy constitutionally infirm, what is the proper remedy? The answer could have important implications for women's autonomy, as we might worry that some sex-neutral remedies could result in excessive intrusion into the pregnancy by the nonpregnant partner, with ill effects on reproductive freedom. Disaggregating sex from pregnancy means separating out those parts of the pregnancy that necessarily involve the woman's body and therefore her autonomy rights from those that involve carework that can be unsexed. For those parts of the pregnancy that can be disaggregated, this section argues that extending legal benefits to those to whom they were formerly denied will tend to be the better legal remedy for most of these equal protection violations. Involving nonpregnant partners in the carework of pregnancy can actually promote rather than undermine both women's equality and autonomy.

When a statute that "benefits one class . . . and excludes another from the benefit" is found to violate the Equal Protection Clause, "[a] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion."<sup>320</sup> We can refer to the first of these alternatives as "leveling down" and the second of these alternatives as "leveling up." Although legislative intent is the guidepost for deciding between these alternatives,<sup>321</sup>

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318. See Douglas Nejaime, *The Nature of Parenthood*, 126 *Yale L.J.* 2260, 2268–69 (2017) ("The law has traditionally connected women to motherhood as biological destiny, and thus crediting the social aspects of motherhood is necessary to value the parenting work of women who break from conventional roles.").

319. See Schoenbaum, *Case for Symmetry*, *supra* note 238, at 98–102 (explaining the importance of combatting sex stereotypes from both sides).

320. *Morales-Santana*, 137 S. Ct. at 1698 (internal quotation marks omitted) (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)); see also *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) ("[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." (quoting *Iowa–Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931))).

321. See *Morales-Santana*, 137 S. Ct. at 1699 ("The choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand.").

ordinarily “extension, rather than nullification, is the proper course.”<sup>322</sup> This has been true in the sex discrimination context.<sup>323</sup>

Leveling up is particularly important for achieving sex equality when it comes to caregiving responsibilities. The Supreme Court has explained, in the context of the FMLA, why it is critical for sex equality to grant not only a right of nondiscrimination on the basis of sex but also gender-neutral affirmative caregiving benefits. In a world where women engage in far more caregiving than men, and where employer “practices continue to reinforce the stereotype of women as caregivers,” a rule of formal equality that allows for no caregiving benefits at all “would exclude far more women than men from the workplace.”<sup>324</sup> Sex-neutral affirmative caregiving benefits “ensure that family-care leave w[ill] no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers [cannot] evade leave obligations simply by hiring men.”<sup>325</sup> Sex-neutral affirmative caregiving benefits are also essential for combatting the “stereotype that only women are responsible for family caregiving, thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.”<sup>326</sup>

But will leveling up present a problem for women’s autonomy? This Article argues that the proper limits in place under *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>327</sup> will mitigate any such concerns. As discussed in section III.B, *Casey* has sometimes been wrongly read to suggest a universal harm of male involvement in the pregnancy writ large. *Casey* was about being able to choose to terminate a pregnancy free from excessive control by spouses.<sup>328</sup> Within this paradigm, *Casey* rightly recognizes that *some* forms of involvement in the pregnancy amount to excessive coercion. In *Casey*, the Court struck down a spousal notification

322. *Id.* (internal quotation marks omitted) (quoting *Westcott*, 443 U.S. at 89).

323. See *id.* (stating this generality in the context of a sex discrimination case and citing several examples in that context); *Califano v. Goldfarb*, 430 U.S. 199, 202–04, 213–17 (1977) (plurality opinion) (Brennan, J.) (extending survivors’ benefits after striking down a sex classification); *Frontiero v. Richardson*, 411 U.S. 677, 678–679, 679 n.2, 691 & n.25 (1973) (plurality opinion) (Brennan, J.) (extending military spousal benefits after striking down a sex classification). But see *Morales-Santana*, 137 S. Ct. at 1700 (“Although extension of benefits is customary in federal benefit cases . . . all indicators in this case point in the opposite direction.”).

324. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003).

325. *Id.* at 737.

326. *Id.*; see also 29 U.S.C. § 2601(b)(4) (2012) (explaining that an affirmative caregiving benefit as provided by the FMLA “minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis”).

327. 505 U.S. 833 (1992).

