GENDER (DISCRIMINATION) TROUBLE

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The LGBTQ civil rights movement has upended traditional understandings of what it means to be male or female. Building on this movement's achievements, a growing number of scholars have urged that the goal of sex discrimination law be to question when, if ever, the law can make distinctions between men and women. This article pushes back against these claims. Even though what it means to be male or female is now much more contested both socially and legally, sex discrimination law always has and always will have to grapple with the normative dilemmas posed by treating those who have traditionally female anatomy differently than those with traditionally male anatomy.

To illustrate this point, I examine two sex equality stories that have rarely been told together: pregnancy in the workplace and sports in educational institutions. Pregnancy discrimination law has often rejected different treatment for those with female anatomy; in contrast, the major federal law dealing with sex discrimination in sports, Title IX,, is premised on recognizing female sports as different from male sports. For those who believe that sex equality efforts should challenge all legal distinctions between men and women, the history of pregnancy and sports offers a cautionary tale. The drive to diminish the significance of anatomical differences has produced a system of legal protections for pregnant workers in the United States that is conspicuously lacking. The substantial rise in female participation in sports under Title IX, on the other hand, has been a resounding success. The history of pregnancy and sports shows that the future of sex equality lies not in abandoning sex distinctions but in creating doctrine and laws that recognize their risks but also accept their benefits.

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I. INTRODUCTION

> If I were a guy, I wouldn't be writing this because I'd be out there playing and winning while my wife was doing the physical labor of expanding our family.
>
> Serena Williams[1]

This article explores two sex equality dilemmas, pregnant people in the workplace and competitive sports in educational institutions. Pregnancy in the workplace is regulated under Title VII's antidiscrimination mandate.[2] The

1. Serena Williams (as told to Rob Haskell), *Serena Williams Says Good-Bye on Her Own Terms*, VOGUE, (Aug. 9, 2022), https://www.vogue.com/article/serena-williams-retirement-in-her-own-words [https://pema.cc/G468-ERC2].

2. Title VII states: "It shall be an unlawful employment practice for an employer– (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

treatment of female athletes in educational institutions is regulated under Title IX's antidiscrimination mandate.[3] Because both issues implicate constitutional sex equality concerns, these statutory mandates also must be implemented in ways that are consistent with the sex equality guarantee in the Equal Protection Clause. Yet, as interpreted, the two statutory mandates reflect very different approaches to sex equality. Despite or because of the antidiscrimination mandate in Title VII, the United States—almost alone among countries in the world—refuses to demand that those who perform reproductive labor be treated differently than those who do not. Despite or because of the antidiscrimination mandate in Title IX, educational institutions must treat female athletes differently than male athletes. For many people concerned about women workers' well-being, refusal to treat pregnancy as a condition that warrants different treatment, in particular, the lack of paid leave, is a dark mark on this country's treatment of women. For many of those same people (and others), Title IX has been a remarkable success for women.

That there are different ways of interpreting antidiscrimination mandates is not in and of itself surprising. The two different approaches to sex equality reflect a "sameness/difference" debate within legal feminism that is at least a century old.[4] The sameness argument suggests that whatever differences may exist between men and women, women will be better off if they are treated by law as the same as men. The difference argument suggests women will be better off if they are treated in a manner that reflects the ways in which they are different than men.

Recent trends in case law and scholarship suggest that the law's traditional struggle with sameness and difference has been misguided.[5] These trends emanate, in part, from the LGBTQ community's successful use of sex discrimination doctrine to secure civil rights for LGBTQ plaintiffs.[6] In *Bostock v. Clayton County*, the case securing antidiscrimination protection for LGBTQ employees under Title VII, the Supreme Court adopted a formal, acontextual sex discrimination methodology that renders any difference approach to sex equality suspect.[7] At the same time, a considerable body of recent sex equality scholarship argues that sex discrimination doctrine, at its

3. Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

4. As Mary Anne C. Case explains, "[s]ameness theorists have been criticized for focusing on the exception to the detriment of the norm . . . . Difference theory, by contrast, has been seen to serve the norm well, but has been criticized for leaving little space for the exception." 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, 103 (1995).

5. *See infra* Part II.

6. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996).

7. Bostock v. Clayton County, 590 U.S. 644, 659–60 (2020).

core, is about dismantling gender stereotypes.[8] Building on broader theoretical attacks on any process that "make[s] coherent the categories of male and female,"[9] scholars argue that any notion that there are "real differences" between men and women "has never been coherent."[10] Thus, according to those scholars, any governmental action grounded in those differences requires especially exacting scrutiny because of the tendency for ideas around difference to perpetuate stereotypes.[11] Both of these approaches, formal equality and anti-stereotyping, have proved important to protecting the LGBTQ community from discrimination,[12] and both approaches avoid the problems attendant upon accommodating difference, but both approaches also abandon the benefits that can flow to the beneficiaries of a difference approach.

Pregnant people and female athletes often benefit from a difference approach.[13] This is not mere coincidence. Pregnancy and sports are related because puberty, the process that makes approximately half of all human bodies able to gestate, also makes those bodies, on average, shorter, wider in the hips, and less capable of developing muscle mass than bodies that are designed to produce sperm.[14] Testosterone, critical to producing sperm and

8. Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1070–71 (2023) ("Sex equality's crown jewel is the anti-stereotyping principle . . . ."); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88 (2010) (defining and encouraging an anti-stereotype approach as "direct[ing] courts' attention to the particular institutions and social practices that perpetuate inequality in the context of sex"); Robin Dembroff et al., *What Taylor Swift and Beyoncé Teach Us About Sex and Causes*, 169 U. PA. L. REV. ONLINE 1, 11 (2020) (stating the only reason we prohibit group-based discrimination is to "interrupt the reproduction of certain generalizations, stereotypes and norms"); *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, 1472 (2000) (stating American antidiscrimination law values "'anti-stereotyping' above all"); David H. Gans, *Stereotyping and Difference:* Planned Parenthood v. Casey *and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1876 (1995) ("Stereotyping is the central evil that the Court's equal protection doctrine seeks to prevent.").

9. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex and Gender*, 144 U. PA. L. REV. 1, 3 (1995) (questioning "the social processes that construct and make coherent the categories of male and female"); *see also* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 9–10 (Linda J. Nicholson ed. Routledge 1999) (1990) (generally challenging the idea that biological differences between men and women are any more real than socially constructed notions of gender).

10. Cahill, *supra* note 8, at 1147.

11. Franklin, *supra* note 8, at 146 ("[E]qual protection law should be particularly alert to the possibility of sex stereotyping in contexts where 'real' differences *are* involved, because these are the contexts in which sex classifications have most often been used to perpetuate sex-based inequality.").

12. *See infra* text accompanying notes 233-239 and 281-284.

13. *See infra* Part IV.

14. *See* Richard J. Auchus, *Endocrinology and Women's Sports: The Diagnosis Matters*, 80 L. & CONTEMP. PROBS. 127, 131 (2017).

far more prevalent in people whose pubescent process involves the enlargement of testes, increases height, muscle mass, and oxygenation capacity.[15] Thus, as a physiological matter, the relationship between pregnancy and competitive sports is obvious: the process that makes humans able to reproduce also produces, on average,[16] bimodally distributed bodies with one mode, the gestators, relatively less tall, strong and fast, and the other mode, the sperm providers, relatively more so.[17]

The existence of this mostly bimodal distribution of physiological differences in humans hardly means that the law has to recognize those differences. How the law might choose to make distinctions, or not, between those on either side of the bimodal distribution is a separate inquiry from whether, on average, the differences exist. There are costs to categorizing and recognizing difference, especially given the potential to perpetuate stereotypes. As noted, the law has been particularly concerned about those stereotypes and has chosen to minimize physiological differences in the context of pregnancy, while openly relying on differences in the context of sports.

This article traces the development of the law in both pregnancy and sports, and it unpacks how the doctrine in both areas still brims with unresolved tensions in the sameness/difference debate. As Part I details, the statutory attempt to secure anti-discrimination treatment for pregnant workers by singling pregnancy out for special (different) treatment in the Pregnancy Discrimination Act[18] fostered a perceived need to embrace a gender neutral (sameness) approach to all forms of childbirth leave in the Family and Medical Leave Act ("FMLA").[19] The recent Pregnant Workers' Fairness Act ("PWFA") takes a step back towards difference by treating pregnancy as a

15. *See* Thomas W. Storer et al., *Testosterone Attenuates Age-Related Fall in Aerobic Function in Mobility Limited Older Men with Low Testosterone*, J. CLINICAL ENDOCRINOLOGY & METABOLISM 2562, 2562–63, 2565 (2016).

16. Somewhere between 0.018% and 1.7% of the population do not have all male or all female primary and secondary sex characteristics. *See* Edward Schiappa, *Defining Sex*, 85 L. & CONTEMP. PROBS. 9, 14–15 (2022) (describing incidence of differences in sexual development).

17. "The primary function of puberty is to produce sexually mature adults capable of reproduction." Logen Breehl & Omar Caban, *Physiology, Puberty*, *in* STATPEARLS [INTERNET] (2023) (ebook), https://www.ncbi.nlm.nih.gog/books/NBK534827/?report=printable [https://perma.cc/792D-RBEG].

18. *See* Pub. L. No. 95-555, § I, 92 Stat. 2076, 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)) (prohibiting discrimination against pregnant employees based on their pregnancy, childbirth, or related medical conditions).

19. *See generally* Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601-2654 (entitling eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons).

distinct form of disability, though it does not affect leave policies.[20] At the same time, Title IX's sports regulations, which create a separate-but-equal (difference) approach to women's sports, sits uncomfortably with the subsequent development of sex equality constitutional law—particularly treatment of other single-sex educational endeavors—which emphasizes the importance of sameness.[21] In neither area has the law rendered a clear picture of when or whether the law demands sameness or difference.

After describing the continuing tension in the doctrine in Part I, Part II then analyzes how the recent embrace of both formal equality and anti-stereotyping might impact the law of pregnancy and sports. A formal equality approach would make it very difficult to offer the kind of paid childbirth leave that the rest of the world provides and it would likely dismantle Title IX's approach to women's sports. An anti-stereotyping approach would require wide-ranging changes to gendered nomenclature in pregnancy and sports and leave those who gestate and most women athletes more vulnerable to discrimination than they are now. But, Part II suggests that the adoption of either approach likely would not resolve the tensions familiar to the sameness/difference debate. Those tensions would remain, manifesting themselves in the normative commitments that underlie legal policies around pregnancy and sports. How the law can or must accommodate physiological differences that continue to characterize more than 98% of the population will continue to reflect hard judgment calls regarding the benefits of singling out for special treatment those with the primary and secondary sex characteristics that have traditionally been associated with women, versus the costs, particularly in terms of the perpetuation of stereotypes, of doing so.

Part III uses contemporary empirical evidence in both the pregnancy and sports contexts to underscore the potential benefits of a difference approach notwithstanding the current pressure to minimize it. It compares the United States' mostly sameness approach to pregnancy leave with the rest of the world's difference approach to find little discernable impact on gendered patterns with regard to caretaking or work participation or wages for those who receive paid pregnancy leave and then return to work. A difference approach to pregnancy leave, adopted by all but one other country in the world, does not seem to foster stereotypes that end up hurting women in the workplace. Thus, it may be appropriate for U.S. law to revisit its sameness approach to pregnancy because, as Part III makes clear, those most hurt by this policy in the United States are women with the fewest economic and social resources. In practice, a sameness approach to pregnancy leave is strikingly regressive.

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20. *See* Pub. L. No. 117-328, div. II, 136 Stat. 4459, 6084–89 (2022) (codified at U.S.C. §§ 2000gg–2000gg-6).

21. *See infra* notes 218-220 and accompanying text.

With regard to women's sports, though sports organizations have a history of using women's physiological differences to treat women athletes worse than male athletes for reasons that have nothing to do with women's physiological differences, there is no denying that Title IX ushered in transformative change with regard to women's relationship to sports. Title IX's embrace of difference is popular across genders, phenomenally effective at increasing girls and women's participation in sports and has rendered positive externalities to self-esteem, team-building ability, and competitiveness in women that help them compete with men in other domains. Given the success of Title IX as a mechanism for empowering so many women, the U.S. may want to be wary of anti-discrimination tests that would dismantle it.

Together, this article makes three contributions. First, it tells two sex equality stories, about pregnancy and sports, that have rarely been told together. By juxtaposing and unearthing the similar tensions in the two stories, it helps reveal how ubiquitous the sameness/difference tension has been. Second, it analyzes why those tensions are likely to remain even if courts adopt formal equality or anti-stereotyping frames that abandon reliance on "real differences" as a justification for different treatment. Third, it cautions, based on an empirical assessment of how the differing approaches to sameness and difference have played out in the context of pregnancy and sports, to be wary of bold claims about what sex discrimination is or what sex equality demands. As the ubiquitous tension between sameness and difference shows, sex discrimination is complicated, and it may be best to simply recognize it as so.[22] The nuanced, tense, sometimes inconsistent approach to sameness and difference may be a desired feature, not a flaw, in sex discrimination doctrine.

II. PREGNANCY AND SPORTS IN AMERICAN LAW

A. Pregnancy

The question of how to treat workers who will or may be pregnant long pre-dated any legal recognition that discrimination against women was a statutory or constitutional discrimination problem in this country.[23] In the first half of the twentieth century, some feminist activists—often called "maternalists"—championed a difference approach, fighting for, and often

22. KIMBERLY A. YURACKO, GENDER NONCONFORMITY AND THE LAW 7 (2016) ("Antidiscrimination law has always reflected a mosaic of principles and values rather than a single commitment or requirement.").

23. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 421 (1908) (reasoning that the child-bearing nature and social role of women provided a strong state interest in reducing their working hours).

establishing, protective legislation for female workers by emphasizing mothers' social value.[24] Maternalism was always controversial, though, because of its tendency to "reinforce[] stereotypes regarding women's physical weakness and . . . [] their duties to home and family life . . . ."[25] A sameness approach stands guard against maternalism's "threat[] to reinforce the normative primacy of motherhood."[26] Neither the statutory prohibition on sex discrimination in Title VII nor the constitutional recognition of sex as a suspect classification under the Equal Protection Clause in the latter part of the twentieth century resolved that tension between protecting those who gestate children and perpetrating stereotypes around those who might do so.[27]

1. The Early Pregnancy Cases

In the 1970s, the Supreme Court began to understand sex discrimination as a constitutional equality problem under the Equal Protection Clause.[28] In 1971, the Court held that statutes could not reflect an arbitrary preference for men over women,[29] and in 1973, the Court held that sex was a suspect classification and therefore husbands of Air Force members should be entitled to the same spousal benefits as wives of Air Force members.[30] That latter case, *Frontiero v. Richardson*, was the first of many sex discrimination cases that used male plaintiffs to emphasize how gender distinctions in law were often rooted in stereotypes about what men and women could do.[31]

There were two early sex discrimination cases involving pregnancy, either of which might have spurred the Supreme Court to treat pregnancy discrimination as sex discrimination rooted in gender stereotypes, but neither case ended up being decided as a matter of Equal Protection.[32] In *Struck v. Secretary of Defense*, a pregnant service member challenged a U.S. Navy policy that required pregnant women to leave the Service after they got

24. Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 456 (2014).

25. Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act & the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 982 (2013).

26. Dinner, *supra* note 24, at 458.

27. *See infra* Part II.A.3.

28. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 77 (1971).

29. *Id.* at 76 (holding that a preference of males over females in appointing an executor does not withstand rational basis scrutiny).

30. *See* Frontiero v. Richardson, 411 U.S. 677, 688, 690–91 (1973) (finding that sex was a suspect classification under the Equal Protection Clause and husband of Air Force lieutenant was entitled to same benefits as a wife would be).

31. *See id.* at 688–89.

32. Struck v. Sec'y of Def., 460 F.2d 1372, 1377 (9th Cir. 1972); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 634 (1974).

pregnant.[33] That case settled after the Navy changed its policy—allowing pregnant service members to be re-assigned—but before the Supreme Court heard oral argument.[34] In *Cleveland Board of Education v. LaFleur*, two school teachers challenged school board policies that required them to leave work four and five months before anticipated child birth.[35] One of the policies also prohibited re-employment until the first semester after the formerly pregnant person's child turned three months old.[36]

Four justices struck down the regulations in *LaFleur* on due process grounds because "the provisions amount[ed] to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing."[37] Justice Douglas concurred in the result without an opinion, and Justice Powell concurred in the result but would have decided the case under the Equal Protection Clause because the provisions were clearly irrational.[38]

Justice Powell's finding of irrationality in *Lafleur* and the Navy's eagerness to change its policy in *Struck* strongly suggest that the policies in those two cases were (ridiculously) overbroad pregnancy policies, likely rooted in archaic notions that pregnant women should not be seen in public or a belief that they were incapable of working. The policies in these two cases evidence a history of rank discrimination based on stereotypes about pregnancy and incapacity. But that does not mean that all pregnancy-based distinctions are rooted in stereotype.[39] Even the majority in *LaFleur*, despite finding that the constitutional problem lay in the conclusiveness of the presumption, suggested that a conclusive presumption regarding the ability to work "during the last few weeks of pregnancy" might be permissible.[40]

Three months after the Court issued its opinion in *LaFleur*, it heard argument in *Geduldig v. Aiello*.[41] *Geduldig* involved a supplemental health insurance program provided by the state of California that required employees to pay into a health insurance fund designed to cover impairments that were

33. 460 F.2d at 1373.

34. *See* Blake Stilwell, *How Ruth Bader Ginsburg Helped End the Military's Policy of Forced Abortion*, MIL. (Sept. 21, 2020), https://www.military.com/history/how-ruth-bader-ginsburg-helped-end-militarys-policy-of-forced-abortion.html [https://perma.cc/DA7L-PFJM].

35. *See* 414 U.S. at 634, 636 (1974).

36. *Id.* at 634–35.

37. *Id.* at 644.

38. "The constitutional difficulty is not that the boards attempted to deal with this problem by classification. Rather, it is that the boards chose irrational classifications." *Id.* at 652–53.

39. *Id.* at 653; *see* Stillwell, *supra* note 34.

40. *LaFleur*, 414 U.S. at 647 n.13. As will be discussed *infra* Part IV.A.2, many Western countries, including all EU countries, *require* gestators to take two weeks of leave after giving birth. See *infra* text accompanying notes 355-363.

41. 417 U.S. 484 (1974).

not covered by workers' compensation.[42] The policy excluded pregnancy and some other conditions.[43] The pregnant plaintiffs argued that treating pregnancy differently than other disabilities was rooted in "the mythology that pregnancy-related disabilities are unique."[44] They also argued that treating pregnancy differently was per se sex discrimination because pregnancy was a "sex-linked characteristic."[45]

The Court did not view the pregnancy exclusion as rooted in mythology.[46] It was persuaded that the policy was rooted in economics.[47] The insurance premiums were purposefully low for everyone, limited to 1% of the employees' income, but high enough to cover the majority of disabilities.[48] Many employees got pregnant, and if normal pregnancies were covered under the plan, everyone's premiums would have to increase in order to maintain the plan's stability.[49]

The Court also rejected the idea that treating pregnancy differently than other disabilities was per se sex discrimination.[50] Famously, the Court found that the policy distinguished between "pregnant women" and "nonpregnant persons" rather than between women and men.[51] The Court explained, "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[52] Men and women were being treated the same way as regards pregnancy and therefore there was no sex discrimination problem.[53] The Court was careful to note that pregnancy distinctions could be "mere pretexts designed to effect an invidious discrimination against the members of one sex or the other," but there was no evidence that the California plan was designed for that purpose.[54]

Two years later, using many of the same arguments but with newly issued Equal Employment Opportunity Commission ("EEOC") guidance to back

42. *Id.* at 484.

43. *Id.* at 488–89. Several other excluded conditions, including addiction and sexual pathology, were likely excluded on grounds of morality. If the Court had thought pregnancy was excluded because being pregnant at work is immoral, it might have been more likely to find an impermissible stereotype.

44. Brief Amici Curiae of the American Civil Liberties Union et al. at 8, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 185753 [hereinafter "Brief Amici Curiae of the ACLU"].

