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*Mothers at Work*

A LOT CAN TURN ON ONE word in a Supreme Court decision. In this passage from Justice Ruth Bader Ginsburg, writing for a majority of the Supreme Court in a case called *United States v. Virginia*, the key word is *artificial*:

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.<sup>1</sup>

*Artificial* does a lot of work in that sentence. It implies its opposite: *natural*. The sentence condemns using inherent differences between the sexes to impose *artificial* constraints on individual opportunity, but it implies there exist other, *natural* constraints that are exempt from this condemnation. Perhaps, like the inherent differences themselves, these natural constraints are cause for celebration, or perhaps they are simply to be borne.

In *United States v. Virginia*, also known as the *VMI* case, the Supreme Court ordered the State of Virginia to let women attend the Virginia Military Institute, a public college with military-style education. Virginia had argued it could not admit women because of at least three “inherent differences” between the sexes: men are stronger, women need more privacy when they undress, and men are more likely to benefit from VMI’s “adversative” style of education, while women thrive on cooperation and self-esteem. Whether all of those three differences are inherent is, to say the least, a matter of debate. The Supreme Court’s skepticism on that point was a big part of why it ruled in favor of admitting women to VMI. There are other sex differences, however, that the Supreme Court has long accepted as inherent: differences that pertain directly to reproduction. Human reproduction requires a sperm, an egg, and gestation by a person who, regardless of gender identity, is

biologically female to the extent of having a uterus. Technological advances are stretching some of these requirements, but they remain, as we say, the facts of life.

Sex-equality law has struggled to figure out what it means to treat people equally when these differences are in play. What is an artificial constraint, and what is a natural one? In cases like *VMI*, the Supreme Court has held that equality means treating women and men the same because the women and men in question were the same in their desire and qualifications for a VMI-style education. When people are the same, or pretty close to the same, equality means treating them the same. But what does equality require when people are different in some way that seems relevant to the situation at hand? For example, in employment law, we ask whether sex equality requires employers to make allowances for pregnancy, childbirth, and breastfeeding—biological processes that primarily constrain women. A pregnant woman might need a light-duty assignment during pregnancy, time off for childbirth, and a clean place to express milk afterwards. In recent years, schools, prisons, and even the US Congress have debated whether to stock their bathrooms with pads and tampons as they do with toilet paper. The drafters of building codes must decide whether “potty parity” means equal square footage, equal numbers of stalls, or equal waiting times.<sup>2</sup> And as the US lurches toward something like universal health care, politicians and pundits argue about what “universal” means when it comes to women’s health. Coverage for contraception and abortion is always controversial, but a few have even argued that pregnancy and childbirth—even gynecological care of all kinds, from pap smears to mammograms—are special things that women need and ought to pay for separately, rather than just part of what it means to have health care. When should society provide the “extra” things that many women need, but most men don’t, because of their reproductive biology?

In America, the first place we usually look for answers to that sort of question is our Constitution. The Fourteenth Amendment to the Constitution says that “no state shall . . . deny to any person . . . the equal protection of the laws,” a passage known as the equal protection clause. This clause is the basis of equality law in the United States, from *Brown v. Board of Education* to the *VMI* case. In the 1970s, when the Supreme Court first started to think that sex discrimination might sometimes violate the equal protection clause, one of the first cases it heard involved pregnancy. The court thus faced early the question of what sex differences mean for sex equality. And in that case, the Supreme Court’s answer was: nothing. Equality meant treating people

the same when they were the same. When people were different, “equality,” as a concept, just didn’t apply. And officially, the court has mostly stuck to that answer ever since.

In chapter 2, I will argue that this official story is not quite true: the answer that sex differences mean “nothing” for sex equality has one major exception. When it is men who are different—men who are at a disadvantage because of sex differences—the Supreme Court has insisted that equality requires special accommodations to make up the gap. Men’s main disadvantage is not being able to become pregnant. Chapter 2 will show how the Supreme Court required the law governing families and parenthood to make up for this disadvantage. The rest of this book is about the implications—for feminism, for society, and for children and parents—of this double standard, a standard that says women’s reproductive burdens are to be borne individually but men’s must be accommodated by law. When courts impose this double standard but stick to an official story that equality is only about being the same, the law becomes even more unequal and bound up with gender stereotypes.