328. *Id.* at 895–98 (focusing on the problematic “dominion” and “authority” that the statute there gave the husband over his wife).

requirement because “[t]he husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.”<sup>329</sup>

Leveling up pregnancy benefits need not present this concern because pregnancy can be disaggregated from sex. Once we recognize the different ways in which the expectant father can participate in the pregnancy, it becomes clearer that these different ways can have different relationships to the mother’s body and thus to her autonomy. This section distinguishes between those ways in which participation would require the involvement of the mother’s body and those in which it would not. Expectant fathers’ joint participation in the pregnancy, such as when attending a prenatal appointment, poses the greatest risk for infringing autonomy. In such circumstances, the pregnant woman’s consent should be required before the expectant father can play any role. The expectant father would have no constitutional<sup>330</sup> or other legal right to attend.<sup>331</sup> Prenatal benefits exercised after the pregnant woman’s consent can be distinguished from the father-involvement laws that courts have invalidated. The invalidated laws *required* mothers to involve fathers in the pregnancy, whereas the paternal involvement proposed here may be exercised only if the mother agrees.<sup>332</sup> With this limit, sex-neutral pregnancy benefits do not present the type of excessive coercion that concerned the Court in *Casey*. This holds true regardless of whether the nonpregnant expectant parent is male or female and whether the pregnant person is female or male.

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329. *Id.* at 898.

330. See *Plotnick v. DeLuccia*, 85 A.3d 1039, 1052–54 (N.J. Super. Ct. Ch. Div. 2013) (rejecting claims by an expectant father that the expectant mother must permit his attendance at birth because “modern constitutional jurisprudence has clearly confirmed that any interest a father has before the child’s birth is subordinate to the mother’s interests”).

331. The expectant mother is the “patient” that the obstetrician treats during the pregnancy. See Denise Grady, *Gynecologists Run Afoul of Panel when Patient Is Male*, N.Y. Times (Nov. 22, 2013), <https://www.nytimes.com/2013/11/23/health/gynecologists-run-afoul-of-panel-when-patient-is-male.html> (on file with the *Columbia Law Review*) (“[T]he American Board of Obstetrics and Gynecology insisted that its members treat only women, with few exceptions . . .”). Except in unusual situations, individuals who are not patients can only be present during appointments with the consent of the patient. See 45 C.F.R. § 164.510 (2017) (“A covered entity may use or disclose protected health information, provided that the individual is informed in advance of the use or disclosure and has the opportunity to agree to or prohibit or restrict the use or disclosure, in accordance with the applicable requirements of this section.”); see also Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, sec. 201, § 1128C(a)(3)(B), 110 Stat. 1936 (1996) (codified as amended at 42 U.S.C. § 1320a-7c(a)(3)(B)) (requiring the creation of “guidelines relating to the furnishing of information by health plans [and] providers,” including “procedures to assure that such information is provided and utilized in a manner that appropriately protects the confidentiality of the information and the privacy of individuals receiving health care services and items”).

332. *Casey*, 505 U.S. at 898 (focusing on the problematic aspect of male “authority” over his pregnant partner).

Even if leveling up benefits in the pregnancy context does not present a constitutional problem, we might be concerned about other significant expressive or material harms to women's autonomy that could come from leveling up. As for the expressive harm, one might be concerned that any legal movement toward recognizing fetal interests—especially as independent from the pregnant woman—will tend to limit women's reproductive rights.<sup>333</sup> But disaggregating sex from pregnancy by providing sex-neutral pregnancy benefits is mostly not about the fetus—and certainly not about providing any rights vis-à-vis the fetus—but about preparing to parent the child after birth. Expectant parents invest in physical capital buying a carseat not for a fetus but for a child. Expectant parents invest in social capital finding a childcare center not for a fetus but for a child. Expectant parents invest in human capital by quitting smoking not only for the fetus but at least as much for a smoke-free environment for the child. This should mitigate—albeit not eliminate—concerns that disaggregating sex from pregnancy would communicate messages harmful to women's autonomy.<sup>334</sup>

Still, curing equal protection violations by leveling up pregnancy benefits could affect bargaining dynamics between pregnant women and expectant fathers. An expectant father who begins to cultivate his domestic productivity is more likely to want to have a say over pregnancy-related matters. Even if she can veto attendance at a prenatal appointment, a pregnant woman may still feel that her autonomy is intruded upon if a one-night stand or an ex-lover or even her spouse has an opinion on the carseat or pediatrician or childcare center—not because he has any right to dictate these matters but simply because he is involved with them *at all*. These concerns may arise for transgender pregnant men and for pregnant women with female partners as well.