45. *Id*. at 24.

46. *See Geduldig*, 417 U.S. at 494 ("We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause.").

47. *Id.* at 495–96.

48. *Id.* at 493.

49. *See id.* at 493–94.

50. *See id.* at 496–97.

51. *See id*. at 497–98, n.20.

52. *Id*. at 496–97.

53. *Id.*

54. *Id*. at 497–98, n.20.

them up,[55] plaintiffs made the same pregnancy-discrimination-is-sex-discrimination argument, this time using Title VII of the Civil Rights Act, not the Equal Protection Clause, as the source of law.[56] The Court in *General Electric v. Gilbert*, relying exclusively on the reasoning in *Geduldig,* dismissed that claim as well.[57] The economic argument was, again, persuasive to the Court.[58] There was no evidence of discriminatory pretext, and it would have cost both men and women more to insure everyone if the plan included pregnancy in its policy.[59] In subsequent years, commentators have suggested that the Supreme Court could not see pregnancy as a sex discrimination problem in these cases because there were no pregnant men to compare the pregnant women to.[60]

2. The Federal Statutes

In very short order, following *Gilbert,* Congress passed the Pregnancy Discrimination Act ("PDA"),[61] which amended Title VII to make clear that the failure to treat "women affected by pregnancy" as "other persons . . . similar in their ability or inability to work," constitutes sex discrimination.[62] The PDA declared that discrimination on the basis of pregnancy was actionable under Title VII and announced a standard that triggered a comparison not between women and men, but between pregnant people and

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55. The EEOC issues regulations implementing the anti-discrimination mandate in Title VII.

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

57. *Id.* at 136 (holding exclusion of pregnancy from disability policy did not violate Title VII), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § I, 92 Stat. 2076.

58. *See Gilbert*, 429 U.S. at 138.

59. *Id.* at 136 (noting no evidence of pretext); *id.* at 138 (noting cost). The Court was unmoved by the evolving EEOC guidance on the issue precisely because the guidance was evolving. Distinctions based on pregnancy that the EEOC had once found to be consistent with Title VII no longer were, according to updated guidance. The changes made the agency interpretation less worthy of deference. *See id.* at 140–45 (discussing changing EEOC guidance).

60. *See* Franklin, *supra* note 8, at 128 (explaining as there were no men to compare pregnant women to, the justices were "confounded" by the idea that pregnancy discrimination might be sex discrimination); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 772 (2011) (critiquing the need for a comparator in discrimination law in part because "a comparator's absence does not necessarily show that discrimination has not occurred").

61. 42 U.S.C. § 2000e(k).

62. "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." *Id.*

non-pregnant people who were similarly affected in their inability to work.[63] The PDA thereby ushered in what became a complicated relationship between sex discrimination law, disability discrimination law, and pregnancy.[64]

For decades, courts have struggled to determine what counts as an acceptable disability comparator for pregnancy.[65] Are the kinds of accommodations pregnancy might require (absence or tardiness due to nausea, temporary weight-lifting limitations, limited extended standing ability, frequent bathroom breaks, temporary exhaustion, etc.) comparable enough to what other employees receive to require accommodation?[66] The use of disability law as a comparator put those concerned about the treatment of pregnant women in the workplace in a kind of double bind.[67] As Professor Deborah Widiss has written:

> To counter [stereotypical] bias against pregnant employees, advocates typically want to emphasize that pregnant women remain competent employees and that employers should ignore pregnancy, just as they should (usually) ignore race, religion, or national origin. At the same time, to receive accommodations advocates must acknowledge that pregnancy sometimes does interfere with work.[68]

With its switch to a disability comparator in the PDA, Congress left unaddressed whether the lack of a male comparator could then be used as a justification for providing pregnant employees with benefits men did not receive. That is, the PDA arguably left the door open for policies to treat some employees differently—and better—because they could get pregnant. The California statute at issue in *California Federal Savings and Loan Association v. Guerra* ("*Cal. Fed.*") did exactly that.[69] The California law required

63. *See id*.

64. The Americans with Disabilities Act, which prohibits "discriminat[ing] against a qualified individual on the basis of disability," was not passed until 1990, so at the time the PDA was passed, disability discrimination was a much more opaque idea. 42 U.S.C. § 12112. Once discrimination on the basis of disability became prohibited by statute in the ADA, the overlap between sex discrimination law and disability discrimination law became even more pronounced.

65. For a description and analysis of the kinds of problems presented with this comparison, see Nicole Buonocore Porter, *Accommodating Pregnancy Five Years After* Young v. UPS*: Where We Are & Where We Should Go*, 14 ST. LOUIS J. HEALTH L. & POL'Y 73 *passim* (2020).

66. *See id.* at 76.

67. *See* Widiss, *supra* note 25, at 976. As we will see, this double-bind reflects just another version of the sameness/difference debate. Should pregnancy be ignored and treated like other protected categories or should it be singled out for special treatment because it requires accommodation in a way that those other protected categories do not?

68. *Id.*

69. *See* 479 U.S. 272, 276 (1987).

employers to provide up to four months of leave for pregnancy-related conditions, but did not require any comparable leave for men.[70] A California employer challenged the law on sex discrimination grounds.[71] Feminists were famously split in this case, some arguing that the California law's difference approach (allowing pregnant women to be treated differently than non-pregnant people) was more consistent with equality values and others arguing that a sameness approach (requiring men to get the same leave that women did) was what equality demanded.[72]

The Supreme Court sided with the difference approach, holding that California was free to treat pregnancy more generously than other conditions and finding that the PDA was "a floor. . . not a ceiling."[73] The Court noted that the statute did "not reflect archaic or stereotypical notions about pregnancy or abilities of pregnant workers"[74] so concerns that had been waged against pregnancy regulation in the past—that they reflected stereotypes about women as workers—were not persuasive.

The Court's interpretation of the PDA in *Cal. Fed.* adopts a difference approach rooted in physiology.[75] The Court reasoned that California could conclude that pregnant employees needed different treatment because of the "actual physical disability" that pregnancy creates.[76] The statute was designed to help and protect women who got pregnant,[77] despite the fact that this inevitably involved giving women a form of help and protection that men did not get.

Like any approach that roots itself in a distinction based on difference, this distinct treatment can easily foment stereotypes. Indeed, the Court's willingness to highlight "actual physical" differences between pregnant people and non-pregnant people made many (sameness) feminists nervous.[78] If women could be treated differently, even if better, just because they got pregnant, where else might they be treated differently and possibly worse?

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70. *Id.*

71. *Id.* at 278–79.

72. *Compare* Brief of Equal Rights Advocates et al. Amici Curiae at 2–3, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494) (defending the statute's special treatment of pregnancy), *with* Brief Amici Curiae of the National Organization for Women et al. in Support of Neither Party at 3, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494) (arguing that the benefits had to be extended to men or that it was unconstitutional). For a discussion of the debate, see Dinner, *supra* note 24, at 521–23 (discussing the *Cal. Fed.* debate among feminists).

73. *Cal. Fed.*, 479 U.S. at 285.

74. *Id.* at 290.

75. *See id*.

76. *Id.*

77. *Id.* at 288–89; *see also* CAL. GOV. CODE § 12945 (West 2024).

78. *See Cal. Fed.*, 479 U.S. at 290; Widiss, *supra* note 25, at 1001.

The sameness feminists mobilized in Congress, working toward passing comprehensive non-gendered parental leave legislation, what eventually became the Family and Medical Leave Act ("FMLA").[79] The FMLA guarantees twelve weeks of unpaid medical leave to care for oneself or other family members.[80] It is available to all workers who have been employed by an employer for at least 1,250 hours over the preceding year if the employer has fifty or more employees.[81] The FMLA makes no distinction between men and women, nor does it include any special treatment for pregnancy.[82] As far as the FMLA is concerned, pregnancy must be treated as advocates had argued it must be treated in *Struck*, just like all other disabilities.[83]

The intersection between the FMLA and sex equality featured prominently in what is probably the most important Supreme Court case interpreting the FMLA, *Nevada v. Hibbs*.[84] Mr. Hibbs, a state of Nevada employee who needed leave to care for his ill wife, sued the state for damages because it refused to grant him FMLA leave.[85] In an opinion by Justice Rehnquist, the Court endorsed the view that the FMLA is a sex equality statute, passed pursuant to Congress' power under Section 5 of the Equal Protection Clause to draft legislation enforcing the Clause's equality mandate.[86] This meant Mr. Hibbs was entitled to damages.[87] Justice Rehnquist emphasized the need to combat "stereotypes about women's domestic roles" and "parallel stereotypes presuming a lack of domestic responsibilities for men."[88] "Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees."[89]

Hibbs is a very different opinion than *Cal. Fed.*, and one that enshrines the principle that those primarily concerned with sameness want to enshrine:

79. Widiss, *supra* note 25, at 1001. (describing "equal treatment" feminists "doubling down" on their approach, even before *Cal. Fed.* reached the Supreme Court, and convincing key congressional allies that a sex-neutral law providing leave for both sexes for a variety of medical conditions would be a better approach).

80. 29 C.F.R. § 825.100(a) (2024).

81. *Family and Medical Leave (FMLA)*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/benefits-leave/fmla [https://perma.cc/75Q5-AAE8].

82. Sabra Craig, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 DRAKE L. REV. 51, 56 (1995).

83. Brief for the Petitioner at 13, Struck v. Sec'y of Def., 409 U.S. 1701 (1972) (No. 72-178).

84. *See* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721 (2003).

85. *Id.* at 725.

86. *See id.* at 726–27.

87. *See id.* at 725.

88. *Id.* at 736.

89. *Id.* at 737.

the law must not make distinctions between men and women.[90] Hibbs provides a ringing endorsement of a statute that treats pregnancy, and those that endure it, just like any other medical need any employee may have. Indeed, to the extent that the FMLA treats parents who gestate and those who don't identically,[91] one could argue that the FMLA encourages employers to treat those who gestate worse. Gestators have significant physical impairments that other parents do not have. These include the physiological burdens of gestation, the physiological burdens of childbirth, whether delivery was vaginal or surgical, and the physiological burdens associated with the body's hormonal adjustments to enable breastfeeding.[92] Most gestators in the United States today, a class that is almost entirely women, have to use their FMLA leave to recover from these conditions, conditions that non-gestator parents never endure.[93]

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90. *See id.* at 730 (noting measures that differentiate on the basis of gender warrant heightened scrutiny).

91. *See* Craig, *supra* note 82.

92. Fatigue, insomnia, leg and abdominal cramps, urinary incontinence, nausea, light-headedness, swelling, and breast pain are just some of the many "normal" conditions associated with pregnancy. *See* Vern L. Katz, *Prenatal Care*, *in* DANFORTH'S OBSTETRICS AND GYNECOLOGY (Ronald S. Gibbs et al. eds., 10th ed. 2008). Perennial tears, pelvic floor damage, pelvic organ prolapse, hemorrhoids, fistula and urinary and fecal incontinence are "normal" injuries associated with vaginal birth. *Common Injuries Experienced by Women After Childbirth*, MEDIBANK, https://www.medibank.com.au/health-support/pregnancy/article/common-child birth-injuries/ [https://perma.cc/R37A-98RV]. On average, it takes about six weeks to recover from a C-section. *C-Section Recovery Timeline and Aftercare*, CLEVELAND CLINIC (Oct. 13, 2021), https://health.clevelandclinic.org/c-section-recovery [https://perma.cc/ZP3J-AT57]. These impairments are distinct from the many common "complications" from pregnancy and delivery that can present far greater dangers. *See Pregnancy Complications*, U.S. DEP'T OF HEALTH & HUM. SERVS.: OFF. OF WOMEN'S HEALTH, https://www.womenshealth.gov /pregnancy/youre-pregnant-now-what/pregnancy-complications [https://perma.cc/V65M-U UM4] (Dec. 29, 2022) (explaining how pre-pregnancy health problems, pregnancy-related problems, and infections during pregnancy can affect the health of the gestator and the baby). A gestator's body also must bear the physiological adjustments to breastfeeding, which the body prepares for even if the gestator does not plan to breastfeed. *See* Rutvi Shah et al., *Physiology, Breast Milk*, *in* STATPEARLS [INTERNET] (2022) (ebook), https://www.ncbi.nlm.nih.gov/bo oks/NBK539790/ [https://perma.cc/6XKW-N34R].

93. *See* Madeline Dixon Whitney et al., *Length of Maternity Leave Impact on Mental and Physical Health of Mothers and Infants, a Systematic Review and Meta-analysis*, 27 MATERNAL & CHILD HEALTH J. 1308, 1309 (2023), https://link.springer.com/article/10.1007/s10995-022-03524-0 [https://perma.cc/3NYZ-7Z32]. There are other medical conditions that disproportionately affect different sexes. Breast and prostate cancer are two obvious examples, but those reciprocally gendered conditions mostly cancel each other out. They are also considerably rarer than pregnancy. In 2016, 86% of U.S. women (down from 90% in 1976) had given birth by age forty-four. *See* GRETCHEN LIVINGSTON, PEW RSCH. CTR., THEY'RE WAITING LONGER, BUT U.S. WOMEN TODAY MORE LIKELY TO HAVE CHILDREN THAN A DECADE AGO (2018), https://www.pewresearch.org/social-trends/2018/01/18/theyre-waiting-longer-but-u-s-women-today-more-likely-to-have-children-than-a-decade-ago/ [https://perma.cc/7F4M2QXG].

The sameness approach embodied in the FMLA came with costs. Those who were part of the effort to pass the law generally agree that if the bill had been limited to twelve weeks of leave only for those who gave birth (a difference approach), it would have passed a decade earlier.[94] A bill that was less focused on identical treatment of men and women might also have carved out pregnancy as a physiological condition that does not necessarily have anything to do with the leave one needs as a parent.[95] Such a carve out might have also made it more feasible for pregnancy leave to be paid. Professor Julie Suk argues that many advocates involved in advancing the FMLA were not "able to imagine the expansion of family leave without an equivalent expansion of medical leave."[96] This lack of imagination likely stemmed from the history of conflating pregnancy with disability, first proposed in *Struck* and adopted in the PDA, or from their insistence on identical treatment for men and women.[97]

It is worth underscoring that no other country in the world conflates pregnancy, parental leave, and medical leave the way the FMLA's sameness approach demands.[98] As Part III will detail, in the rest of the world, pregnancy and childbirth are treated differently than parental leave, and parental leave is treated differently than other medical leave. The conflation of pregnancy, parental, and medical leave in the FMLA is a direct result of those who insisted that reproductive labor *not* be treated as something special or uniquely entitled to social support.[99]

To be clear, the FMLA did not usurp the PDA. The PDA still did important anti-discrimination work.[100] It protected employees from adverse employment actions while they were pregnant and working.[101] Studies indicate that pregnancy discrimination is fairly rampant worldwide and

94. Widiss, *supra* note 25, at 1001–02.

95. The failure to distinguish pregnancy from parental leave is built into traditional usage of the term "maternity." "Maternity leave" is often used to describe leave that covers both the medical need for leave during and after childbearing and leave thought important for bonding with a newborn. Some policies in Europe and private policies in the United States often make explicit the distinction between childbearing leave and caretaking leave, though many other policies do not. *See infra* Part IV.A.2.

96. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 17 (2010).

97. *See* Brief for Petitioner at 13, Struck v. Sec'y of Def., 409 U.S. 1701 (1972) (No. 72-178).

98. *See infra* Part IV.

99. *See FMLA Frequently Asked Questions*, U.S. DEP'T OF LAB.: WAGE AND HOUR DIVISION, https://www.dol.gov/agencies/whd/fmla/faq [https://perma.cc/GS73-L2D5] (discussing that the FMLA does not just apply to mothers or persons who gave birth).

100. I use the past tense here because the Pregnant Workers' Fairness Act, passed hurriedly in January of 2023, amended the PDA in significant ways. *See infra* text accompanying note 107.

101. *See* 42 U.S.C. § 2000e(k).

includes practices that would clearly be violations of the PDA in this country.[102] But the PDA provided protection for pregnant workers only to the extent that the employer already covered comparable disabilities.[103] The more distinct pregnancy's limitations were, the harder it was to find a comparable disability.[104] Thus, the way to protect pregnant employees was to push the boundaries of disability law, not equality law. Many advocates therefore focused their energy on expanding the kinds of disabilities that had to be covered under the Americans with Disabilities Act ("ADA"),[105] rather than changing the PDA itself. This made some scholars question whether there was anything "to be gained by continuing to fight these battles" under the equality framework in the PDA, or instead channel energies "into theorizing and interpreting the ADA."[106]

The most recent Congressional foray into this area helps allay that concern. In the Pregnant Workers' Fairness Act, passed in January of 2023, Congress clarified that employers have an affirmative duty, under Title VII and the PDA, to provide reasonable accommodations for pregnant employees.[107] The bill incorporates the ADA's definitions of "reasonable accommodation" and "undue hardship,"[108] into Title VII's prohibition on pregnancy discrimination, but it makes clear that physical or mental conditions arising out of pregnancy deserve accommodation because they arise out of pregnancy not because they meet the ADA's definition of disability.[109] Like the PDA, the PWFA delegates enforcement responsibility to the EEOC.[110] It re-inscribes the idea that pregnancy discrimination is sex

102. *See* INT'L LABOUR ORG., MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD 9 (2014), https://www.ilo.org/publications/maternity-and-paternity-work-law-and-practice-across-world-overview [https://perma.cc/85SW-8HAD] (these practices include harassing pregnant women because they are pregnant, requiring undated resignation letters that employees are forced to sign when they get pregnant and forcing women to sign documents promising not to get pregnant).

103. U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2015-1, Enforcement Guidance on Pregnancy Discrimination and Related Issues (2015) [hereinafter "EEOC Guidance"], https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IC [https://perma.cc/S3B7-36EM].

104. Porter, *supra* note 65 *passim*.

105. *See* 42 U.S.C. § 1211 (1990).

106. Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 115 (2013) (concluding that it was important to continue to frame pregnancy discrimination as a sex equality issue).

107. *See* 42 U.S.C. §§ 2000gg–2000gg-6.

108. § 2000gg(7).

109. § 2000gg(4).

110. § 2000gg(1).

discrimination,[111] but it does not explain why. In doing so, the PWFA takes a step in the direction of a difference approach to sex equality by conceptualizing pregnancy as something distinct, deserving of accommodation regardless of whether it is like other disabilities.

3. Summary

When first asked to confront the question of whether pregnancy discrimination was sex discrimination, the Supreme Court said no because it was pregnancy, not sex or gender, that the law was treating differently.[112] There was no sex discrimination problem because men and women were treated the same with regard to pregnancy and the Constitution did not require any special accommodation of pregnancy.[113]

Congress responded by declaring that pregnancy discrimination was sex discrimination and instructed courts to evaluate it as such by comparing pregnancy to other disabilities.[114] This switched the comparators from women and men to pregnant people and other temporarily impaired workers.[115] Men as a class were not relevant in the comparison.[116] By leaving men out of the discrimination question, the PDA thus allowed states and employers to treat pregnancy "better" than other disabilities without worrying about sex discrimination.[117] Concerned about this approach, those concerned about sameness lobbied hard for a federal parental leave policy—the FMLA—that emphasizes sameness, arguably at the expense of recognizing the distinct needs that gestators have.[118] The PWFA tempers that sameness approach somewhat, by singling pregnancy out as a unique disability, one that does not necessarily meet the ADA's definition of disability.[119]

111. *See generally* § 2000gg(4) (noting that the Act covers physical and mental conditions "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions…").

112. Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974).

113. *Id.*

114. *See supra* Part II.A.2 (discussing the Federal Statutes regarding pregnancy).

115. *See supra* note 63 and the accompanying text.

116. *See supra* notes 67-70 and the accompanying text.

117. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 291 (1987) (demonstrating that California law required employers to grant leave for pregnancy-related conditions but did not require comparable leave for men).

118. *See supra* note 79 and the accompanying text.

119. *See supra* notes 107-109 and the accompanying text.

B. Women's Sports

1. History

The contemporary approach to women and sports is best understood against a historical backdrop. Just as the early twentieth century saw tension between difference and sameness feminists with regard to how women should be treated in the workplace, there was a sameness/difference debate about what to do with women's sports during the first seventy years of the twentieth century.