#### PREGNANCY AND THE LAW OF EQUALITY

But first, the official story. In US constitutional law, the story about what reproductive biology means for sex equality started with that early pregnancy case, known as *Geduldig v. Aiello* and decided in 1974.<sup>3</sup>

In *Geduldig*, four women sued the State of California for denying their applications for disability-insurance benefits. As part of their jobs, all four women, like all other California workers, had to pay into an insurance program for temporary disabilities. If someone was physically unable to work for some weeks or months, the program replaced part of their income for that time. The four women in *Geduldig* were all temporarily disabled from their jobs because of pregnancy, so they applied for the insurance benefits. However, since its creation in 1946, the California program had refused to pay benefits for disabilities related to pregnancy. When the state denied the four women’s claims, they sued under the equal protection clause.

Three of the women in *Geduldig* had pregnancies that ended in miscarriage or medically necessary abortion. The state denied their claims because the program excluded *all* disabilities arising out of pregnancy. But while they were litigating their case, a California court changed the rules for the

program. Under the new rules, *complications* from pregnancy—problems like eclampsia or ectopic pregnancy—would be covered just like any other condition. The new rule applied retroactively, so the three women who had lost their pregnancies received their benefits. That left the fourth woman, Jackie Jaramillo, alone against the State of California when the case got to the Supreme Court. (The case is called *Geduldig v. Aiello* because Dwight Geduldig was the California official in charge of the program, and Carolyn Aiello was one of the other three women, whose name happened to be listed first. Her name stayed on the case even after California agreed to pay her benefits, but Jaramillo was the only plaintiff who was really still in the case.)

Jaramillo, who was supporting her family while her husband went to law school, had what the court described as a normal pregnancy, meaning she had no major complications. Of course, even the easiest childbirth makes other work physically impossible for some period of time, but California still refused to cover disability from a pregnancy it considered normal. Jaramillo argued there wasn't a meaningful difference between pregnancy and other temporary disabilities, except that pregnancy affected only women. Even though California's policy didn't say "women" or "on the basis of sex," it was still sex discrimination to single out pregnancy. The program covered nearly everything a man could need disability insurance for, including male-specific procedures like prostate surgery, mostly male disorders like gout, and even medically unnecessary procedures like circumcision, cosmetic surgery, sterilization, and orthodontic treatment. It covered all of these things "without regard to cost, voluntariness, uniqueness, predictability, or 'normalcy' of the disability."<sup>4</sup> Because men received comprehensive protection for a full spectrum of disabilities they might suffer, Jaramillo argued that equality required similarly comprehensive protection for women, including for normal pregnancy and childbirth.

But astonishingly, a majority of the Supreme Court concluded that the policy was not discriminatory because neither women nor men were covered for pregnancy. Rather than distinguishing between women and men, according to the court, the policy distinguished between pregnant and non-pregnant persons. As the court saw it, the strong *correlation* between pregnancy and a person's sex didn't turn a policy that targeted pregnancy into a policy that targeted women. In parsing the policy this way, the court was not accounting for transgender men or others who might be pregnant. To the contrary, the court that decided *Geduldig* considered the capacity for pregnancy to be women's defining trait, and the court has long been in the habit

of using *gender* as merely a euphemism for *sex*. The holding in *Geduldig* was that *even though* pregnancy was the main characteristic that distinguished women from men, discriminating against pregnant people didn't count as discriminating against women.

To reach its holding that pregnancy discrimination was not sex discrimination, the court had to take a narrow view of what it means to treat people equally when they're different in some way. Under *Geduldig*, when nature imposes a burden on women, that's a problem for women, but it's not a problem for the law. Society doesn't have to make up for the difference; workplace rules don't need to be redesigned in light of women's natural burdens. After all, it wasn't California's fault that women got pregnant and men did not. In the words, both explicit and implicit, of the *VMI* decision, the inability to work due to pregnancy is a *natural* constraint on women, not an *artificial* one, which puts it outside the scope of equality law. Sex equality in *Geduldig* thus meant that women who could meet the demands of the workplace, on the workplace's own terms, could not be excluded or treated differently because of their sex. But the workplace need not adapt itself to women's needs.