This harm is a real concern, and real enough that concerns about bargaining dynamics during pregnancy can overwhelm any attempt to compare pregnancy to parenting. But these possible harms can take on a different cast if we reframe the concept of autonomy in the way that feminists have long urged. Feminist legal theorists have critiqued liberal theory for viewing people as atomized individuals rather than in critical relationships with each other, and for failing to account for these relationships in considering what makes individuals free.<sup>335</sup> In her

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333. See Greenhouse & Siegel, *supra* note 261, at 1445–49 (discussing this concern in the context of fetal-protective policies); Grossman & Thomas, *supra* note 185, at 19 (discussing this concern in the context of the PDA).

334. 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, 2005–20 (2003) (discussing messages sent by laws at the intersection of work and family, such as the FMLA).

335. See, e.g., Susan Moller Okin, *Justice, Gender, and the Family* 25–40 (1989) (arguing that understanding what constitutes a just society requires considering the connections we have with others, especially in the family); West, *supra* note 136, at 1–2

seminal book, *The Autonomy Myth*, law professor Martha Fineman emphasized that the human condition is marked far more by connection than separation.<sup>336</sup> She argued that those with caregiving responsibilities—disproportionately women—do not achieve freedom by being left alone but are far more free—and thus far more equal—when they are supported.<sup>337</sup>

Under this view, freedom for caregivers inevitably turns on connection, not separation—on support, not solace. Rather than necessarily interfering with autonomy, participation in pregnancy to support women in performing the caregiving tasks that they tend to bear alone can be a means toward greater freedom and thus greater equality. The law should not ignore this but should instead try to ensure that critical relationships are constructive relationships. Rather than acting only as a barrier to expectant fathers unduly interfering in pregnancy in a way that undermines sex equality, as in *Casey*, law can play a role in encouraging expectant fathers (and nonpregnant expectant mothers) to participate in pregnancy in a way that promotes sex equality.

Disaggregating sex from pregnancy might be viewed as part of a long line of laws that have garnered the support of liberal feminists despite the fact that they likely play into a woman's calculus about whether to carry a pregnancy to term. It would seem strange to think of laws like the

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(arguing that law and legal theory are pervasively marked by a view of people as separate rather than connected); see also Michael J. Sandel, *Liberalism and the Limits of Justice* 133 (1982) (stating that most contemporary political theory is grounded in the view that “what separates us is in some important sense prior to what connects us,” and thus “[w]e are distinct individuals first, and *then* we form relationships”).

336. See Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (2004).

337. See *id.* at xix (“If we want our families to shoulder responsibility for dependency then we must look directly at that task and build policy to foster and facilitate caretaking.”). Because *Casey* was concerned with how a spousal notification requirement could interfere with women's autonomy, the Court had little opportunity to consider the positive ways in which connections can foster autonomy. See *Casey*, 505 U.S. at 896 (“The Constitution protects *individuals*, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.” (emphasis added)). Other courts have shown glimmers of recognition of the fact that autonomy turns on connection. One recent decision considered a Texas abortion regulation that would force the closure of a significant number of abortion clinics in the state, requiring some women to travel a substantial distance to obtain an abortion. See *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 682–83 (W.D. Tex. 2014), *aff'd sub nom. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The restriction was struck down in part based on the recognition that exercising the right to an abortion might rely on support from others, such as those who might provide “childcare” or “transportation,” and that “poor, rural, or disadvantaged women” would not be able to pay for this support in the absence of connections to provide it. *Id.* at 683; see also *June Med. Servs. v. Kliebert*, 250 F. Supp. 3d 27, 83 (M.D. La. 2017) (“Women who cannot afford to pay the costs associated with travel, childcare, and time off from work may have to . . . rely on predatory lenders, or borrow money from family members or abusive partners or ex-partners, sacrificing their financial and personal security.”).

PDA, the FMLA, or child-support requirements<sup>338</sup> as autonomy-reducing measures simply because they affect women's reproductive choices, as they have been shown to do.<sup>339</sup> This is because, as with laws that would unsex pregnancy, such laws reduce abortion by changing the social circumstances of pregnancy in ways that support the pregnant woman and make pregnancy less costly.<sup>340</sup> Indeed, such prenatal supports can be seen as autonomy enhancing, in that they open up choices for women that they might not have had before.

This doesn't mean that paternal involvement in the pregnancy will always be easy for pregnant women. As in the postbirth period, women may feel territorial over this domain that they have typically occupied alone, leading to maternal gatekeeping.<sup>341</sup> And gendered bargaining dynamics may play out such that women do not always put their own interests first.<sup>342</sup> But, despite these difficulties, research shows how constructive paternal participation in the pregnancy advances sex equality. Expectant fathers whom pregnant women think will be more responsible generally empower rather than constrain these women.<sup>343</sup>

Successful comparative examples confirm that paternal involvement in the pregnancy—within appropriate limits—and reproductive autonomy are not only consistent but mutually reinforcing. The United Kingdom has created a sex-neutral paid prenatal leave program<sup>344</sup> alongside

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338. Indeed, one of the state law provisions upheld in *Casey* required women to be provided with information about child support from the father. See *Casey*, 505 U.S. at 881.