In the late 1800s, colleges introduced competitive sports for women.[120] For several decades, these school-based teams grew alongside industrial and amateur leagues, as well as high school and municipal leagues that fielded women's basketball, baseball, softball, and track and field teams.[121] Different constituencies tended to focus on different sports. Women's basketball thrived in more rural areas, like Arkansas, Tennessee, Texas, and Iowa.[122] Track and Field attracted Black women in both rural and urban communities.[123] Team sports, with their emphasis on both physical and emotional intensity among women, became a natural haven for lesbians, especially in the working class, given constrained work options and adult paths that assumed heterosexual marriage.[124]

For many women reformers, especially those who might identify as difference feminists or maternalists, this growing acceptance of women playing sports like men made them nervous.[125] They repeatedly cautioned against the potentially harmful effects of masculinization, commercialization, and excessive competition for women.[126] Women physical education instructors, a small but dedicated group of professional women, had a distinct

120. *See* ALLEN GUTTMANN, WOMEN'S SPORTS: A HISTORY 116 (Columbia Univ. Press 1991) (explaining that baseball and basketball were the most popular).

121. *See id.* at 137–38.

122. SUSAN K. CAHN, COMING ON STRONG: GENDER AND SEXUALITY IN WOMEN'S SPORT 95 (2d ed. 2015) (discussing popularity of basketball).

123. *See id.* at 118 (discussing the African-American community's acceptance of and pride in women track and field athletes).

124. *See id.* at 204 ("Back then you either had to go into the convent or you had to get married and that was about it. Nobody ever thought that there was anything else for women back then. Thank God we had the sports!"); Erin E. Buzuvis, *Challenging Gender in Single-Sex Spaces: Lessons from a Feminist Softball League*, 80 LAW & CONTEMP. PROBS. 155, 158 (2017) ("[L]esbians in the mid-twentieth century found softball and other team sports to be an essential context for self-discovery and community-building[.]").

125. *See* Buzuvis, *supra* note 124, at 159–61.

126. *See* CAHN, *supra* note 122, at 24 (discussing concerns); Buzuvis, *supra* note 124, at 160 (discussing female educators fear of the "all-consuming nature of college, high school, and youth sports").

personal interest in ensuring that women's sports be treated differently.[127] If women's sports were not that different than men's sports, then women's sports might no longer need the women who had professionalized women's sports instruction.[128] As historian Susan Cahn suggests, these reformers came to define women's sports as those that were "not boy like."[129] It was this coalition of women who either believed in or whose livelihood depended on the idea of "women's difference" who worked to ensure that women's sports were different.[130]

These reformers pushed an inclusive but decidedly non-competitive approach to women's sports in college.[131] Contrary to the "cut" environment of traditional team sports, the women's approach championed "A Sport for Every Girl and a Girl for Every Sport."[132] These efforts included practices like "Play Days" at women's colleges.[133] At Play Days, women from different colleges would come together, and individuals would be assigned to teams randomly, with women from each college on every team, thus diminishing the chances for rivalry.[134]

Throughout much of the first part of the twentieth century, these reformers tussled with the amateur and industrial leagues that continued to field popular women's teams.[135] The reformers had the most success at the elite college level.[136] By 1945, only 16-17% of colleges had intercollegiate varsity sports for women.[137] Eighteen states had eliminated state tournaments for high school girls which, combined with the states that never had them, meant that thirty-six states had none.[138]

Amateur and industrial leagues began to suffer for other reasons. Television became the recreation of choice for many households, thus diminishing interest in spectating at local sporting events.[139] Women left the industrial workforce in droves after World War II.[140] Young men were no

127. *See* Buzuvis, *supra* note 124, at 160.
128. *See* CAHN, *supra* note 122, at 66–67.
129. *See id.* at 63.
130. *See id.* at 67.
131. *See id.* at 64–66.
132. *Id.* at 65.
133. *Id.* at 66.
134. *Id.*; GUTTMANN, *supra* note 120, at 140–42.
135. CAHN, *supra* note 122, at 82.
136. *See id.* at 72.
137. *Id.* at 79 (detailing decline in women's varsity sports). Black colleges and universities rejected the elite schools' disdain for competitive sports and especially embraced their women track stars. *See id.* at 118–19.
138. *Id.* at 79.
139. *Id.* at 161.
140. *See* Evan K. Rose, *The Rise and Fall of Female Labor Force Participation During World War II in the United States*, 78 J. ECON. HIST. 673, 709 (2018).

longer being drafted into the army and were available to play the sports that women had played in their absence.[141] Men were also going to college in huge numbers and playing sports there.[142]

With the amateur and industrial leagues in decline, the interest and acceptance of more competitive college sports programs for women began to grow.[143] In the 1960s, movements for equality of all different kinds gathered steam across the country and both women athletes and new instructors pushed for greater athletic opportunity for women athletes.[144] If women were to continue athletic pursuits, educational institutions were the place to do it.

2. The Statute

In 1972, Congress passed Title IX of the Civil Rights Act. It states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[145] The need for a separate sex discrimination act in education stemmed from initial resistance to including sex in Title VI's prohibition on race discrimination in education.[146] That resistance came from some who were concerned that including sex would weaken protections based on race[147] and others who thought sex discrimination was sufficiently different from race discrimination to warrant different treatment.[148]

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141. *American Sports During World War II*, PEARL HARBOR (Feb. 27, 2018), https://pearlharbor.org/blog/american-sports-during-world-war-ii/ [https://perma.cc/5NM4-G4AG].

142. The G.I. Bill helped increase the numbers of men going to college after World War II. John Bound & Sarah Turner, *Going to War and Going to College: Did World War II and the G.I. Bill Increase Educational Attainment for Returning Veterans?*, 20 J. LAB. ECON. 784, 785 (2002).

143. Richard C. Bell, *A History of Women in Sport Prior to Title IX*, SPORT J., Mar. 14, 2008, at 1, 4, https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/ [https://perma.cc/49XR-FFW3].

144. *See* CAHN, *supra* note 122, at 248–49 (discussing growing movement to invest more in women's college sports).

145. 20 U.S.C. § 1681(a).

146. Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Spec. Subcomm. on Educ. of the H. Comm. on Educ. & Lab., 91st Cong., pt.2, at 623 (1970) (statement of William H. Brown III, Chairman, Equal Employment Opportunity Commission).

147. *See id.* at 667 (statement of Hon. Frankie M. Freeman, Comm'r, U.S. Commission of Civil Rights) ("Were the Commission of Civil Rights given jurisdiction with respect to discrimination based on sex without such a substantial increase in resources, it could lose its momentum, and its expertise in the area of discrimination based on race, color, and national origin could be dissipated.").

148. The Nixon Administration took the position that some segregation on the basis of sex was permissible, even if racial segregation was not. *See id*. at 678 (statement of Jerris Leonard, Assistant Att'y Gen., Civil Rights Division, Department of Justice).

In the debate over whether to include sex in Title VI, proponents of doing so introduced considerable evidence of gender discrimination in education.[149] In 1969 many U.S. universities had quotas on the number of women who could be admitted.[150] In 1968, women received only 43.4% of Bachelor's Degrees, 35.8% of Masters' Degrees, 12.6% of Doctoral Degrees, and 4.6% of Professional Degrees.[151] This evidence introduced at the Title VI hearings may have eliminated the need to discuss the existence of sex discrimination when Title IX was introduced as a separate sex discrimination measure two years later. Congress adopted Title IX with little discussion and without any formal hearings or report.[152] It demanded sex equality in educational institutions without explaining what that might require.

If one measures Title IX's progress through changes in the academic enrollment metrics just listed, Title IX has been an astounding success. Today, women earn 61% of Associate Degrees, 57% of Bachelor's Degrees, 61% of Masters Degrees, and 54% of doctoral degrees.[153] The majority of U.S. medical and law school students are women, (50.5%[154] and 55.7%,[155] respectively) and 41% of top business school students are women.[156] Though there are still some particularly lucrative fields—Computer Science, Engineering and Physical Sciences—in which men significantly outnumber women,[157] the thorough integration of women into most academic programs has been remarkable.

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149. *See, e.g.*, *id.* at 644 (statement of Peter Muirhead, Deputy Assistant Secretary, Associate Comm'r for Higher Education, Office of Education, HEW).

150. *See, e.g.*, *id.* at 657.

151. *Id.*

152. *See* Grove City Coll. v. Bell, 465 U.S. 555, 566 (1984) (noting sparse legislative history); New Haven Bd. of Educ. v. Bell, 456 U.S. 512, 527 (1982) (noting "even more sparse" legislative history).

153. Richard V. Reeves & Ember Smith, *The Male College Crisis is Not* Just *Enrollment, but Completion*, BROOKINGS fig. 3 (Oct. 8, 2021), https://www.brookings.edu/articles/the-male-college-crisis-is-not-just-in-enrollment-but-completion/ [https://perma.cc/PS3R-TNA8].

154. Press Release, Stuart Heiser, Senior Media Rels. Specialist, Ass'n of Am. Med. Colls., The Majority of U.S. Medical Students Are Women, New Data Show, fig. 3, (Dec. 9, 2019), https://www.aamc.org/news/press-releases/majority-us-medical-students-are-women-new-data-show [https://perma.cc/57MM-JPQL].

155. AM. BAR ASS'N, 2023 PROFILE OF THE LEGAL PROFESSION 76 (2023), https://www.americanbar.org/content/dam/aba/administrative/news/2023/potlp-2023.pdf [https://perma.cc/ZC6K-WPMA].

156. Sydney Lake, *MBA Programs Are Nearly Reaching Gender Parity with More Than 41% Women Enrollment*, FORTUNE RECOMMENDS (Jan. 27, 2023, 7:47 PM), https://fortune.com/education/articles/mba-programs-are-nearly-reaching-gender-parity-with-more-than-41-women-enrollment/ [https://perma.cc/N6TV-UY5K].

157. See *Bachelor's, Master's, and Doctor's Degrees Conferred by Postsecondary Institutions, by Sex of Student and Discipline, Division: 2017-18*, INST. OF EDUC. SCI., NATI'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d19/tables/dt19_318.30.asp?current=yes [https://perma.cc/W2X4-MGGP].

It has also been mostly without controversy. There has been surprisingly little Title IX litigation involving academic programs. The ease and speed with which women were integrated into academic programs could indicate that Title IX was a reflection, not a cause, of the change that was coming to educational institutions. Perhaps most stakeholders—students, universities, parents, alumni, and the business and professional communities that hire those who graduate from higher educational institutions—were ready and eager to integrate academic programs on the basis of sex.

The same hypothesis could not hold true for women's sports. The controversies surrounding the purpose and meaning of Title IX's sports regulations suggest considerable disagreement about what antidiscrimination demands in the context of sports.[158] Congress delegated the job of defining antidiscrimination in sports to the agency charged with implementing federal education policy, which at that time was the Department of Health, Education and Welfare ("HEW"). HEW's Title IX regulations required schools to "provide equal athletic opportunity for members of both sexes," but suggested that schools could "sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[159]

The Title IX sports regulations adopt a difference approach to sex equality. The regulations require schools to provide women with alternatives to men's contact sports and alternatives for any "cut" sports in which one's ability to join the team is based on competitive skill.[160] Perhaps HEW was concerned that a sameness approach that only allowed women to try out for men's teams would not comply with the statute because women would, in practice, be "excluded from participation in" or "denied the benefits of"[161] sports programs because so few women would make the teams. Or perhaps HEW thought that a difference approach was compatible enough with Title IX's antidiscrimination mandate and would likely be much more popular. Perhaps many people thought both.

Other provisions in Title IX suggest Congressional comfort with a difference approach to sex equality in education, in particular a separate-but-equal approach. As originally passed, Title IX included numerous exceptions for single sex activities (fraternities and sororities, Boys Scouts and Girl Scouts) and explicitly exempted private undergraduate schools and "any

158. R. Shep Melnick, *The Strange Evolution of Title IX*, NAT'L AFFS. (Summer 2018), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix [https://perma.cc/3GL9-UVA4].

159. 45 C.F.R. §§ 86.41(b), (c) (2024). The contact sports listed were boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact. § 86.41(b).

160. *See* § 86.41(b).

161. 20 U.S.C. § 1681.

public institution of undergraduate higher education which is an institution that traditionally and continually has had a policy of admitting only students of one sex."[162] As we will see, the Supreme Court has since held that treating men and women differently in some of the ways that Congress saw as compatible with sex equality is inconsistent with the Equal Protection Clause.[163]

With regard to athletics, HEW and its successor agency, the Department of Education ("DOE"), soon learned that a difference approach creates its own controversies.[164] If separate can be equal, what counts as equal enough? The answer to that question is what has generated most of the controversy, and hence most of the litigation, involving the Title IX regulations.[165] In 1979, DOE drafted a "Policy Initiative" that included a three part test to determine if a school was complying with what Title IX demanded.[166] An affirmative answer to any of these three prongs indicates compliance with Title IX: (1) Are the athletic opportunities provided for men and women provided in numbers "substantially proportional" to their respective enrollments?; (2) If there is a history of one sex being underrepresented, can the school show a continuing practice of program expansion for the underrepresented sex?; (3) Where one sex is underrepresented and there is little program expansion, have the "interests and abilities" of the underrepresented sex been "effectively accommodated?"[167]

Like the PDA, with its recurrent litigation challenging what accommodation of pregnancy requires, Title IX litigation has mostly revolved around what adequate accommodation of women athletes requires.[168] Both statutes attempt to combat sex discrimination by comparing those with bodies designed to gestate to something other than those with bodies designed to produce sperm.[169] With the PDA, the comparison was to a comparably disabled worker, not necessarily a man.[170] With Title IX, the comparison is to

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162. § 1681(a)(5).

163. *See infra* notes 185-208 and the accompanying text (analyzing Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982)); United States v. Virginia, 518 U.S. 515, 555–56 (1996).

164. From the beginning, these regulations generated controversy. The agency received almost 10,000 comments to its Title IX regulations, most of them related to athletics. *See Sex Discrimination Regulations: Hearings on Title IX of Pub. L. 92-318 Before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. & Lab.*, 94th Cong. 438–39 (1973) (statement of Caspar W. Weinberger, Secretary, Department of Health, Education, and Welfare).

165. *See infra* Part II.B.3.

166. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71414 (Dec. 11, 1979) [hereinafter "Title IX Policy Interpretation"].

167. *See id.* at 71414–18.

168. *See infra* Part II.B.3.

169. *See* 20 U.S.C. § 1681; 42 U.S.C. § 2000e(k).

170. *See supra* notes 61-63 and accompanying text.

whether what is actually provided is appropriate in light of the "interests and abilities" of women at the school.[171]

In assessing whether schools' have accurately gauged women's interest and abilities, courts endorse the idea that "[e]qual opportunity to participate lies at the core of Title IX's purpose."[172] Providing that opportunity often requires increasing athletic options available to women. In practice, in an environment of limited resources, in order to make funds available for new women's teams, schools eliminate men's teams. No male plaintiffs or universities have succeeded in arguing that this preferencing of women's teams over men's teams violates either Title IX or the Equal Protection Clause, though a full Supreme Court has never addressed the issue.[173]

3. The Constitutional Cases

One Justice on the Supreme Court did have to address the question of whether Title IX's treatment of women's sports constituted impermissible sex discrimination.[174] The case was brought by a sixth grade girl named Karen O'Connor who was an excellent basketball player.[175] She challenged her school's insistence that she play on the girls team, presenting expert evidence that she was as good as or better than an average high school sophomore girl basketball player or an eighth grade boy basketball player.[176] The District Court found that Karen would suffer if forced to play on a team with teammates who were "not equal or superior to her in ability."[177] That holding was stayed pending appeal and Justice Stevens ruled on that stay petition in *O'Connor v. Board of Education of School District 23*.[178]

Applying a standard of review that was considerably less than exacting, Justice Stevens explained that "the question whether the discrimination is justified cannot depend entirely on whether the girls' program will offer [the plaintiff] opportunities that are equal in all respects . . . The answer must

171. Title IX Policy Interpretation, *supra* note 166, at 71414.

172. Cohen v. Brown Univ. (*Cohen I*), 991 F.2d 888, 897 (1st Cir. 1993).

173. For a partial list of U.S. Court of Appeals decisions, see *Cohen I*, 991 F.2d at 889–90; Cohen v. Brown Univ. (*Cohen II*), 101 F.3d 155, 184–85 (1st Cir. 1996); Neal v. Bd. of Trs. of Cal. St. Univs., 198 F.3d 763, 769–70 (9th Cir. 1999); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 275 (6th Cir. 1994); Kelley v. Bd. of Trs., 35 F.3d 265, 270 (7th Cir. 1994); Roberts v. Colo. St. Bd. of Agric., 998 F.2d 824, 831–32 (10th Cir. 1993). *See also* CAHN, *supra* note 122, at 285 (noting that courts have shown little sympathy for male plaintiffs claiming reverse discrimination).

174. *See* O'Connor v. Bd. of Educ. of Sch. Dist. 23, 449 U.S. 1301, 1306 (1980) (Stevens, J., in chambers).

175. *Id.* at 1302.

176. *Id.*

177. *Id.* at 1303.

178. *Id.* at 1304.

depend on whether . . . the classification is reasonable in substantially all of its applications . . . ."[179] He noted that the school's policy complied with what the agency regulations required, which was separate teams being available for both boys and girls.[180] The main reason Justice Stevens thought the regulations were reasonable was because if the school did not adopt a difference, gendered approach, "there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events."[181]

This adoption of the difference approach in women's sports, like a difference approach to pregnancy, clearly runs the risk of exacerbating stereotypes. A separate-but-equal regime in sports implicitly suggests that women, on average, cannot compete with men, just as a statute that singles out pregnancy for special treatment suggests that women workers are more needy and more expensive to employ.[182] Moreover, Justice Stevens' willingness to accept the injuries to both Ms. O'Connor, who was not allowed to play at her own level, and the less talented boys, who could not make the boys' team but might well have been able to displace many sixth-grade girls, says something that has grown increasingly controversial. It suggests that antidiscrimination law may be comfortable with making laws around the average, not the exceptional, woman or man.[183] Justice Stevens upheld the stay in order to protect those average, less exceptional, girls who wanted to play basketball.[184]

The constitutional jurisprudence involving sex segregation in other educational contexts has been more concerned with protecting non-average men and women. For instance, a male plaintiff in *Mississippi University for Women v. Hogan*, decided two years after Justice Stevens endorsed the separate teams provision in the Title IX regulations, challenged the single-sex admission policy of a state nursing school.[185] In an opinion by Justice O'Connor (no relation to Karen), the Court struck down the single-sex

179. *Id.* at 1306. Because it was a stay position, the Court was required to show deference to the lower court decision. *Id.* at 1304. Justice Stevens also highlighted the importance of the agency's interpretation of the statute, a notably different approach than the Court in *Gilbert*. *See id.* at 1307–308. *But see supra* notes 57-59 and accompanying text.

180. *O'Connor*, 449 U.S. at 1307.

181. *Id.*

182. Patrick S. Shin, *Sex and Gender Segregation in Competitive Sport: Internal and External Normative Perspectives*, 80 L. & CONTEMP. PROBS. 47, 54–55 (2018); *see* Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimating Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 225–26 (1998).

183. For discussion of averages versus exceptions, see *infra* notes 203-222 and accompanying text.

184. *See O'Connor*, 449 U.S. at 1306–07.