339. See Jocelyn Crowley et al., *The Effect of Child Support Enforcement on Abortion in the United States*, 93 Soc. Sci. Q. 152, 165–69 (2012) (finding a relationship between child support policies and childbearing decisions); Robert Plotnick et al., *The Impact of Child Support Enforcement Policy on Nonmarital Childbearing*, 26 J. Pol'y Analysis & Mgmt. 79, 96 (2007); see also Shari Motro, *The Price of Pleasure*, 104 Nw. U. L. Rev. 917, 971 (2010) (considering and defending legal rules that aspire to improve the conditions of pregnancy and therefore affect abortion rates).

340. See Crowley, *supra* note 339, at 169–70 (finding that the rate of abortions falls as the expectation that men will pay child support rises because women feel more confident about the behavior of the expectant father).

341. See Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 Vill. L. Rev. 525, 536–41 (1999) (discussing how gendered norms may lead mothers to engage in “gatekeeping” vis-à-vis fathers to retain the primary caretaking role).

342. See generally Amartya Sen, *Gender and Cooperative Conflicts*, in *Persistent Inequalities: Women and World Development* 123 (Irene Tinker ed., 1990) (discussing how gender influences intrafamily bargaining and how women can place family interests ahead of their own).

343. See Shari Motro, *Preglimony*, 63 Stan. L. Rev. 647, 657 (2011) (“Thus, increasing support for pregnant women regardless of the pregnancy's outcome is likely, over time, to change abortion from being used as a form of birth control that lets men off the hook into a last resort that both parties are invested in preventing.”).

344. See, e.g., Press Release, Jo Swinson, Dep't for Bus., Innovation & Skills, *New Right for Fathers and Partners to Attend Antenatal Appointments* (Oct. 2, 2014), <https://www.gov.uk/government/news/new-right-for-fathers-and-partners-to-attend-antenatal-appointments> [<https://perma.cc/HY4U-DEN8>] (granting fathers and same-sex partners

vigorous protections of the right to choose.<sup>345</sup> Consistent with a shift toward sex neutrality in caregiving, such laws provide benefits not only to expectant fathers but to nonpregnant expectant mothers (for example, lesbian partners) as well.<sup>346</sup>

#### CONCLUSION

The Supreme Court's opinion in *Obergefell v. Hodges* recognizing a constitutional right to same-sex marriage is replete with "end of history" rhetoric.<sup>347</sup> Law is one long march in which "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."<sup>348</sup> The law has gradually moved from constraining the sexes to liberating them. This is particularly true when law interjects itself at the "faultline between work and family."<sup>349</sup> Women can be workers and parents, and so can men.

Except when it comes to pregnancy. Federal and state governments spend billions of dollars each year subsidizing women devoting themselves to carework during the pregnancy, and encouraging men not to do so.<sup>350</sup> However far we want to go forward toward sex equality in the future, we have to start further back at the pregnancy itself in considering when sex inequality begins. This Article moves us backward in precisely this way to move the law forward in achieving its goal of sex equality.

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the right to leave work to attend several prenatal appointments) [hereinafter U.K., New Right].

345. United Nations, Dep't of Soc. & Econ. Affairs, Population Div., World Abortion Policies 2013 (2013), [https://www.un.org/en/development/desa/population/publications/pdf/policy/WorldAbortionPolicies2013/WorldAbortionPolicies2013\\_WallChart.pdf](https://www.un.org/en/development/desa/population/publications/pdf/policy/WorldAbortionPolicies2013/WorldAbortionPolicies2013_WallChart.pdf) (on file with the *Columbia Law Review*).

346. See U.K., New Right, *supra* note 344.

347. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) ("Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm."); NeJaime, *supra* note 318, at 2260 ("In the wake of *Obergefell v. Hodges*, courts and legislatures claim in principle to have repudiated the privileging of different-sex over same-sex couples and men over women in the legal regulation of the family.")

348. *Obergefell*, 135 S. Ct. at 2603.

349. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (explaining that this is "where sex-based overgeneralization has been and remains strongest").

350. See *Nat'l P'ship, Reasonable Accommodations*, *supra* note 180.