185. 458 U.S. 718, 720 (1982).

admission policy.[186] Given the facial distinction based on sex, the Court applied a form of scrutiny that required an "exceedingly persuasive" justification, one "free of fixed notions concerning roles and abilities" of different genders.[187] "The State's primary justification for [the policy was] . . . that it compensate[d] for discrimination against women and therefore constitute[d] educational affirmative action."[188] The Court rejected that argument.[189] Citing data on how many women earned nursing baccalaureates in both Mississippi and the country as a whole, the Court found it more likely that the school's "objective [was] to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior."[190] That objective was "illegitimate."[191] Notably, when confronted with an argument that the Court's suspicion of stereotypes was inconsistent with Title IX's approach to gender difference, the Court dismissed it with a cite to *Marbury v. Madison* and a recitation of the principle that it is the Court's job to interpret what equality means under the Constitution.[192]

The citation of *Marbury* allowed the *Hogan* court to dismiss the tension between Title IX's segregated approach to athletics and Mississippi's partially segregated approach to nursing schools,[193] but it is possible to reconcile that tension. Hogan implies, but does not state, that the result might be different if Mississippi had opened a Science Technology, Engineering, and Math ("STEM") academy for women.[194] The data on how many women go to nursing school was proof for the court that the sex distinction was not

186. *Id.* at 733.

187. *Id.* at 724–25.

188. *Id.* at 727.

189. *Id.* The Court noted that 94% of nursing degrees in Mississippi and 98.6% of nursing degrees in the U.S. were awarded to women in 1970. *Id.* at 729.

190. *Id.* at 725.

191. *Id.*

192. *Id.* at 733 (citing Marbury v. Madison, 5 U.S. 137 (1803)). The Court thus yet again flip-flopped on the extent to which it felt the need to incorporate an agency's understanding of whether equality could demand difference. *Compare* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 127, 144–45 (1976) (not deferring to EEOC allowing different treatment of pregnancy), *with* O'Connor v. Bd. of Educ. of Sch. Dist. 23, 449 U.S. 1301, 1307–08 (1980) (deferring to the HEW's allowance of different treatment of sports). In one particularly influential Court of Appeals case challenging the Title IX regulations, decided after *Hogan*, the First Circuit dismissed the claim that the regulations were inconsistent with the Equal Protection Clause by citing the Chevron doctrine. *See* Cohen v. Brown Univ. (*Cohen I*), 991 F.2d 888, 899 (1st Cir. 1993) (citing Chevron, U.S.A. v. Nat. Res. Defense Council*,* 467 U.S. 837, 843 (1993)).

193. *See Hogan,* 458 U.S. at 733.

194. *See id.* at 729–30. This interpretation would also gibe with what Justice Ginsburg wrote in *United States v. Virginia*, when she suggested that single-sex schools that aimed "to dissipate rather than perpetuate traditional gender classifications" might be permissible. 518 U.S. 515, 534 n.7 (1996).

necessary.[195] In contrast, given the low percentages of women in the sciences, the affirmative action argument might be persuasive in the STEM context.[196]

That unstated assumption goes a ways toward reconciling Justice Steven's endorsement of single sex sports teams under Title IX and the Court's discomfort with traditionally gendered stereotypes that a women's only nursing school exacerbates, but it relies heavily on data about what average women do, and it requires a deeply contextual approach to what equality might require.[197] In such an analysis, a great deal turns on a court's assessment of what women, as a group, have traditionally done. If women have not traditionally participated in sports, then it is permissible to deny boys a place on a team in order to make sure that other girls have more opportunity.[198] If women have traditionally participated in nursing, then it is not permissible to deny a man an easier route to pursue that activity.[199]

That reliance on averages later seemed to make a majority of the Court nervous.[200] In what is widely viewed as the Supreme Court's most important constitutional sex discrimination case to date, United *States v. Virginia* ("*Virginia*"), the Court expressed deep ambivalence about relying on assessments of what average women do or have done.[201] Virginia Military Institute ("VMI") was a state-sponsored male only military school.[202] Plaintiffs challenged the exclusion of women and won, in large part because the Court found that "generalizations about 'the way women are' and estimates of what is appropriate for most women no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[203] An expert for VMI had testified that "educational experiences must be designed 'around the rule' . . . 'not around the exception.'"[204] But the Court held that VMI could not "constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords," the right to enroll.[205]

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195. *Hogan*, 458 U.S. at 729–30.

196. Whether any affirmative action argument, even one based on sex, can survive *Students for Fair Admissions v. President and Fellow Harvard College*, 600 U.S. 181 (2023), remains to be seen.

197. *See Hogan*, 458 U.S. at 729–30; O'Connor v. Bd. of Educ. of Sch. Dist., 449 U.S. 1301, 1307–08 (1980) (Stevens, J., in chambers).

198. *See, e.g.*, Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982) (ruling that precluding boys from playing the girls' volleyball team did not violate the Equal Protection Clause).

199. *See Hogan*, 458 U.S. at 729–30.

200. *See infra* notes 203-205 and the accompany text.

201. United States v. Virginia, 518 U.S. 515, 550 (1996).

202. *Id.*

203. *Id.* at 520.

204. *Id.* at 550.

205. *Id.* at 541.

It is almost impossible to square that language in *Virginia* with Justice Stevens' defense of the Title IX regulations. After all, Karen O'Connor had the "will and capacity" to play on the boys team, but Title IX suggests she can be denied that training and the attendant opportunities.[206] Title IX endorses a separate but equal regime because what "hold[s] true for many, maybe even most" women is that they will not be able to compete as effectively against men.[207] Justice Stevens' opinion condones suppressing the talents of the "exceptional" in order to encourage participation from "average" girls.[208]

There are a host of reasons why many women might not compete as effectively as men in traditional military exercises or in sports. Many of these reasons stem from feminine stereotypes with which most women are socialized.[209] These were the stereotypes that the Court in *Virginia* was most interested in dismantling.[210] But, just as gestation is not just a stereotype though it has stereotypes associated with it, neither are differences in strength, speed, and height just stereotypes. On average, going through puberty as one sex or the other affects one's ability to compete in many military exercises and many sports.[211]

Consider the relationship between height and elite performance in sports. In many, many sports, height is an advantage. The average man in the United States is five to six inches taller than the average woman.[212] The average man in the NBA is eight inches taller than the average man[213] and the average woman in the WNBA is ten inches taller than the average woman.[214] This

206. *Id.* at 542.

207. *See* Nguyen v. INS, 533 U.S. 53, 90 (2001) (O'Connor, J., dissenting) (citing Miller v. Albright, 523 U.S. 420, 460 (1998) (Ginsberg, J. dissenting)).

208. *Cf. Virginia*, 518 U.S. at 550 (explaining that policies cannot be based on the "average and not exceptional" ability of women).

209. *Keeping Girls in the Game: Factors that Influence Sport Participation*, WOMEN'S SPORTS FOUND. 4 (2020), https://www.womenssportsfoundation.org/wp-content/uploads/2020/02/Keeping-Girls-in-the-Game-Executive-Summary-FINAL-web.pdf [https://perma.cc/3WKT-HHAV] (discussing stereotypes, including that 32.2% of parents think boys are better at sports than girls).

210. *See Virginia*, 518 U.S. at 550.

211. *See* Kelly A. Brown et al., *Participation in Sports in Relation to Adolescent Growth and Development*, 6 TRANSLATIONAL PEDIATRICS 150, 153 (2017).

212. *See Body Measurements*, CDC, NATI'L CTR. FOR HEALTH STAT., https://www.cdc.gov/nchs/fastats/body-measurements.htm [https://perma.cc/HW23-UX72] (Sept. 10, 2021).

213. *The Average NBA Player Height 2024*, LINES, https://www.lines.com/guides/average-height-nba-players/1519 [https://perma.cc/7TFY-98MF] (June 17, 2024).

214. *Compare* Miro Gladovic, *Is It Time for the WNBA to Raise the Stakes by Lowering the Rim?*, SPORTS BUS. J. (July 19, 2024), https://www.sportsbusinessjournal.com/Articles/2024/07/19/oped-19-gladovic [https://perma.cc/CA4D-H3P7] ("The average WNBA player's height is 6 feet."), *with* Ashley Marcin, *What's the Average Height for Women and How Does That Affect Weight?*, HEALTHLINE (Feb. 24, 2019), https://www.healthline.com/health/womens-health/average-height-for-women [https://perma.cc/TVR2-6DFN] ("The average height for women in the United States is about 5 foot 4 inches (or about 63.7 inches) tall.").

means the average man in the NBA is four to five inches taller than the average woman in the WNBA. In soccer, where height is less obviously important, the average professional woman player is five inches taller than the average woman and the average male professional soccer player is three inches taller than the average man, leaving the average professional woman soccer player still three inches shorter than the average professional male soccer player.

If antidiscrimination law needs to be made around the exception, not the average, then those statistics are irrelevant. After all, Isaiah Thomas, a man, was an NBA star at five foot nine inches.[215] The tallest woman in WNBA history, Margo Dydeck, was seven foot two inches, eight inches taller than the average professional man.[216] It is entirely likely that there are more girls like Karen O'Connor and women like Margo Dydek who could, if given the opportunity, compete effectively against men. Must those exceptional women be allowed or required to play with men? Arguably, sex segregation in sports forces those women to live with the stigma of "only" being women athletes.[217] If one allowed Dydeck to play in the men's league, what of the injury to the man whom she would replace who, presumably, would not be allowed to play in the women's league? Or should women's leagues just disappear? *Virginia's* protection of the exceptional woman and concern about stereotypes sits uncomfortably with how Title IX prioritizes opportunity for all women by demanding different treatment that can lead to stereotypes.

On further examination of the *Virginia* opinion, one sees the Court recognizing this tension. Both the structure of the entire opinion and some choice footnotes suggest that, fully understood, constitutional sex equality is capacious enough to take both a sameness and a difference approach, though the opinion is somewhat unclear on when a difference approach may be required.[218] Much of the *Virginia* opinion is devoted to detailing how the Women's Institute for Leadership program provided by Mary Baldwin college, the all-female school that Virginia had offered as a "separate-but-equal" alternative to VMI, did not come close to actually being equal.[219] It was less well funded, had a significantly less distinguished faculty and much worse facilities.[220] To read *Virginia* as adopting a pure sameness approach is

215. *Isaiah Thomas*, BASKETBALL REFERENCE, https://www.basketball-reference.com/players/t/thomais02.html [https://perma.cc/MQG6-RQ8J] (July 21, 2024).

216. *See* Clare Mulroy, *How Tall Is Brittney Griner? She's Among the Tallest Players in WNBA History*, USA TODAY, https://www.usatoday.com/story/sports/2023/10/10/how-tall-is-brittney-griner/70487501007/ [https://perma.cc/3L8J-3AMZ] (Aug. 6, 2024, 5:28 PM).

217. Query whether someone like Margo Dydek, playing at the highest level of her sport, would rather play on an all-women's team or a men's team. Exceptional women are likely to be bigger stars in an all-women's league than in a mixed sex league. Can equality principles take those subjective feelings into account?

218. *See* United States v. Virginia, 518 U.S. 515 (1996).

219. *See id.* at 551–56.

220. *Id.* at 551–52 (describing Women's Institute for Leadership program).

to read out the pages of the opinion devoted to showing why separate (difference) was not equal in this instance, not why separate (difference) is never equal.[221] In addition, the majority suggested that when women are admitted to VMI, there would need to be some adjustments to living facilities (for privacy purposes) and physicality requirements.[222] But if the Court was instructing VMI to adopt different physicality requirement for women than men, it was mandating a difference approach in the name of equality. If it was suggesting that different living quarters might be appropriate it was suggesting that there was something legitimate in different treatment. It was opening up the possibility for stereotypes about women's weakness and need for protection from men to creep back in. Thus, the sameness/difference tension is reflected not just in the relationship of Title IX to the constitutional jurisprudence, but within the constitutional law itself.

4. Summary

The legal treatment of women's sports played out differently than the legal treatment of pregnancy. It involved a different kind of sameness/difference debate,[223] though like pregnancy, the tension between sameness and difference is irrefutable. Those who argued for a sameness approach during much of the twentieth century were claiming that women should be able to play the same kind of sports as men, not that women should necessarily compete with men.[224] Those who emphasized women's difference argued that women should be channeled into different kinds of athletic endeavors.[225]

Title IX represented a victory of sorts for the sameness argument, but only if one is willing to accept the legitimacy of difference. Title IX provided women with the opportunity to play the same sports as men by perpetuating the idea that women are different. Achieving that sameness came at what many see as a serious cost to the proliferation of stereotypes. Title IX expressly adopted a separate-but-equal regime that implicitly endorses the idea that women should not or cannot compete with men.[226] Courts have been

221. *Cf.* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 492–94 (1954) (declining to discuss "tangible factors" because injury from segregation stemmed less from them and more from the recognition that separation "generates a feeling of inferiority").

222. *See Virginia*, 518 U.S. at 550 n.19 ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.").

223. *See supra* Part II.B.

224. *See supra* notes 182-184 and the accompanying text.

225. *See supra* notes 179-181 and the accompanying text.

226. *See supra* Part II.B.2.

accepting of that cost and willing to let individuals suffer injuries,[227] like those to women who want to compete directly with men and men whose teams get cut so as to make room for women's teams, in the name of promoting opportunities for more average women.

III. FORMALISM AND ANTI-STEREOTYPING

Most of the legal battles described above took place in the latter part of the twentieth century. *Cal. Fed.* was decided in 1987;[228] *Hibbs* in 2003;[229] and *Virginia* in 1996.[230] Almost all of the litigation involving Title IX's sports regulations took place in the 1990s.[231] The differing approaches to the sameness/difference question in the law of pregnancy and sports had stabilized into some kind of uneasy equilibrium mostly before the twenty-first century's LGBTQ civil rights movement pushed anti-discrimination law in new directions.[232] This Part addresses how the law and practice described above would be impacted by recent developments in sex discrimination law that discourage accommodation of any physiological difference.

A. Formal Equality

In *Bostock v. Clayton County*, the Supreme Court, relying primarily on a textual reading of the word "sex," found that Title VII prohibited discrimination against "homosexuality and transgender status."[233] One of the plaintiff's in *Bostock,* Aimee Stephens, alleged that she was fired because she notified her employer that she was transitioning from male to female.[234] She argued that if the employer fired her based on that transition, the employer was discriminating against her on the basis of her sex.[235] Writing for the majority, Justice Gorsuch explained that treating homosexual and transgender individuals differently necessarily requires consideration of the term sex and is therefore facially discriminatory.[236] Neither non-discriminatory intent[237]

227. *See supra* Part II.B.3.
228. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).
229. Nev. Dep't Hum. Res. v. Hibbs, 538 U.S. 721 (2003).
230. United States v. Virginia, 518 U.S. 515 (1996).
231. *See* cases cited *supra* note 173.
232. *See supra* Parts II.A.3, II.B.4; *infra* Part III.B.
233. *See* 590 U.S. 644, 659–60, 683 (2020).
234. *Id.* at 654.
235. *Id.*
236. *See id.* at 655–57.
237. *See id.* at 645 ("[S]ex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees . . . [because it] inescapably intends to rely on sex in its decision making.").

nor comparable treatment for men and women with regard to their gender[238] can save an employer whose policy necessarily requires consideration of the term "sex."

Professor Jessica Clarke has recently argued that Bostock's "formal, sterile and individualistic" approach can "[expand] the reach of sex discrimination law to forms of gender inequality overlooked in the past."[239] While careful not to endorse the Bostock method as the only or best approach to sex discrimination law,[240] Clarke suggests that by making "traditional and community standards irrelevant to . . . whether a practice 'discriminates,'" a formal approach can avoid contextual evaluations that might blind courts to hetero and cisgender normativity.[241] A formal approach also avoids "sociological arguments about the nature of discrimination or feminist or other such normative theories"[242] that conservative judges can be especially wary of. Additionally, formal equality can avoid the comparator problem, so prevalent in our discussion in Part I, by simply asking whether a policy implicitly or explicitly categorizes on the basis of sex.

Professor Clarke offers a typology of formal tests that courts can use,[243] but for purposes of this article, her explication of explicit and implicit categorization is particularly important. *Explicit* classifications based on sex are easy to identify; single sex bathrooms and women's sports are classic examples. Other examples include excluding women from jobs that might affect their fertility, as did the company in *United Automobile Workers v. Johnson Controls*, *Inc.* ("*Johnson Controls*"),[244] and excluding women from certain prison guard positions, as did the state in *Dothard v. Rawlinson*.[245] The Supreme Court struck down the policy in *Johnson Controls*, but upheld it in *Dothard*.[246] A robust anti-classification doctrine could strike down all policies that classified so explicitly on the basis of sex, or at least require a defendant to offer an exceedingly persuasive justification.[247]

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238. *Id.* at 659 ("Nor is it a defense for an employer to say it discriminates against both men and women because of sex.").

239. Jessica A. Clarke, *Sex Discrimination Formalism*, 109 VA. L. REV. 1699, 1702–03 (2023).

240. *Id.* at 1707.

241. *Id.* at 1729.

242. *Id.* at 1705.

243. *Id.* at 1703–04 (discussing "three distinct types of formal rules when it comes to intentional sex discrimination").

244. 499 U.S. 187, 191–92 (1991).

245. 433 U.S. 321, 327–28 (1977).

246. *UAW*, 499 U.S. at 211; *Dothard*, 433 U.S. at 336–37.

247. For instance, instead of categorically excluding women for prison guard positions, a prison system might be required to administer tests for strength, agility and self-defense ability to screen for candidates for prison guard positions.

Determining whether a policy *implicitly* classifies on the basis of sex is more complicated. According to *Bostock*, the question is whether a policy is "inextricably bound up with sex."[248] Professor Clarke cites examples of lower court opinions overturning policies or acts that penalized people for tampon usage,[249] for having particularly large breasts,[250] and for having genitalia that did not comport with their driver's license sex designation[251] as courts using the kind of implicit anti-classification approach endorsed by Justice Gorsuch in *Bostock*.[252] These courts used reliance on primary or secondary sex characteristics (menstruation, breast size, genitalia) as proof of facial discrimination. They did not rely on comparators.[253]

Professor Clarke acknowledges that this approach abandons or ignores the Supreme Court's holding in *Gilbert*. Recall that in *Gilbert*, as in *Geduldig*, the Court found that pregnancy was not a trait inextricably bound up with sex.[254] The plaintiffs in *Geduldig* had argued that pregnancy is a "uniquely female condition . . . since it is based on a sex-lined characteristic."[255] In his dissent in *Gilbert*, Justice Stevens voiced agreement with this idea when he wrote "[b]y definition" a rule that treats pregnancy differently "discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."[256] Professor Clarke suggests that *Bostock* and emerging case law relying on it reject the majority's reasoning in *Geduldig* and *Gilbert*.[257]

Because Professor Clarke's work focuses on Title VII not constitutional cases,[258] and because the PDA can be read to overrule both the result and

248. Bostock v. Clayton County, 590 U.S. 644, 660–61 (2020).

249. Clarke, *supra* note 239, at 1746–48, 1746 n.246, 1753 (discussing Flores v. Virginia Department of Corrections, No. 20-cv-00087, 2021 WL 668802 (W.D. Va. Feb. 22, 2021)).

250. *Id.* at 1746 n.246, 1749, 1753–54 (discussing Nathan v. Great Lakes Water Authority, 992 F.3d 557 (6th Cir. 2021)).

251. *Id.* at 1746 n.246, 1749–50 (discussing Corbitt v. Taylor, 513 F. Supp. 1309 (M.D. Ala. 2021)).

252. *See id.* at 1746 ("One somewhat surprising application of sex discrimination formalism post-*Bostock* is the idea that singling out aspects of reproductive biology for disfavorable treatment is sex discrimination."); *Bostock*, 590 U.S. at 658–60.

253. Clarke, *supra* note 239, at 1746 & n.246 ("[I]n the past, courts have declined to apply but-for tests in this context and have sometimes pointed to the lack of a sex classification or similarly situated comparator to conclude that laws that turn on differences in reproductive biology are not discrimination. In holding otherwise, recent decisions apply formal inquiries in new ways.").

254. *See supra* note 51 and accompanying text.

255. Brief Amici Curiae of the ACLU, *supra* note 44, at 19.

256. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 161–62 (1976) (Stevens, J., dissenting).

257. *See* Clarke, *supra* note 239, at 1751–54.

258. *See generally id*.

reasoning in *Gilbert*,[259] the cases cited by Professor Clarke may indicate that, under Title VII, distinctions rooted in pregnancy constitute facial sex classifications from which findings of sex discrimination can be readily inferred. Thus, Title VII may treat decisions based on reproductive anatomy as a sex classification even if the Constitution does not.

This embrace of an anti-classification approach for purposes of Title VII leaves the legitimacy of a case like *Cal. Fed.* in some doubt. An anti-classification approach would suggest that the California statute at issue in *Cal. Fed.*, which singled out a trait inevitably bound up with sex (pregnancy) for different treatment,[260] was suspect. This is the argument made by the employer and the sameness feminists in *Cal. Fed.*, though a majority of the Court did not agree with it.[261] Just as important, in deciding that the PDA is a "a floor. . . [but] not a ceiling" on how employers could treat pregnancy, the Court in *Cal. Fed.* embraced a very non-formalistic methodology.[262] When the employer and sameness feminists argued in *Cal. Fed.* that the state statute requiring special treatment for pregnancy was facially discriminatory and that therefore any resort to legislative history was inappropriate,[263] the Court responded by quoting a racial affirmative action case, *United Steelworkers v. Weber*:[264] "It is a familiar rule that a thing may be within the letter of the statute and yet not within its spirit, nor within the intention of its makers."[265]

The *Cal. Fed.* Court then went on to detail the legislative history of the PDA, which did not suggest any sex discrimination concerns with the special treatment of pregnancy,[266] and it quoted Justice Brennan's dissent in *Gilbert,* which emphasized that "discrimination is a social phenomenon encased in a social context and therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment . . . ."[267] The *Cal. Fed*. Court rejected a textualist approach and dived into a discussion of history, legislative intent and social context.[268] In tone and methodology, Justice Marshall's opinion in *Cal. Fed.* could not be further than Justice Gorsuch's

259. Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1, 1 (2009).

260. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 275–76 (1987).

261. *See supra* text accompanying note 72.

262. *Cal. Fed.*, 479 U.S. at 280.

263. *Id.* at 284.

264. United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

265. *Cal. Fed.*, 479 U.S. at 284 (quoting *Weber*, 443 U.S. 193).

266. Opposition to the bill came from those concerned about cost and the application of the bill to abortion, not those who argued it was misguided as a matter of anti-sex-discrimination law. *Id.* at 286.

267. *Id.* at 289 (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting)).

268. *See Cal. Fed.*, 479 U.S. at 272.

opinion in *Bostock.* Both are Title VII cases. Which tone and methodology should control?

The embrace of a more formalist approach would continue to protect pregnant workers from being discriminated against while working. Pregnant workers must be accommodated as other workers are because pregnancy is a trait inextricably bound up with sex so they cannot be treated worse, but a formalist approach would endanger policies that would allow pregnant workers to be treated "better." In *Cal. Fed.*, the Court allowed pregnant workers to be treated better in part because it saw better treatment as a form of affirmative action.[269] Hence the cite to *Weber*. In *Virginia*, Justice Ginsburg did something comparable when she wrote that different treatment of women was acceptable in order "to compensate women 'for particular economic disabilities [they have] suffered,' [and] to 'promot[e] equal employment opportunity . . . .'"[270] The *Bostock* methodology puts a remedial approach that acknowledges difference in jeopardy.[271]

As Part III will demonstrate, some U.S workplaces, disproportionately those populated by well-paid workers, provide more generous benefits for those who gestate.[272] They treat childbearing, a trait inextricably bound up with sex, differently,[273] just as the policy in *Cal. Fed.* did. A formalist approach endangers these policies and begs fundamental questions about the aims of discrimination law. If discrimination law is primarily concerned with empowering those who have been disempowered because of traits bound up with sex, then laws affecting pregnant employees should be floors not ceilings, and different treatment is permissible. If discrimination law is primarily concerned with eradicating, within the law, notions of differences between the sexes, then special treatment for pregnancy is particularly problematic. If discrimination law is concerned with both of those goals, then a court must do some sort of balancing of the benefits of different treatment against the costs of stereotypes.

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269. *See id.* at 294–95.

270. United States v. Virginia, 518 U.S. 515, 533 (1996) (citing *Cal. Fed.*, 479 U.S. at 289).

271. Clarke acknowledges that formalistic methodologies are often fatal to remedial statutes. Clarke, *supra* note 239, at 1762. It is possible to view both the PDA and Title IX as remedial statutes and to treat the entire spectrum of "difference" approaches as remedial. The economic and athletic world that we know were made by and for individuals that did not gestate. True equality may demand difference as a remedial measure because of the systemic equality wrought by economic, political and legal structures designed for and by those who do not gestate. The problem then becomes, of course, at what point is remedial action no longer necessary. One advantage of grounding the statute in physiological differences not stereotypes is that physiological differences are, on average, permanent.

272. *See infra* Part IV.

273. *Id.*

With regard to segregated sports teams, it is even more difficult to square *Bostock*'s formal textualist approach with Title IX's embrace of a separate-but-equal regime and its willingness to force opportunities for women at the expense of male athletes. Very early in the *Bostock* opinion, Justice Gorsuch makes clear that while an anti-discrimination statute might be designed to consider "how a policy affects one sex as a whole versus the other as a whole," Title VII is not such a statute.[274] Relying on statutory text, the Court notes that the statute mentions the word "individual" three times, thus providing all the proof the Court needs that Title VII is concerned with individuals not groups.[275] There is no way that Justice Stevens' protection of average girls at the expense of individuals like Karen O'Connor would pass muster under Title VII as the Court in *Bostock* interpreted it.[276] Again, we have a sameness/difference debate surfacing. A sameness approach allows the exceptional woman to compete with the men. A difference approach lumps genders together to empower the less exceptional.

Technically, one need not reconcile Title IX's sports regulations with the opinion in *Bostock* because *Bostock* defines discrimination under Title VII, not Title IX, but a willingness to accept Justice Stevens approach to group-based discrimination and difference in Title IX and Justice Gorsuch's approach to formality and sameness in Title VII, would leave the law with three distinct approaches to sex discrimination linked to reproductive anatomy. First, there is the Constitutional approach, as reflected in *Geduldig*, which rejects the idea that classifications based on pregnancy are sex discrimination.[277] Second, there is the contemporary Title VII approach, which according to Professor Clarke treats classifications based on traits like pregnancy as sex discrimination (and likely prevents employers from treating pregnant employees better than others).[278] Third, there is the Title IX approach, which allows "different" (and better) treatment based on reproductive biology if it provides women as a group with more opportunities to participate.[279] The perpetual tension around sameness and difference remains.

274. Bostock v. Clayton County, 590 U.S. 644, 658–59 (2020).

275. *Id.*

276. *See* O'Connor v. Bd. of Educ. of Sch. Dist. 23, 449 U.S. 1301, 1306–08 (1980) (Stevens, J., in chambers).

277. Geduldig v. Aiello, 417 U.S. 484, 494 (1974).

278. Clarke, *supra* note 239, at 1753.

279. *See* 20 U.S.C. § 1681.

B. Anti-stereotyping

The other increasingly important approach to sex equality used by many LGBTQ plaintiffs has been anti-stereotyping.[280] Understanding sex discrimination as a problem of stereotypes helps prevent discrimination against LGBTQ individuals who fail to comply with gender stereotypes by not being cisgender or heterosexual.[281]

Professor Cary Franklin has argued that stereotyping was central to Ruth Bader Ginsburg's theoretical understanding of what sex discrimination is and Franklin suggests anti-stereotyping has been central to courts' findings that LGBTQ discrimination is sex discrimination.[282] Professor Courtney Cahill, in a recent featured article in the Yale Law Journal, takes anti-stereotyping theory even farther suggesting that "biologically rationalized sex discrimination is a sex stereotype – all the way down."[283] Because men can now get pregnant, because children can be "born of" two people of the same sex, and because any classification based on sex "overgeneralizes about what male and female anatomy is," there is simply nothing left of "real differences" between men and women.[284] Honoring the anti-stereotype principle (which Cahill refers to as "sex equality's crown jewel") means abandoning any notion of different treatment based on sex in constitutional law and under Title VII.[285]

Like the formal equality approach, the anti-stereotyping approach eliminates the need for comparators because the question is simply whether a gender stereotype is at the root of different treatment, not whether someone else would be treated the same way.[286] But an anti-stereotype approach differs from the formal equality approach in important ways. Recall that in endorsing a formal approach, Professor Clarke argued that courts are growing more willing to find an implicit classification based on sex if physiological traits

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280. *See generally* Franklin, *supra* note 8 (explaining the history of the use of the anti-stereotyping principle regarding sex discrimination).

281. *See, e.g.*, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (discriminating against a gay man because he acted in an effeminate manner is sex discrimination); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (holding transgender man who argued he was suspended because he was transgender must be able to proceed under an anti-stereotyping theory); s*ee also* Case, *supra* note 4 (arguing that sex discrimination must police stereotyping around gender). *See generally* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1377–78 (2012) ("The extension of sex-based . . . protections to gay and transgender workers is the result of . . . courts . . . develop[ing] new understandings of the ways in which discrimination against sexual minorities can reflect and reinforce gendered conceptions of sex and family roles.").

282. Franklin, *supra* note 8, at 88, 97–104 (discussing the influence of anti-stereotyping theory on Ginsburg's strategy).

283. Cahill, *supra* note 8, at 1073.

284. *Id.* at 1068, 1109.

285. *Id.* at 1070–71.

286. *See generally* Franklin, *supra* note 8.

are "inextricably bound up with sex."[287] Professor Cahill suggests there is no such thing as being physiologically "inextricably bound up with sex."[288] Indeed, one of the cases that Professor Clarke cites as proof that courts are willing to use the inextricably bound up with sex test, a case that required a finding that harassing someone because of their breast size was sex discrimination,[289] would be a case that fails under Professor Cahill's interpretation of the jurisprudence. Cahill suggests that any judicial recognition of difference between men and women's breasts reflects an unsupportable stereotype.[290] Treating men and women's breasts as different, as would be required to find that making fun of someone's breasts can constitute sex discrimination, just perpetuates stereotypes about gender difference.

A comprehensive anti-stereotyping approach would require changing existing laws, including laws surrounding pregnancy[291] and sports.[292] But it is not clear how such an approach would clarify how the law should ultimately treat differences rooted in primary and secondary sex characteristics. For instance, Professor Cahill argues that the law cannot provide benefits to "pregnant women but not men."[293] To the extent she means that a law cannot treat pregnant women any better than pregnant men, this seems an uncontroversial statement and not one that will disrupt many existing practices. The term "pregnant woman" will need to change. "Pregnant women" will likely become "gestators" or "pregnant people." But the question of whether to treat gestation itself as a sex discrimination issue will remain.

The recent naming of the Pregnant Worker's Fairness Act suggests that Congress was concerned about sexist nomenclature—hence the term "Pregnant Workers"—but it still situated enforcement of the law in the EEOC and thus it still treats pregnancy discrimination as sex discrimination. Cahill lauds the bill for not "tethering pregnancy (or childbirth) to women specifically,"[294] but neither she nor Congress explain why pregnancy discrimination is sex discrimination. If the argument is that different treatment of pregnancy is always rooted in stereotype because it was rooted in stereotype in the past,[295] then the PDA and the PWFA are themselves sex discrimination

287. *See supra* note 248 and accompanying text.

288. *See* Cahill, *supra* note 8, at 1130.

289. Clarke, *supra* note 239, at 1746 n.246, 1749, 1753–54 (discussing Nathan v. Great Lakes Water Authority, 992 F.3d 557 (6th Cir. 2021)).

290. Cahill, *supra* note 8, at 1131 (criticizing the idea that "male and female breasts look different and function differently").

291. *Id.* at 1138 (supporting changes to the law surrounding pregnancy).

292. *Id.* at 1143 (supporting changes to the law surrounding sports).

293. *Id.* at 1138.

294. *Id.* at 1145–46.

295. *See supra* note 33 and accompanying text for a discussion of *Struck* (explaining how pregnancy has been stereotyped in the past).

because they suggest that pregnancy has something to do with sex.[296] Moreover, as the Court found in *Cal. Fed.*, different treatment of pregnant people is not always rooted in stereotype.[297] Sometimes it is rooted in real, "actual physical disability."[298] If that actual physical disability should not be tethered to sex or gender, shouldn't sex simply be removed as a valid frame for thinking about pregnancy? Pregnancy discrimination can be analyzed, as it already partly is,[299] as a form of disability discrimination. Sex should have nothing to do with it.

That construction leaves gestators, a class that is overwhelmingly women, without any constitutional protection as gestators. This is, arguably, where they already are, given *Geduldig*,[300] but it also a proposition that is vigorously contested in the aftermath of *Dobbs v. Jackson Women's Health*.[301] If women have a sex equality right to terminate pregnancies, it must have something to do with pregnancy being a condition that has something to do with women.[302]

296. *See* 42 U.S.C. § 2000e(k); 42 U.S.C. § 2000gg.

297. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 290 (1987).

298. *Id.*

299. *See supra* Part II.

300. *See* Geduldig v. Aiello, 417 U.S. 484, 494 (1974).

301. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022). In recent work, Professor Franklin and Professor Reva Siegel have argued that abortion regulations are rooted in stereotypes about women's essence as mothers. *See* Cary Franklin & Reva Siegel, *Equality Emerges as a Ground for Abortion Rights in and After* Dobbs, *in* ROE V. DOBBS: THE PAST, PRESENT AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION 22 (Lee C. Bollinger & Geoffrey Stone eds., 2024). The brief of Constitutional Law Scholars in *Dobbs* makes a comparable argument. *See* Brief of Equal Protection Constitutional Law Scholars Serena Mayeri et al. as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392). The problem with these arguments, as I suggest in other work, is that to make the argument that abortion regulation is about stereotypes not the regulation of a "real difference," scholars themselves rely on stereotypes regarding differences between motherhood and fatherhood and they routinely conflate child-bearing with child-rearing in ways that assume women will take responsibility for the children they bear. But that assumption is rooted in stereotypes about the inevitability of women's caretaking role. In contrast, a sex equality right to abortion rooted in the burden of gestation would recognize that compelling women to bear all the gestational burdens of an unwanted pregnancy presents an equality problem because women alone (or wildly disproportionately) bear that burden. *See* Katharine K. Baker, *Abortion, Parenthood and Equality*, 26 GEO. J. GENDER & L. 1 (2024).

302. Cahill suggests that "it is entirely possible to argue that pregnancy and abortion are themselves sex neutral, but pregnancy and abortion discrimination are not." Cahill, *supra* note 8, at 1144. She then discusses a case in which co-workers harassed a man who was pregnant. *Id.* at 1144–45 (citing Complaint and Jury Demand at 3, Simmons v. Amazon.com Servs., Inc., No. 20-cv-13865 (N.J. Super. Ct. L. Div. Oct. 5, 2020)). No doubt this case involved discriminating against a pregnant person because of stereotypes surrounding which gender is supposed to get pregnant, but the far more prevalent cases are likely to be those that discriminate against all pregnant people equally. If an employer discriminates against male and female gestators equally, why is it sex discrimination? Treating those cases as sex discrimination as the PWFA does just perpetuates the stereotype that pregnancy is female. Cahill suggests that "there are abundant

More comprehensively with regard to stereotypes around parenting, it would be relatively easy to canvass federal and state codes with a "search and replace" instruction that would substitute the words "parent" for the words "mother" and "father" and "gestator" for "pregnant woman." These semantic changes are not likely to resolve the sameness/difference tension. If the law were to eliminate all explicitly gendered terms, sex equality law would then be faced with what to do, if anything, with the fact that the vast majority of gestators are women. Cahill insists that sex equality law can brook no interest in the "vast majority" of anything because anti-discrimination must be concerned with the "law of one" not the "law of averages."[303] But to suggest equality law has abandoned all reliance on the law of averages is to ignore the sameness/difference tension in *Virginia*, which condoned both allowing an exceptional woman to enter VMI (the law of one) and changing facilities and physicality requirements in order to accommodate (average) women's desires and capabilities.[304] Rejecting any reliance on averages would also undermine policies like those at issue in *Cal. Fed*., which required leave based on what is appropriate for average gestators.[305]

Proponents of an anti-stereotype approach may not be arguing that relying on physiological differences is always a smokescreen for stereotypes, but only that any invocation of "real" differences as a justification for different treatment requires strict scrutiny.[306] Cahill suggests that such "scrutiny is [always] necessary in order to expose stereotypes."[307] Franklin writes that "equal protection law should be particularly alert to the possibility of sex stereotyping in contexts where 'real' differences *are* involved because these are the contexts in which sex classifications have most often been used to perpetuate sex-based inequality."[308] It is not clear that more scrutiny will get these scholars the results they think appropriate.

Consider one of the more controversial lines of "real differences" cases, those brought by genetic fathers arguing that equality demands that they be vested with the same rights at birth as genetic mothers who are also gestators.[309] In a string of cases, the Supreme Court held that mothers and fathers were differently situated at birth and therefore the state could treat

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reasons why abortion restrictions are problematic from a sex-equality perspective that have nothing to do with pregnant men," but she does not list or explain what those reasons are. *Id.* at 1131.

303. *Id.* at 1102.

304. *See* United States v. Virginia, 518 U.S. 515 (1996).

305. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

306. *See* Franklin, *supra* note 8, at 146.

307. *See* Cahill, *supra* note 8, at 1147.

308. Franklin, *supra* note 8, at 146.

309. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979) (holding that a New York statute which treated unmarried parents differently based on their sex was unconstitutional).

them differently.[310] Many sex equality scholars, including Franklin and Cahill, express something like outrage at what they see as this insupportably sexist practice.[311] But stricter scrutiny of gestation and childbirth just brings into relief how physiology can explain why gestators and non-gestators acquire parental rights differently and why genetics should not necessarily root parental status determinations.[312] With more scrutiny, the Court would see that the idea of rooting fatherhood in genetics, not marriage, started with a Papal edict in the thirteenth century that was primarily concerned with easing financial burdens on local parishes that otherwise had to support children born to unwed mothers.[313] The edict had the added benefit, from the Church's perspective, of discouraging extramarital sex.[314] Saving money and discouraging extramarital sex are not likely to register as particularly important governmental interests under a strict scrutiny approach. Moreover, because it was almost impossible to prove genetic connection until the advent of genetic testing, as an historical matter and in practice, genetics only very rarely determined fatherhood.[315]

Rooting motherhood in gestation has a much more stable history. Until it became possible to sever gestation from sexual reproduction in the 1990s, motherhood had never been rooted in anything else.[316] Rewarding gestation, because of the unique (different) investment the gestator makes in producing a child, might well register as a particularly valid state interest. Rooting parenthood in gestation rewards the work that gestators do, though it also, inevitably, runs the risk of exacerbating maternalist stereotypes about women because it will be (overwhelmingly but not exclusively) women who will

310. *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246 (1978); Lehr v. Robertson, 463 U.S. 248 (1983); Michael H. v. Gerald D., 491 U.S. 110 (1989). There are also similar citizenship cases. *See, e.g.*, Miller v. Albright, 523 U.S. 420 (1998); Nguyen v. INS, 533 U.S. 53 (2001).

311. *See, e.g.*, Cary Franklin, *Biological Warfare: Constitutional Conflict over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 1, 14 (explaining that these cases reflect "separate spheres" ideology); Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race and Nation*, 123 YALE L.J. 2134, 2205 (2014) (explaining that these cases reflect "maternalist" norms); Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2231 (2020) (suggesting these cases are "regressive"); Douglas Nejaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2268 (2017) (using these cases to suggest that the Supreme Court has only a "partial and incomplete" approach to gender equality in the parenthood context).

312. *See* Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2039–41 (2016) (discussing origins of paternity doctrine).

313. *See id.* at 2043–45.

314. *See id.* at 2045.

315. *See Evolution of DNA Paternity Testing*, EASYDNA, https://easydna.co.uk/knowledge-base/evolution-of-dna-paternity-testing/ [https://perma.cc/WA8U-5MEX].

316. The leading gestational surrogacy case vesting motherhood in someone other than the gestator is *Johnson v. Calvert*, 5 Cal. 4th 84 (1993) (vesting parenthood by intent).

benefit from the law recognizing the importance of gestation.[317] The harms from those stereotypes must be balanced against the harms of discounting—as constitutionally irrelevant—the work that gestators do.

A complete discounting of the relevance of gestation so as to minimize stereotypes surrounding motherhood would also just perpetuate another sexist stereotype: that the work women do within families and for their children is a labor of love in no need of recognition or compensation.[318] Why is it that the extraordinary burdens of gestation, burdens that have until exceedingly recently been borne exclusively by women, can be ignored as irrelevant to questions of parenthood?[319] Strict scrutiny would require a court to consider all of these interests. It would not provide an obvious answer. There is little reason to think that applying strict scrutiny will eliminate the need to address the relative advantages and disadvantages of recognizing physiological difference.

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With regard to sports, Cahill and others argue that sex distinctions in sports should mostly be eliminated, though they often concede that "there might be good reasons to sustain sex separatism" for "[s]ports in which testosterone provides an advantage."[320] Testosterone provides an advantage in many, many sports.[321] And, if testosterone levels can justify a sex distinction in those sports,[322] why should an ability to gestate not justify a sex distinction in other contexts? After all, it is the same physiological process, puberty, that either creates (in over 98% of people) an ability to produce a lot

317. *See* Heidi Brooks, *Exploring a Nonbinary Approach to Health*, NATIONAL INSTITUTE FOR CHILDREN'S HEALTH QUALITY: INSIGHTS (June 29, 2021), https://nichq.org/blog/exploring-nonbinary-approach-health#:~:text=While%20a%20large%20majority%20of, 0.6%25 [https://perma.cc/ANQ9-B3BW].

318. *See* Katharine B. Silbaugh, *Turning Labor into Love: Housework and the La*w, 91 NW. L. REV. 1, 35–54 (1996) (detailing the numerous ways laws and governmental programs treat women's domestic labor as freely given, not work entitled to recognition as work). *See generally* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994) (discussing the evolution of the marital service doctrine that refused to compensate wives for labor performed in the marital home).

319. *See* Katharine K. Baker, *Equality, Gestational Erasure, and the Constitutional Law of Parenthood*, 35 J. AM. ACAD. MATRIM. LAWS. 1, 9–14 (2022) (discussing gestational erasure in sex equality scholarship).

320. Cahill, *supra* note 8, at 1143 & n.400.

321. *See supra* notes 16-17 and accompanying text (discussing that any sport in which height, strength, or speed is particularly valuable is a sport where testosterone provides an advantage). This explains why athletes dope with testosterone. Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS. 63, 75 (2017) (discussing that the athletic benefits of testosterone explain "why men and women dope with androgens").

322. *See* David J. Handelsman et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 ENDOCRINE REVS. 803, 805 (2018).

of testosterone or an ability to gestate.[323] What an anti-stereotype proposal seems to demand is that sports be divided not by sex, but by testosterone level or other secondary sex characteristics that serve as physical markers of certain kinds of athletic competitiveness.[324] A physiological marker like that untethers sports from sex classifications, just as Cahill argues pregnancy should be untethered from sex.

Others have made this proposal.[325] Basketball teams could be chosen based on height and strength tests. Soccer teams could be chosen based on speed and perhaps height and strength. Crew teams could be chosen based only on weight, not, as they traditionally have been, on weight only after a gender distinction has been made (i.e., men's and women's heavyweight, men's and women's lightweight). As Professor Patrick Shin has observed, though, "any new technical classification system, whatever the chosen criteria or metrics, could be publicly perceived as a veiled proxy for, or even just a relabeling of, the traditional categories of male and female or man and woman."[326]

Just as a world in which all references to mother, father, maternity, paternity and pregnant woman are struck in favor of gender neutral terms will likely be a world in which gendered stereotypes remain because the vast majority of gestators will still be women, and just as the law would then be pressed to decide whether distinctions based on pregnancy are necessary or even consistent with sex discrimination law, so a world without explicitly gendered sports teams would likely be a world in which gendered stereotypes with regard to physical ability would remain. The law would then be pressed to decide whether separate programs for shorter, weaker and slower people should be allowed or required. If a school was strapped for resources and decided to fund only the most popular or most "testosterone-determinative" sports, would that present a sex discrimination problem? It was precisely in those situations—when schools tried to prioritize the most testosterone determinative sports—that Title IX forged the most change.[327]

Finally, it is worth noting that eliminating sex segregation in sports is emphatically not the result that most of the trans athletes that are fighting to

323. *See* Breehl & Caban, *supra* note 17.

324. *See, e.g.*, Heath Fogg Davis, *Why Testosterone Ranges Should Replace Sex-Segregation in Title IX Sports*, THE GENDER POL'Y REP. (Aug. 22, 2017), https://genderpolicyreport.umn.edu/why-testosterone-ranges-should-replace-sex-segregation-in-title-ix-sports/ [https://perma.cc/XK73-VDRB].

325. *See, e.g.*, Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1249, 1286 (2018) (suggesting height, weight, and hormone levels replace sex as a way of distinguishing sports teams); Shin, *supra* note 182, at 59 (discussing physiology-based gender-neutral proposals).

326. Shin, *supra* note 182, at 60.

327. *See supra* note 184 and accompanying text (explaining cases that successfully challenged school attempts to prioritize traditionally male sports).

compete in college and high school sports are asking for.[328] Those athletes are fighting to participate in the sport of their self-identified gender and fighting the gender-neutral, physical markers (testosterone level, etc.) that would likely replace sex as the way to categorize different sports.[329] Cahill acknowledges this when she says that "certain aspects of LGBTQ equality reinforce rather than challenge real differences."[330]

This article is agnostic on where sports should draw the physiological line that might define sex in sports, but unless the law tolerates the idea of accepting some physiological definition of "women" and "men" in sports, there is no reason other than stereotype for having men's and women's teams. If subjective gender-identity, not "real difference," is what determines which team one plays on, then a socially constructed notion of gender is the only reason to make distinctions. Maintaining separate teams in a world in which gender is untethered from physiology would serve no purpose other than to perpetuate sex stereotypes.

C. Summary

Both formal equality and anti-stereotyping theory have considerable power to push sex equality law in directions that can be and have proved important to sexual minorities. But applying these methodologies to the problems raised by pregnancy and sports is either unlikely to resolve the sameness/difference tension, or resolve it in a manner that will strike so many people as inconsistent with beliefs in women's empowerment that the resolution will be short-lived. Equality law has often pushed boundaries in ways that disrupt understandings of "normal" and "equal," but precisely because the problems presented by pregnancy and sports are rooted not just in stereotype, but in physiological processes that will continue to produce primary and secondary sex characteristics no matter what the law does, there are limits to what the law can transform. And there are hard normative questions surrounding what the law should transform.

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328. *See, e.g.*, Louisa Thomas, *The Trans Swimmer Who Won Too Much*, THE NEW YORKER (Mar. 17, 2022), https://www.newyorker.com/sports/sporting-scene/how-one-swimmer-became-the-focus-of-a-debate-about-trans-athletes [https://perma.cc/D5NH-RGHF] (describing controversy surrounding Lia Thomas, a transwoman swimmer who competed as a woman for the University of Pennsylvania swim team).

329. This would mean that the opportunity to signal gender as distinct from biology would be lost. *See* Kimberly A. Yuracko, *The Culture War Over Girls' Sports: Understanding the Argument for Transgender Girls' Inclusion*, VILL. L. REV. 717, 755 (2022) ("[I]f male/female categorization in sport were eliminated altogether—with all players competing together—a crucial opportunity to signal society's rejection of biological sex and embrace of gender identity would be lost.").

330. Cahill, *supra* note 8, at 1132.

Even if primary and secondary sex characteristics are not as perfectly bimodally distributed as once thought and even if those sex characteristics are also saturated with gendered stereotypes, what the law should do about the mostly bimodal distribution of sex characteristics in the workplace and in sports are questions that have no easy answers. Accommodating, by recognizing the particular challenges for those who have bodies that are able to gestate, will inevitably perpetuate stereotypes about those who gestate.[331] Refusing to accommodate those particular challenges will leave those with bodies that are different than the male norms—around which both the workplace and sports were constructed—at a considerable disadvantage. Recognizing physiological differences perpetuates stereotypes. Refusing to recognize physiological differences perpetuates disadvantage. That is the sameness/difference tension in a nutshell. Sex equality law's job may not be to resolve that tension so much as to continue to conduct contextual balancing of the advantages and disadvantages of acknowledging difference.

IV. WHAT MATTERS?

This Part draws on empirical evidence from the United States and much of the rest of the world to suggest that the contemporary skepticism of the difference approach in American sex equality law may not adequately acknowledge the advantages that can come from recognizing difference.

A. Parental Leave Policies in Practice

1. Child-Related Leave in the United States

As mentioned, only one other country in the world (Papua New Guinea) fails to guarantee some form of paid leave for workers who give birth.[332] The sameness approach exemplified in the FMLA did nothing to encourage paid coverage for childbirth and may even have discouraged employers from offering it. The number of employers offering paid childbirth leave fell from 27% to 16% between 1996, when the FMLA was passed, and 2008.[333] A

331. *See supra* Part III.B.

332. INT'L LAB. ORG., MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD 26 (2014) [hereinafter "LAW AND PRACTICE"], https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_242615.pdf [https://perma.cc/KD4S-MTHA] (185 countries out of the 193 self-governing countries in the world recognized by the United Nations provided information for this survey).

333. JOAN C. WILLIAMS & HEATHER BOUSHEY, CTR. FOR WORKLIFELAW, CTR. FOR AM. PROGRESS, THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE 65 (2010), https://cdn.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/threefaces.pdf [https://perma.cc/8ZTT-9GFT].

January 2019 report from the Bureau of Labor Statistics suggests that as of 2017, that percentage had fallen further to 15%.[334] According to the latest Bureau of Labor Statistics report, this leaves only approximately 25% of all civilian workers with access to paid family leave.[335] That quarter of the civilian workforce with paid leave is disproportionately likely to be composed of high-income earners.[336] Roughly 36% of workers classified as working in Management, Professional or related fields have access to paid leave.[337] Only 14% of those working in Production, Transportation and Moving have access to paid leave, even less than the 16% of workers in the service industry who have it.[338] The more high-wage workers a firm has, the more likely that firm

334. ANN P. BARTEL ET AL., U.S. BUREAU OF LAB. STATS., MONTHLY LABOR REVIEW: RACIAL AND ETHNIC DISPARITIES IN ACCESS TO AND USE OF PAID FAMILY AND MEDICAL LEAVE: EVIDENCE FROM FOUR NATIONALLY REPRESENTATIVE DATASETS 2 (Jan. 2019), https://www.bls.gov/opub/mlr/2019/article/pdf/racial-and-ethnic-disparities-in-access-to-and-use-of-paid-family-and-medical-leave.pdf [https://perma.cc/GX56-AWSQ].

335. *National Compensation Survey: Employee Benefits in the United States*, U.S. BUREAU OF LAB. STATS. (Mar. 2022) [hereinafter "*2022 National Compensation Survey*"], https://www.bls.gov/ebs/publications/september-2022-landing-page-employee-benefits-in-the-united-states-march-2022.htm [https://perma.cc/Q5Y6-PL9X] (locate the "Download 2022 Excel tables (ZIP)" hyperlink and download the zip file; open zip file and click the "Civilian workers" folder; click and open the "civilian-average-wage-category-2022.xlsx" excel sheet; locate and click the "Leave" tab at the bottom of the sheet; look at the "Family" row and "All Workers: Estimate" column to find 25%). *Cf.* Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175, 2183 (2021) ("Just one in five American employees—and one in ten low-wage workers—receive paid parental or family leave.").

336. *See 2022 National Compensation Survey*, *supra* note 335 (locate the "Download 2022 Excel tables (ZIP)" hyperlink and download the zip file; open zip file and click the "Civilian workers" folder; click and open the "civilian-average-wage-category-2022.xlsx" excel sheet; locate and click the "Leave" tab at the bottom of the sheet; look at the "Family" row and "Lowest 25 Percent: Estimate" column to find 13%); *id*. (locate the "Download 2022 Excel tables (ZIP)" hyperlink and download the zip file; open zip file and click the "Civilian workers" folder; click and open the "civilian-work-and-bargaining-status-2022.xlsx" excel sheet; locate and click the "Leave" tab at the bottom of the sheet; locate the "Family" row and "Work Status: Part time: Estimate" column to find 12%); *see also* Megan Shepherd-Banigan & Janice F. Bell*, Paid Leave Benefits Among a National Sample of Working Mothers with Infants in the United States*, 18 MATERNAL & CHILD HEALTH J. 286, 292 ("Our data suggest significant disparities in the receipt of leave benefits by income level . . . Lower levels of income . . . were associated with less generous leave benefits.").

337. *See 2022 National Compensation Survey*, *supra* note 335 (locate the "Download 2022 Excel tables (ZIP)" hyperlink and download the zip file; open zip file and click the "Civilian workers" folder; click and open the "civilian-occupational-group-2022.xlsx" excel sheet; locate and click the "Leave" tab at the bottom of the sheet; look at the "Family" row and the "Management, professional, and related" column to find 36%).

338. *Id*. (locate the "Download 2022 Excel tables (ZIP)" hyperlink and download the zip file; open zip file and click the "Civilian workers" folder; click and open the "civilian-occupational-group-2022.xlsx" excel sheet; locate and click the "Leave" tab at the bottom of the sheet; look at the "Family" row and scroll to the "Production, transportation, and material

is to provide paid parental leave.[339] Only 23% of firms with few high-wage workers provided paid leave, compared to 41% of firms with many high-wage earners.[340] Those who need paid leave because they cannot afford unpaid time off do not get it; those who have enough of a financial cushion, either through savings or with combined household income, are most likely to have access to paid parental leave.[341] The gap between the percentage of high earners and low earners with access to paid family leave is growing.[342] Thus, in practice, paid leave policy in the United States is strikingly regressive.[343]

When U.S. firms provide paid leave, they usually do so in a manner that treats gestators differently than non-gestators.[344] EEOC guidance on the PDA allows employers to give more maternity than paternity leave as long as the employer distinguishes between "leave related to the physical limitations imposed by pregnancy and child-birth" and "leave for purposes of bonding with a child."[345] Most generous paid leave policies do exactly that.[346] In a

moving: Estimate" column to find 14%); *id*. (locate the "Download 2022 Excel tables (ZIP)" hyperlink and download the zip file; open zip file and click the "Civilian workers" folder; click and open the "civilian-occupational-group-2022.xlsx" excel sheet; locate and click the "Leave" tab at the bottom of the sheet; look at the "Family" row and scroll to the "Service: Estimate" column to find 16%).

339. *See Women's Health Policy: Paid Leave in the US*, KAISER FAM. FOUND. fig. 4 (Dec. 17, 2021), https://www.kff.org/womens-health-policy/fact-sheet/paid-leave-in-u-s/ [https://perma.cc/9ZS7-56DC].

340. *Id*. Unionization only has a marginal impact on the likelihood of access to paid leave. Thirty-two percent of firms with union workers, compared to thirty percent of firms without union workers, provide parental leave. *Id*.

341. Low-income women are more likely to live in households without a parenting partner and/or be in parenting relationships where there is little sharing of income. *See* Baker, *supra* note 312, at 2074–77 (discussing studies of household and parenting dynamics in low-income households).

342. *See Paid Sick Leave Was Available to 79 Percent of Civilian Workers in March 2021*, U.S. BUREAU OF LAB. STAT. (Oct. 12, 2021), https://www.bls.gov/opub/ted/2021/paid-sick-leave-was-available-to-79-percent-of-civilian-workers-in-march-2021.htm [https://perma.cc/22VM-AK4C].

343. In addition to exacerbating income inequality, the United States' lack of access to paid leave has race and health implications. *See* BARTEL ET AL., *supra* note 334. Women of color, especially Hispanic women, are the least likely to have access to paid leave. *Id*. at 2, 6. The lack of paid leave leads to shorter maternity leaves, which in turn correlate with negative health outcomes for those who give birth and their children. Shepherd-Banigan & Bell, *supra* note 336, at 292.

344. EEOC GUIDANCE, *supra* note 103.

345. *Id*. ("For purposes of determining Title VII's requirements, employers should carefully distinguish between leave related to any physical limitations imposed by pregnancy or childbirth (described in this document as pregnancy-related medical leave) and leave for purposes of bonding with a child and/or providing care for a child (described in this document as parental leave).").

346. *See* Henry O'Loughlin, *119 Companies with the Best Maternity Leave (May 2024)*, BUILDREMOTE (May 16, 2024), https://buildremote.co/companies/best-maternity-leave/ [https://perma.cc/FQ6G-LG2M].

survey of ninety-seven law firms by Chambers Associates, the average paid maternity leave was sixteen weeks; the average paid paternity policy was five weeks.[347] These discrepancies between maternity and paternity leave are only not sex discrimination if the maternity leave is designed to cover childbirth in addition to parental bonding leave.[348]

The United States' classed access to explicitly gendered paid leave policies is perhaps ironic, but it also says something about what sex equality may mean. As a group, affluent professionals affirm more belief in gender egalitarianism than most members of the middle and working class, but, as a group, they are also the ones most likely to enjoy the benefits of gendered paid leave policies.[349] Conventional wisdom within elite industry suggests that generous maternity leave policies are necessary to retain top talent.[350] If it is private markets and the need to retain top talent that motivates employers to offer gendered paid leave even though the law does not compel them to, the data suggest that those with the highest acceptance of gender egalitarianism demand a difference approach.

The rejection of this difference approach in the FMLA leaves gestators without a caretaking partner particularly vulnerable. In order to foster the degendering of caretaking, the FMLA sacrifices whatever good may come from paid, but gendered, leave at birth. For gestators who take primary, if not exclusive, responsibility for their children, this sacrifice does no good. She gets paid nothing so that the law can encourage a partner to take leave, but she has no partner who will take leave. Forty percent of children in the United States are born to unmarried mothers, and while many of the genetic fathers of these children willingly accept legal responsibility as fathers, many of them are not prepared to or do not want to invest significantly in caretaking.[351] Unmarried fathers are particularly unlikely to trade off income for caretaking,

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347. *Parenting and BigLaw*, CHAMBERS ASSOC., https://www.chambers-associate.com/where-to-start/commercial-awareness/parenting-and-biglaw [https://perma.cc/B25V-TPAT].

348. EEOC GUIDANCE, *supra* note 103 (making distinction between "leave related to any physical limitations imposed by pregnancy or childbirth" and "leave for purposes of bonding with or providing care for a child").

349. *See* Richard J. Harris & Juanita M. Firestone, *Changes in Predictors of Gender Role Ideologies Among Women: A Multivariate Analysis*, 38 SEX ROLES 239, 240 (1998) (indicating that education level and participation in the labor force correlate with belief in gender equity for both men and women).

350. Alex Maffeo, *Paid Parental Leave: Employers Can't Win Talent Without It*, ALM BENEFITS PRO (May 4, 2022, 9:13 AM), https://www.benefitspro.com/2022/05/04/paid-parental-leave-employers-cant-win-talent-without-it/?slreturn=20240922-11454 [https://perma.cc/VAA7-CQ3X]; Caroline Calvin, *Paid Leave Proves Critical for Talent Retention*, HRDIVE (Aug. 3, 2021), https://www.hrdive.com/news/paid-family-leave-retention/604370/ [https://perma.cc/6F7C-HR8F].

351. *See* Baker, *supra* note 312, at 2077–78, 2081 (discussing lack of caretaking investment by many low-income unmarried fathers).

even if they felt they could afford to.[352] Gestators, to their economic detriment, almost always make that trade-off and take considerably more unpaid leave than non-gestators.[353]

2. Child-Related Leave in Other Countries

The rest of the world treats pregnancy differently. Approximately 72% of countries for which there is information available mandate *compulsory* leave for the gestator before or after childbirth.[354] All EU countries require women to take at least two (paid) weeks of leave after giving birth.[355] In the United States today, these mandatory leave policies might well be construed as impermissible sex discrimination.[356]

As in the U.S. with firms that offer paid leave, other countries often treat childbirth leave and parental leave as one for the gestator, but the gestator invariably gets more leave than a non-gestator. Sixty-two percent of countries that provide paid maternity leave provide at least six weeks of benefits.[357] Only 4% of the 185 countries surveyed by the International Labour Organization provide paid paternity leave of more than two weeks, and 21% of those 185 countries provide less than one week of paid paternity leave.[358] Thus, in the rest of the world, childbirth is often treated as distinct from parental leave; when it is not and even often when it is, maternity leave is treated more generously than paternity leave, and neither childbirth nor parental leave are considered medical leave.

This is not to say that the rest of the world is completely sanguine about potential stereotypes that may be fostered by these explicitly gendered leave policies. Sweden has been particularly innovative in trying to encourage

352. *See id*. at 2079–81.

353. *E.g.*, JANE HERR ET AL., ABT ASSOCS., GENDER DIFFERENCES IN NEEDING AND TAKING LEAVE 3 (2021), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLAGenderShortPaper_January2021.pdf [https://perma.cc/DKW2-GVD5] ("On average, women take 54 days of leave from work for reasons related to a new child, three times longer than men (18 days for a new child).").

354. LAW AND PRACTICE, *supra* note 332, at 12. Compulsory leave protects workers from employers trying to pressure them into taking less leave than the state determines they deserve, but it reflects a governmental paternalism that the United States tends to be uncomfortable with. See, in the consumer context, James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340 (2007) (noting European comfort with more paternalistic approach to consumer law).

355. Suk, *supra* note 96, at 53.

356. EEOC GUIDANCE, *supra* note 103 ("An employer may not compel an employee to take leave because she is pregnant, as long as she is able to perform her job. Such an action violates Title VII even if the employer believes it is acting in the employee's best interest.").

357. LAW AND PRACTICE, *supra* note 332, at 12.

358. *Id.* at 53 (five out of 185 countries provide a paternity leave of more than two weeks). Among developed countries, most paternity leave is financed by social insurance. *See id.* at 57.

fathers to take more childcare leave.[359] Initially, fathers (or other non-gestator parents) are entitled to ten days of birth leave when the child is born.[360] This is for the express purpose of supporting the gestator.[361] After the childbearing leave, both parents are eligible for up to eight months of parental leave at 77.6% of their former earnings.[362] One parent can transfer all but ninety days of their parental leave to the other parent.[363] The ninety day non-transferrable provision was designed to encourage men to take more leave.[364] If fathers do not take their nontransferable leave, the family loses it.[365] Other countries have also instituted what are known as "daddy quotas."[366]

Sweden is a particularly important comparator for the U.S. because, as Professor Franklin has documented, Ruth Bader Ginsburg—the architect of the United States' constitutional approach to gender equality—was heavily influenced by Swedish programs.[367] Her litigation strategy grew out of her attempt to import Sweden's distrust of gender stereotypes into the American legal system.[368] She succeeded in importing that deep distrust of stereotypes, but in the United States today, leave-taking is more gendered than it is in Sweden. Seventy percent of the fathers who take paternity leave in the United States take less than ten days, and that includes time taken just after the child

359. *See infra* notes 367-375.

360. Jack Ryan Twaronite, *Comparing the Societal Impact of Parental Leave Policy in Sweden and Italy*, 2 N.C. J. EUR. STUD. 87, 88 (2021); *see also Employment, Social Affairs & Inclusion, Sweden, Parental Benefits and Benefits Related to Childbirth*, EUROPEAN COMMISSION, https://ec.europa.eu/social/main.jsp?catId=1130&intPageId=4808&langId=en [https://perma.cc/BQ6S-DKB7].

361. *See Emloyment, Social Affairs & Inclusion*, Sweden, *supra* note 360.

362. *Id.*

363. Jan M. Olsen, *Swedes Take New Step in Paid Parental Leave*, THE COLUMBIAN (July 1, 2024, 4:44 PM), https://www.columbian.com/news/2024/jul/01/swedes-take-new-step-in-paid-parental-leave [https://perma.cc/7H8D-XBJ2].

364. *See* Ann-Zoife Duvander et al., *Fathers on Leave Alone in Sweden: Toward More Equal Parenthood?*, *in* 6 PERSPECTIVES ON WORK-LIFE BALANCE AND GENDER EQUALITY: FATHERS ON LEAVE ALONE 125, 125 (Margaret O'Brien & Karin Wall eds., 2017).

365. Barbara Janta & Katerine Stewart, *Use It or Lose It – Why Taking Parental Leave Is So Important for Fathers*, ENCOMPASS (Mar. 2019), https://encompass-europe.com/comment/use-it-or-lose-it-why-taking-parental-leave-is-so-important-for-fathers [https://perma.cc/9D8J-4QLV].

366. JANNA VAN BELLE, RAND EUR., PATERNITY AND PARENTAL LEAVE POLICIES ACROSS THE EUROPEAN UNION 16 (2016), https://www.rand.org/pubs/research_reports/RR1666.html [https://perma.cc/DA6B-D54Q].

367. *See* Franklin, *supra* note 8, at 88–89, 97–104 (discussing Sweden's influence on Justice Ginsburg's thinking about sex equality).

368. *Id.*

is born.[369] Men take three times less FMLA leave at birth than women do.[370] In Sweden, men take one-half, not one-third of the leave that women take[371] and 90% of men take parental leave in addition to the ten days they are entitled to when the child is born.[372]

A foil Ginsburg may not have contemplated is how her vision for equality might play out differently in a country with far less comfort with social insurance programs. The Swedish social welfare system is one of the most generous in the world.[373] Sweden got men to take more leave by building up a social insurance program that could pay them—a lot—to do so.[374] Robust welfare states can respond to calls for sameness treatment by ratcheting up: rewarding those who have not received or taken a benefit with the same benefits others get. Less generous countries, like the United States, often respond by ratcheting down. In our case, we pay mothers as little as we pay fathers.[375]

Other countries are less concerned with gendered stereotypes. As Professor Suk has explored, France has a particularly generous, but particularly gendered, parental leave policy.[376] Suk suggests that the greater acceptance of gendered policies around birth and childcare policies in Europe may stem from historical beliefs in the importance to the state of protecting

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369. U.S. DEPT. LAB., DOL POLICY BRIEF: PATERNITY LEAVE 2 (2012), https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/PaternityBrief.pdf [https://perma.cc/UX8U-8KMM].

370. *See* JANE HERR ET AL., *supra* note 353, at 3 ("On average women take 54 days of leave from work for reasons related to a new child, three times longer than men (18 days for a new child).").

371. *What Is the Evidence on the Swedish "Paternity Leave" Policy?*, FREE NETWORK (Feb. 5, 2024), https://freepolicybriefs.org/2024/02/05/fathers-parental-leave-policy [https://perma.cc/85KM-W5A7].

372. S.H., *Why Swedish Men Take So Much Paternity Leave*, THE ECONOMIST (July 23, 2014), https://www.economist.com/the-economist-explains/2014/07/22/why-swedish-men-take-so-much-paternity-leave [https://perma.cc/3AKF-XX5V].

373. Nima Sanandaji, *So Long, Swedish Welfare State?*, FOREIGN POL'Y (Sept. 5, 2018, 10:13 AM), https://foreignpolicy.com/2018/09/05/so-long-swedish-welfare-state/ [https://perma.cc/XKH7-UG7T].

374. *See Parental Benefit in Sweden*, NORDIC CO-OPERATION, https://www.norden.org/en/info-norden/parental-benefit-sweden [https://perma.cc/FJ5S-34HD].

375. In one of her last majority opinions as a justice, Justice Ginsburg endorsed a ratcheting down policy when it came to determining whether the right to convey citizenship to one's genetic child could be determined differently for men and women who gave birth to the child. She opted to treat citizen mothers of children born overseas as stingily for purposes of conveying citizenship as the law treated citizen fathers. *See* Sessions v. Morales-Santana, 582 U.S. 47 (2017). Ratcheting down ensures formal equality–sameness–and it reduces the risk of stereotype. However, it also forces those who perform reproductive labor to shoulder all of the physiological and economic costs associated with doing so.

376. Suk, *supra* note 96, at 49 ("[S]pecial entitlements for pregnant women and mothers are far more generous than those available to fathers . . . .").

women and children.[377] Women in France get up to sixteen weeks of paid leave.[378] Men get approximately two weeks.[379]

What is perhaps most surprising given these varied approaches to leave is how little difference they seem to make to women's equal stature in the paid workforce. In general, the U.S. ranks with most other developed countries in terms of female labor participation rates.[380] In 2019, the female employment-to-population ratio in Sweden, the UK, Canada, and Australia were all higher than the United States, though lower in other developed countries with generous leave policies like Germany, Denmark, Austria, and France.[381] The gender wage gap is higher in the United States than it is in most other developed countries.[382]

In terms of hours devoted to unpaid household work (including caretaking), women in the United States perform 60% more unpaid work than men,[383] which is less than women in Germany, the UK, and France, who spent 70 to 90% more time than their male partners performing unpaid work, but more than women in Canada (50%), Sweden (49%) and Denmark (30%).[384]

In terms of female representation in management roles, on average, 35.3% of managers in the EU are female compared to almost 41% in the United States, though in France, with particularly gendered patterns of leave, the percentage of women managers is 38.3% and in Sweden, it is 43.8%.[385] Again, though the data shows some variation between countries, the notable

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377. *Id*. at 40. The different perceived need to protect mothers and children in Western European countries in the mid-twentieth century may be a consequence of the devastation wrought by World War II.

378. *Id*. at 26.

379. *Id*. at 29–30 (men get 11 consecutive days of paid leave in France).

380. Esteban Ortiz-Ospina et al., *Women's Employment*, OUR WORLD IN DATA (Mar. 2024), https://ourworldindata.org/female-labor-supply [https://perma.cc/DT9U-K6XD]. Canada and the UK, both with more generous maternity policies but minimal paternity policies, have slightly higher female labor participation than the United States. *Id.* Sweden, with generous maternity and paternity provisions, has significantly higher female labor participation rates, but Germany, with generous maternity policy and some nontransferable paternity rights, ranks below the United States. *Id.*

381. *Id.* The 2019 female employment-to-population ratios are as follows: United Kingdom (56.39%), Canada (58.45%), Australia (57.85%), the United States (55.36%), Germany (55.03%), Denmark (54.93%), Austria (53.67%), and France (46.98%). *Id.* Germany and Austria jumped above the United States by 2022, but that may be a residual effect of COVID-19 policies. *Id.* The important point is that all of these countries are clumped together, despite having very different leave policies.

382. Esteban Ortiz-Ospina et al., *Economic Inequality by Gender*, OUR WORLD IN DATA (Mar. 2024), https://ourworldindata.org/economic-inequality-by-gender#citation [https://perma.cc/5V8U-99A3].

383. *Id.*

384. *Id.*

385. *Women in Leadership (Quick Take)*, CATALYST (Mar. 1, 2022), https://www.catalyst.org/research/women-in-management/ [https://perma.cc/LLN2-SMZU].

finding is how little difference the United States' unique non-gendered approach to parental leave seems to make.[386]

Scholars have spent considerable time trying to discern why these gendered patterns persist and which parental leave policies best facilitate women's full participation in the paid labor force. Studies indicate that women with paid leave have higher rates of return to work after childbirth than women with only unpaid leave,[387] though in the United States this finding may be impacted by the fact that the women who are most likely to have access to paid leave are the ones with the highest earning jobs and likely the best access to childcare.[388] Studies also suggest that long leaves (more than forty weeks) re-enforce gendered division of labor,[389] though these studies are over twenty years old and recent data for the EU suggests that the countries with longer leaves do not necessarily have more gendered divisions of labor.[390] Despite economists' concerns that guaranteed leaves decrease women's wages, data suggests that leaves of up to six months have no effect on wages.[391] Two studies suggest that mandatory leave policies tend to channel women into less lucrative employment, but other researchers have questioned those conclusions.[392]

Two other findings seem less controversial, though they both have clear implications for U.S. policy. First, no country has made a sizable dent in the "motherhood penalty" that continues to show mothers making less than fathers.[393] Given how little difference childbirth and parental leave policies seem to have on women's labor force participation rates, it is perfectly possible that the bulk of the motherhood penalty stems from gendered patterns regarding how parents balance work and family while their children grow.[394] Many studies confirm that men feel more strongly about their attachment to the workforce than women do.[395] Attacking what Joan Williams refers to as

386. *See supra* note 367 and accompanying text. The one exception may be Sweden which has the most generous and the most intentionally (and facially discriminatory) egalitarian policies. But, as discussed, acceptance of a robust welfare state likely facilitates attempts to disrupt traditional patterns and steer behavior to more egalitarian directions.

387. Ariane Hegewisch & Janet C. Gornick, *The Impact of Work-Family Policies on Women's Employment: A Review of Research from OECD Countries*, 14 CMTY., WORK & FAM. 119, 122 (2011).

388. *Id.*

389. *See id.* at 124–25.

390. *See id.* at 125.

391. *Id.*

392. *Id.* at 131–32.

393. *Id.* at 125.

394. *Id.* at 127–28.

395. *See* WILLIAMS & BOUSHEY, *supra* note 333, at 52–53, 57 (discussing escalation of work hours in professional jobs); *see also* JOAN WILLIAMS, UNBENDING GENDER 1-6 (2000)

the "ideal worker" norm[396] and disrupting the masculinity norms that tie men's identity to work may be more important than disrupting gendered patterns of leave at birth.

Second, fathers are unlikely to take more than a few days of leave unless it is paid.[397] Gestators take leave regardless of whether it is paid.[398] This means that the FMLA's insistence on gender neutrality in the name of equality does almost no good. At the lower end of the income scale, where the FMLA is the only protection available, gendered patterns continue because non-gestator parents are unwilling or unable[399] to sacrifice pay for time with a child,[400] though gestators almost always make that sacrifice.[401] At the higher end of the income scale, employers offer paid leave because coveted employees seem to demand it,[402] but that leave, unlike the FMLA, treats gestators differently than other parents.[403]

Respecting difference and treating child bearers more generously than other parents, as the rest of the world and elite firms in the United States do, appears to have no discernible effect on gendered caretaking patterns later in the child's life or on the ideal worker norm that helps perpetuate those gendered patterns.

(describing the "ideal worker" model from which many men derive their working identity); Phyllis Moen & Stephen Sweet, *Time Clocks: Work-Hour Strategies*, *in* IT'S ABOUT TIME: COUPLES AND CAREERS 17, 24 (Phyllis Moen ed. 2003).

396. WILLIAMS, *supra* note 395, at 2.

397. Hegewisch & Gornick, *supra* note 387, at 127.

398. Niall McCarthy, *Parental Leave: U.S. Dads Less Likely to Take Unpaid Leave*, STATISTA (Dec. 5, 2019), https://www.statista.com/chart/20202/paid-parental-leave-for-fathers-in-the-us/ [https://perma.cc/H5F3-VF4P].

399. It is fair to question whether "unable" is a fair categorization. The genetic father is not usually any worse off financially than the gestator and she takes leave.

400. Claire Cain Miller, *Paternity Leave: The Rewards and the Remaining Stigma*, N.Y. TIMES (Nov. 7, 2014), https://www.nytimes.com/2014/11/09/upshot/paternity-leave-the-rewards-and-the-remaining-stigma.html [https://perma.cc/7N2F-NPT3].

401. *Id.*

402. *See Higher Paid Workers More Likely Than Lower Paid Workers to Have Paid Leave Benefits in 2022*, U.S. BUREAU OF LAB. STAT. (Feb. 15, 2023), https://www.bls.gov/opub/ted/2023/higher-paid-workers-more-likely-than-lower-paid-workers-to-have-paid-leave-benefits-in-2022.htm [https://perma.cc/6F9P-6LZS]; *see also The State of Paid Parental Leave: Facts and Statistics from 2023*, PARENTO (Nov. 9, 2023), https://www.parentoleave.com/blog/the-state-of-paid-parental-leave-facts-and-statistics-from-2023 [https://perma.cc/PE4M-GM3H].

403. *See* Ice Miller, *How Employers Can Avoid Discrimination Lawsuits When Offering Parental Leave*, ICE MILLER: THOUGHT LEADERSHIP (Feb. 20, 2023), https://www.icemiller.com/thought-leadership/how-employers-can-avoid-discrimination-lawsuits-when-offering-parental-leave [https://perma.cc/V5G2-3F25].

B. Sports

1. The Beneficial Effects of Title IX

Title IX's adoption of a difference approach has made an indisputable impact on the world of sports. In 1972, when Title IX was passed, fewer than 300,000 girls were involved in High School athletics and only 30,000 played organized sports in college.[404] A typical Midwestern Big 10 university spent at a ratio of 1300 to 1 on men's and women's sports.[405] Secondary schools were often similarly lopsided in their funding.[406] The Syracuse New York public school system spent $90,000 on boys teams and $200 on girls teams.[407] Within forty years of Title IX's passage, by 2012, 3.2 million girls played high school sports and 190,000 played sports in college.[408] By 2015, women made up 51% of Division 1 athletes and received 45% of athletic opportunities and 42% of scholarships.[409]

The litigation around Title IX sports suggests that the substantial and rapid increase in women's participation would not have come as quickly or emphatically as it did without Title IX's legal mandates.[410] In 2012, when 44% of the U.S. Olympic team was female, the press referred to that class of athletes as "Team Title IX."[411] These were women who were introduced to high school and college sports after most of the legal battles on behalf of women athletes under Title IX had already been won.[412]

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404. CAHN, *supra* note 122, at 285.

405. *Id.* at 250.

406. *See id.* at 259–60.

407. GUTTMANN, *supra* note 120, at 221. It's likely that if Title IX had not been passed, women plaintiffs would have challenged state schools' disproportionate investments under the Equal Protection Clause. As it turned out, with Title IX explicitly endorsing a separate-but-equal approach to women's sports, it has been schools and male athletes who have tried to use the Equal Protection Clause to argue that schools could not preference the development of women's sports. Those attempts to use constitutional law as a counter to Title IX have mostly failed. *See supra* note 173 and accompanying text.

408. CAHN, *supra* note 122, at 285.

409. *Id.* at 287. Women only secured 28% of total money spent, but women's sports also tend to produce less revenue than men's sports.

410. *See* Sarah Wheatly, *Understanding Title IX and its impact on Women in Sports*, TEAM TRAVEL SOURCE (Sept. 25, 2023), https://www.teamtravelsource.com/2023/09/25/understanding-title-ix-and-its-impact-on-women-in-sports [https://perma.cc/G4X9-W4J9].

411. *What We Can Expect to See from Team U.S.A.*, PBS NEWS (Aug. 1, 2016, 7:37 PM), https://www.pbs.org/newshour/show/can-expect-see-team-u-s [https://perma.cc/F49F-5ERD]; *Equality for Woman in the Olympics*, FEMINIST MAJORITY FOUND., https://feminist.org/our-work/education-equity/gender-equity-in-athletics/equality-for-women-in-the-olympics [https://perma.cc/K9WY-VKKQ].

412. *See* Ann Killion, *Amid 40th Anniversary of Title IX, Women Set New Standard in London*, SPORTS ILLUSTRATED (Aug. 12, 2012), https://www.si.com/more-sports/2012/08/12/2012-olympics-women-title-ix [https://perma.cc/D5EF-3M4J].

Title IX led to "an indisputable sense of female entitlement" and "ripple effects that extend to municipal and recreational sports, elite amateur athletics and professional sports."[413] Despite or because of Title IX's embrace of difference, both men and women believe that Title IX has had a positive impact on gender equality.[414] Over 60% of respondents to one Pew poll said that funding for men's and women's sports should be roughly equal, not based on the money brought in by the team.[415] Eliminating Title IX's difference approach to sports would make it much more likely that funding would be tied to money brought in by the team, not abstract principles of sex equality based on difference.[416]

As girls began playing more competitive sports, scholars started researching the potential costs and benefits of treating girls sports differently. Studies from Europe find that girls' participation in sports tends to be lower than boys at all levels, even when girls have physical advantages over boys before male puberty.[417] Once puberty hits for boys, girls' participation in coeducational physical activities drops off significantly.[418] This is particularly important because studies also indicate that beliefs about ability influence participation rates.[419] Young people need to believe that incremental improvement can help them compete, and incremental improvement is more likely to make a difference if the gap between the least and best players is not so significant.[420] On average, differences in talent and ability are greater between boys and girls than within gender groups.[421] Studies also indicate that

413. CAHN, *supra* note 122, at 284.

414. Ruth Igielnik, *Most Americans Who Are Familiar with Title IX Say It's Had a Positive Impact on Gender Equality*, PEW RSCH. CTR. (Apr. 21, 2022), https://www.pewresearch.org/short-reads/2022/04/21/most-americans-who-are-familiar-with-title-ix-say-its-had-a-positive-impact-on-gender-equality [https://perma.cc/9ZW8-GXNU].

415. *Id*.

416. *See* David Kelley, *Sports Fundraising and Gender Equity: Clearing Up the Confusion*, NAT'L FED'N OF STATE HIGH SCH. ASS'N (Apr. 13, 2016), https://www.nfhs.org/articles/sports-fundraising-and-gender-equity-clearing-up-the-confusion [https://perma.cc/P7L9-BW8J].

417. Stacey Emmonds et al., *Youth Sport Participation Trends Across Europe: Implications for Policy and Practice*, 95 RESEARCH QUARTERLY FOR EXERCISE AND SPORT 69, 69–72 (2024) ("Overall, male participation in youth sport was significantly higher than females. This trend was evident across all age categories from U8 to U18 (80% male vs. 20% female)[.]").

418. *See id*.

419. C.K. John Wang & W.C. Liu, *Promoting Enjoyment in Girls' Physical Education: The Impact of Goals, Beliefs, and Self-Determination*, 13 EUR. PHYSICAL EDUC. REV. 145, 146 (2007).

420. *Id.*

421. Emmonds et al., *supra* note 417, at 72.

women in single-sex environments tend to be less risk averse.[422] Competitive sports often involves taking risk.[423]

These studies suggest that there are gendered socialization processes that compound physiological differences between men and women in sports.[424] Girls are taught that they are not as athletic or as able to compete with boys even before puberty hits, and then once puberty hits, that previously false maxim is supported by physiological changes.[425] By embracing difference, Title IX works to counteract that socialization process by placing girls in environments in which they need not worry about whether they are as good as the boys and they can be encouraged to take risks that gendered socialization practices have kept them from taking.[426]

For girls that play team sports, overcoming those socialization practices may be particularly beneficial.[427] A study of ethnically diverse urban adolescent girls in the U.S. found that achievement in team sports was a more solid predictor of global self-esteem for girls than was achievement in individual sports.[428] Team dynamics help undermine other impediments with which girls are socialized.[429] Girls and women are more likely than boys and men to engage in exclusionary practices within the team, making team cohesion more of a problem for women's teams.[430] Winning requires that cohesion, so striving to win on a women's team may mean overcoming socialized tendencies to be suspicious of bonding with their team.[431]

In general, there is considerable evidence that playing any sport, whether team or not, is beneficial to girls and women. One U.S. business school study

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422. Alison L. Booth & Patrick Nolen, *Gender Differences in Risk Behaviour: Does Nurture Matter?*, 122 ECON. J. F56, F60 (2012).

423. *See id.* at F56.

424. Robert O. Deaner et al., *Sex Differences in Exclusion and Aggression on Single-Sex Sports Teams*, 15 EVOLUTIONARY BEHAV. SCI. 159, 159 (2021).

425. *See id.* at 160.

426. Melnick, *supra* note 158.

427. Deaner et al., *supra* note 424, at 161 ("[S]ex difference in sports participation is substantially greater for team sports than individual sports.").

428. Sara Pedersen & Edward Seidman, *Team Sports Achievement and Self-Esteem Development Among Urban Adolescent Girls*, 28 PSYCH. WOMEN Q. 412, 419 (2004) ("[F]indings suggest that the associations of team sports achievement and team sports self-evaluations with global self-esteem may be due in part to the esteem-enhancing qualities of the team environment and are not entirely a function of sports' participants higher rates of physical activity.").

429. *Id.* at 413.

430. Deaner et al., *supra* note 424, at 161.

431. *See generally id.* The "male warrior hypothesis" suggests that men do better than women at suppressing competition within a group if there is an outside adversary. *Id.* at 170. Whether this is innate or learned behavior is entirely irrelevant to this article. If it is demonstrable as a practice, it is in women's interest to overcome it because working as team can be an exceedingly important skill in the workplace. *Id.* at 161.

indicates that more than half of top female executives are college athletes.[432] Girls who play high school sports are 14% more likely to think they are smart enough to achieve what they want in their life, 16% less likely to want to change their appearance, 17% less likely to believe that men are better leaders, and almost 30% less likely to believe that they are bad at math and science.[433] Black and Hispanic female athletes are more likely than are White female athletes to say that their participation in sports had a very positive impact on their confidence and self-esteem and more likely than White athletes to say sports had a very positive impact on their job opportunities.[434] These statistics indicate that the benefits to playing organized sports for girls may be substantial, perhaps substantial enough to treat increased participation for average girls as more important than individual injury to exceptional girls, just as Justice Stevens did in Karen O'Connor's case.[435]

The studies regarding risk aversion and team bonding also suggest that Title IX may be serving a remedial purpose correlated to but not rooted in physiological difference. If Title IX is working to overcome stereotypes about risk aversion and team bonding, stereotypes that inhibit girls' ability to become full economic, social and political citizens regardless of how fast, strong and tall they are, then a sex equality law concerned with combatting stereotypes must weigh not only the benefits of acknowledging difference against the costs of stereotypes but the ability of different treatment to combat not just exacerbate stereotypes.[436]

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432. Nanette Fondas, *Research: More Than Half of Top Female Execs Were College Athletes*, HARV. BUS. REV. (Oct. 9, 2014), https://hbr.org/2014/10/research-more-than-half-of-female-execs-were-college-athletes [https://perma.cc/D72G-8LE8].

433. RULING OUR EXPERIENCES, THE GIRLS' INDEX: GIRLS AND SPORTS IMPACT REPORT (2017), https://issuu.com/alison772/docs/girls_sports_-_rox_impact_report_-_ [https://perma.cc/2XJB-2VBT].

434. Ignielnik, *supra* note 414 ("Larger shares of Black and Hispanic athletes (44% each) than White athletes (36%) say their participation in sports had a very positive impact on their confidence or self-esteem. Black athletes are also more likely than White athletes to say playing sports had a very positive impact on their job opportunities (27% vs 16%).").

435. *E.g.*, O'Connor v. Bd. of Educ. of Sch. Dist. 23, 449 U.S. 1301 (1980) (Stevens, J., in chambers).

436. Professor Clarke acknowledges that formal tests like the ones she elaborates on are not usually nuanced enough to evaluate remedial projects like affirmative action, but she suggests that equality law's embrace of remedial projects is "already on thin ice." *See* Clarke, *supra* note 239, at 1725–28. While that ice may already have cracked in the context of race, see generally *Students for Fair Admissions v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) (striking down Harvard's policy of considering race in admissions), the popularity of Title IX and courts' unanimous rejection of men's attempts to establish that Title IX is an impermissible form of affirmative action suggest that the ice is quite strong in the context of sex in sports.

2. The Stereotype Costs

All those benefits notwithstanding, there is compelling evidence that organizations take advantage of gendered stereotypes to the disadvantage of women athletes when they can. Professional women's soccer and basketball leagues are two examples. In both cases, when the leagues started, women players received a lower percentage of league revenue than men.[437] The U.S. women's soccer team sued to change that, and won, or at least negotiated a settlement in which they would get a comparable share of revenue as the men.[438] WNBA players have recently reached a collective bargaining agreement that grants them a considerably larger share of revenue than they had previously.[439]

The National Collegiate Athletic Association ("NCAA") has been comparably guilty of treating women athletes worse than male athletes for no justifiable reason. For years, despite the growing popularity of women's college basketball, the NCAA would not let the women's teams use "March Madness" branding, though they have now changed that policy.[440] When a college women's basketball player made a video of the difference in size and quality between the men and women's weight lifting facilities at the March tournament in 2021, it went viral.[441] But it may have gone viral because there was an expectation, created by Title IX's difference approach, that investment in men's and women's teams should be comparable. Query whether if it was a video that compared work-out facilities of the Division I and Division III teams it would have made as big an impact.

No one contends that the women's NCAA Division I team could beat the men's NCAA Division I team, though most women Division I basketball players could probably play on a men's Division III team somewhere. Which

437. David Berri, *Basketball's Growing Gender Wage Gap: The Evidence the WNBA Is Underpaying Players*, FORBES (Sept. 20, 2017, 5:58 PM), https://www.forbes.com/sites/davidberri/2017/09/20/there-is-a-growing-gender-wage-gap-in-professional-basketball/ [https://perma.cc/ZT6T-VSJK]; *see* Meg Kelly, *Are U.S. Women's Soccer Players Really Earning Less Than Men?*, THE WASHINGTON POST (July 8, 2019), https://www.washingtonpost.com/politics/2019/07/08/are-us-womens-soccer-players-really-earning-less-than-men/ [https://perma.cc/WT2X-9QAD].

438. Andrew Das, *U.S. Soccer and Women's Players Agree to Settle Equal Pay Lawsuit*, N.Y. TIMES, https://www.nytimes.com/2022/02/22/sports/soccer/us-womens-soccer-equal-pay.html [https://perma.cc/T5XN-FH78] (May 18, 2022).

439. Howard Megdal, *W.N.B.A. Makes 'Big Bet On Women' With a New Contract*, N.Y. TIMES, https://www.nytimes.com/2020/01/14/sports/basketball/wnba-contract-collective-bargaining-agreement.html [https://perma.cc/7DLH-CH8W] (Jan. 16, 2020).

440. Rachel Bachman et al., *NCAA Withheld Use of Powerful March Madness Brand from Women's Basketball*, WALL STREET JOURNAL (Mar. 22, 2021, 12:03 PM), https://www.wsj.com/articles/march-madness-ncaa-tournament-womens-basketball-11616428776 [https://perma.cc/RLH8-HG9D].

441. *Id.*

does more for the cause of breaking down gendered stereotypes, having a women's Division I league and watching the best all women's teams compete against each other, or watching a few exceptional women play competitively on non-elite men's teams? There is no easy answer to that question.

The behavior of professional soccer and basketball leagues and of the NCAA suggests that the stark difference in salaries between professional men and women athletes are probably partially rooted in sex discrimination. But, at present, for some sports, salary differences are also rooted in market forces.[442] The NBA's yearly revenue hovers around the $10 billion mark.[443] The WNBA's projected revenue is closer to $60 million. Attendance, ticket prices and TV ratings are all lower for the WNBA than the NBA.[444] If the top ten players in the WNBA were paid as much as the top ten players in the NBA, the WNBA would be bankrupt in an instant.[445]

In those sports where fan interest in men's and women's competitions is comparable, as is the case with soccer in the U.S. and tennis internationally, pay is being equalized.[446] Tennis is one of the few sports in which the top women make more money than the top men in the United States.[447] All four major international tennis tournaments provide equal prize money for men and women.[448] This equalization of prize money only counts as equality if we accept the legitimacy of the male and female categories.

Serena Williams, quoted at the outset and probably the most successful women's tennis player ever, famously said that Andy Murray, her

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442. *See, e.g.*, Olivia Abrams, *Why Female Athletes Earn Less Than Men Across Most Sports*, FORBES, https://www.forbes.com/sites/oliviaabrams/2019/06/23/why-female-athletes-earn-less-than-men-across-most-sports/ [https://perma.cc/QV6Z-CXYR] (Dec. 21, 2021, 9:41 AM). "The pay disparities in baseball/softball and basketball come down almost entirely to the revenue their leagues generate." *Id.* The affected athletes often acknowledge this. *Id.*

443. Deron Snyder, *Brittney Griner, the WNBA and the NBA Pay Disparity, Explained*, THE GRIO (Dec. 14, 2022), https://thegrio.com/2022/12/14/brittney-griner-the-wnba-and-the-nba-pay-disparity-explained/ [https://perma.cc/C82Q-34KG]; Laurel Wamsley, *What Brittany Griner's Detention in Russia Tells Us About Basketball's Gender Pay Gap*, NPR, https://www.npr.org/2022/04/14/1092677483/brittney-griner-russia-detention-wnba-nba-pay-gap [https://perma.cc/2KL9-JPGY] (Apr. 14, 2022).

444. Snyder, *supra* note 443.

445. *Compare* Sarah Tidwell, *WNBA Highest Paid Players: Diana Taurasi, Jewell Loyd, Arike Ogunbowale Headline List in 2023*, THE SPORTING NEWS (May 19, 2023, 8:54 PM), https://www.sportingnews.com/us/wnba/news/wnba-highest-paid-players-2023/nupraqxcmb5kbh2nrvyyleji [https://perma.cc/35W5-MTM3] (stating top 10 WNBA salaries adding up to approximately $2.2 million), *with NBA Player Salaries - 2024-2025*, ESPN, https://www.espn.com/nba/salaries/_/year/2025/seasontype/4 [https://perma.cc/C4DT-9VXC] (showing top 10 NBA player salaries adding up to over $470 million).

446. Abrams, *supra* note 442.

447. *See id*.

448. *Male vs Female Professional Sports Compensation*, ADELPHI UNIV. N.Y. (Oct. 23, 2023, 4:12 PM), https://online.adelphi.edu/articles/male-female-sports-salary/ [https://perma.cc/7Z27-RUT4].

contemporary and champion men's tennis player, would beat her "6-0, 6-0 in 5 to 6 minutes."[449] Other men, who come nowhere close to her earnings or popularity, could likely do the same.[450] Which does more for combatting stereotypes around femininity and women's subordination, having the world know who Serena Williams is and celebrate her female accomplishments, or instituting a genderless world of sports?

And finally, there is an example of how intertwined the issues of pregnancy and sports can be. Middle-distance runner Alysia Montano, a gold medalist in the Pan Am games, was sponsored, as many athletes are, by Nike.[451] When Montano started working with Nike, the company's sponsorship policy reduced athletes pay if they got pregnant and had no provisions for childbirth and childcare.[452] Nike's policy reflected the gender-neutrality of the FMLA—both men and women were treated the same if they got pregnant and they got equally little time off for childcare.[453] Ms. Montano publicly challenged Nike's policy, demanding that Nike adopt a difference approach and recognize the unique problems that women athletes face.[454] Nike acceded.[455]

In a genderless world of sports, Ms. Montano and many other international leaders in women's track would struggle to even be competitive

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449. Sarthak Shitole, *Serena Williams Admitted Andy Murray Would Beat Her '6-0, 6-0 in 5 to 6 Minutes' While Highlighting the Difference Between Men and Women's Tennis*, FIRST SPORTZ (Mar. 25, 2024), https://firstsportz.com/tennis-news-serena-williams-admitted-andy-murray-would-beat-her-6-0-6-0-in-5-to-6-minutes-while-highlighting-the-difference-between-men-and-womens-tennis/ [https://perma.cc/B4EY-53YN].

450. *See, e.g.*, Sandra Harwitt, *Serena Williams Once Challenged Men's Player at Australian Open*, USA TODAY SPORTS, https://www.usatoday.com/story/sports/tennis/aus/2017/01/21/serena-williams-nicole-gibbs-australian-open/96876832/ [https://perma.cc/YQY5-ZXEW] (Jan. 21, 2017, 7:30 PM) (noting both Williams and her sister lost to a man who was ranked 203rd among men, though the challenge was an informal dare and both Williams sisters were quite young).

451. *See* WOMEN'S SPORTS FOUNDATION, CHASING EQUITY: THE TRIUMPHS, CHALLENGES, AND OPPORTUNITIES IN SPORTS FOR GIRLS AND WOMEN 14 (2020).

452. *See id.*

453. *See* Alysia Montaño, *Nike Told Me to Dream Crazy, Until I Wanted a Baby*, N.Y. TIMES (May 12, 2019), https://www.nytimes.com/2019/05/12/opinion/nike-maternity-leave.html [https://perma.cc/8UHU-Q5JV] ("According to a 2019 Nike track and field contract shared with The Times, Nike can still reduce an athlete's pay 'for any reason' if the athlete doesn't meet a specific performance threshold, for example a top five world ranking. There are no exceptions for childbirth, pregnancy or maternity.").

454. Katie Kindelan, *Nike to Change Pregnancy Policy in Athlete Contracts After Backlash*, ABC NEWS (May 20, 2019, 9:31 AM), https://abcnews.go.com/GMA/Wellness/nike-change-pregnancy-policy-athlete-contracts-backlash/story?id=63147457 [https://perma.cc/E3HG-ZW4D].

455. Montaño, *supra* note 453 ("Following this report, after broad public outcry and a congressional inquiry, Nike announced a new maternity policy for all sponsored athletes on Aug. 12.").

in college.[456] In a genderless world of sports, there would be no such thing as women track stars and Nike would not sponsor them.[457] The only companies or leagues that would have childbearing and extensive childcare policies would be those that catered to the sports in which physiological differences wrought by puberty make no difference or advantage women.[458] There would be few female sports leaders able to bring attention to challenges of gestation and, in the sports context, there would be little need to do so because so few so few athletes competing at elite levels would be able to gestate.[459]

V. CONCLUSION

This article has analyzed the "problems" of pregnancy in the workplace and women's competitive sports. Of course, these issues are "problems" only because the worlds of work and sports as we know them have been structured around male norms. If gestation was and had always been seen as normal and necessary in the world of work, the law of the workplace would likely look different. If men had not played such an overwhelming role in the development of sports, the world might well value rock-climbing and distance swimming as much as it values soccer and tennis. But that is not the world in which contemporary law must figure out what sex equality demands or allows.

For over 98% of the population, puberty produces a series of primary and secondary sex characteristics that divide the population into gestators and sperm producers.[460] Stereotypes regarding differences between gestators and sperm producers have flourished for thousands of years. Many of those stereotypes are groundless and attribute to physiology traits that have nothing to do with physiological differences, but the existence of those stereotypes does not negate the fact that there are, for more than 98% of the population, physiological differences.[461] In areas like pregnancy and sports, where primary and secondary sex characteristics are particularly salient to a person's ability to perform, anti-discrimination law must balance the harms of perpetuating groundless stereotypes against the harms of treating those who gestate just like those who produce sperm.

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456. Women's records in the 100, 400, and 800 meters are "beaten by literally hundreds of men each year, including by many high school boys." Coleman, *supra* note 321, at 89.

457. *See, e.g.*, *id.* at 109 (arguing that the world knows the names of many female athletes, including marathoners like Paula Radcliffe and swimmers like Katie Ledecky, because there are separate events for men and women).

458. *See supra* notes 456-457 and accompanying text.

459. *See id.*

460. *See generally* Breehl & Caban, *supra* note 17 (describing the different sex characteristics between men and women).

461. *E.g.*, *id*.

For over a century in this country, the law has wrestled with that balancing. LGBTQ litigation has challenged assumptions the law might have previously made about when differences are salient because now pregnant people are not always women, and adults have not always gone through puberty as the gender with which they come to identify, but there are still differences that are exceedingly closely correlated with gender. To ignore those differences because there is only correlation, not perfect overlap, between physiological difference and gender is to adopt a sameness approach that discounts the harms of assuming a male norm. It also discounts the benefits that difference can provide.[462]

The rest of the world has been willing to embrace a difference approach to pregnancy in the workplace. This makes pregnancy significantly less costly for gestating workers in the rest of the world, without impacting their ability to perform and compete with male workers. Comparably, the world of women's sports has embraced difference in a manner that has greatly enhanced women's participation in sports, participation that has led to more female role models, more confident women workers and more prestige and money for women athletes.[463]

Adopting these difference approaches has no doubt also allowed certain stereotypes to continue to flourish. That laws both improve women's well-being and encourage unfounded stereotypes is not necessarily a sign of the law's incoherence or incomplete commitment to sex equality. It is instead a sign that the law continues to wrestle with the advantages and disadvantages of sameness and difference.

462. *See id*.

463. *See generally* Kirsten Rasmussen et. al., *Gender Marginalization in Sports Participation Through Advertising: The Case of Nike*, INT'L J. ENV'T RSCH. & PUB. HEALTH, 1 (2021) (discussing the effect of differences between genders in sport and how enabling such differences increases participation and has led to more advertisement).