A standard feminist criticism of *Geduldig* is that the court failed to consider how the arcs of women's and men's careers interact with family life.<sup>5</sup> Men, but not women, could have children without any disability, and the workplace had been designed with only men in mind. Indeed, the workplace was designed not just for any man but for the man who was what Professor Joan Williams has called the "ideal worker."<sup>6</sup> An ideal worker is not just a "non-pregnant person." He also has a wife at home who will handle the pregnancy and all the other homemaking that lets her husband focus on his career. Unlike Jaramillo, he can have children without interrupting his service to his employer. The workplace was designed for men like him. For many feminists, the discrimination was in that design. They believed that sex equality depended on restructuring the workplace, starting with some form of maternity leave. The flaw in *Geduldig* was that it ignored how California's insurance policy affected the careers of women and men over the long term. The court's parsing of pregnant and non-pregnant persons considered only a snapshot in time, ignoring the fact that the large majority of women would be pregnant at some point in their careers. An even larger majority were *at risk* of being pregnant at some point, and risk, after all, is what insurance is for.<sup>7</sup>

This feminist critique goes further than Jaramillo's argument in *Geduldig* itself. Jaramillo's lawsuit depended on the fact that California covered disabilities other than pregnancy. She asked only to be treated the same as a

similarly disabled man. The feminist critique, however, suggests that pregnancy is in fact different from other disabilities, precisely because it is sex-specific. States and employers are generally free to offer their workers disability insurance or not. Jaramillo's argument was thus a modest one. She argued that once a state or employer *chose* to cover other disabilities, it had to cover pregnancy too. It could still choose not to cover anyone. But from a narrow sex-equality perspective, one could argue that there is a *greater* obligation to cover a sex-specific condition like pregnancy than to cover other, sex-neutral disabilities because the large majority of women will become pregnant at some point in their lives. Sex equality might require that the workplace be designed with both women's and men's reproductive patterns in mind, whether or not it also takes care of people with other, non-sex-specific disabilities.

Even though Jackie Jaramillo lost in the Supreme Court, her case spurred Congress to study the matter and come to a different conclusion. In 1978, Congress passed the Pregnancy Discrimination Act to outlaw pregnancy discrimination in employment. (Congress cannot overrule the Supreme Court's interpretation of the equal protection clause of the Constitution. It can, however, tinker with the meaning of "equality" for purposes of federal employment law.<sup>8</sup>) The PDA says employers must treat pregnant workers the same as other workers who are "similar in their ability or inability to work."<sup>9</sup> This was what Jaramillo had asked for.

Ironically, the State of California had by then come around to the view that pregnancy should be accommodated, at least a little, even if other disabilities are not. In 1978, it passed a new law giving pregnant women the right to four months of unpaid maternity leave. A new mother wasn't guaranteed her job when the four months were up, but her employer had to make a "good faith" effort to bring her back. One woman who tried to take advantage of the new law was Lillian Garland, a receptionist at the California Federal Savings & Loan Association.<sup>10</sup> While she was pregnant in 1982, she trained a new employee to cover for her during her maternity leave. But when she was ready to go back to work, CalFed told her they'd replaced her—with the person she had trained.<sup>11</sup> She complained to the state, which brought suit to enforce the maternity-leave law against CalFed. (Just like with Jackie Jaramillo in *Geduldig*, the name of the main character in the story is missing from the name of the case. When Lillian Garland's case got to the Supreme Court, it was called *CalFed v. Guerra* because Mark Guerra was the California official responsible for enforcing the maternity-leave law.)

*CalFed v. Guerra* was the mirror image of *Geduldig*. In *Geduldig*, California had singled out pregnancy to be excluded from a benefit that otherwise applied to all people and conditions. The Supreme Court said that was not sex discrimination. In *CalFed*, California singled out pregnancy for a special benefit that wasn't available for other conditions. CalFed argued it was discriminatory to require a benefit that was only for women. Under the logic of *Geduldig*, CalFed's argument would have failed because California was giving maternity leave to pregnant persons, not to women. But CalFed argued that the Pregnancy Discrimination Act had changed all that. Because the PDA said pregnant women had to be treated "the same as" other disabled workers, CalFed argued it was actually illegal to have maternity leave *except* as part of a larger disability program. Special rights for pregnant women were just as bad as a special exclusion.

Most feminists reject the notion that maternity leave and other accommodations for pregnancy constitute unfair "special rights" for women. Following the logic of the "ideal worker" argument, they believe the main reason workplaces *lack* accommodations for pregnancy is that workplaces were designed for men. In *CalFed*, however, many feminist lawyers had their own concerns about "special rights," and thus they disagreed with the California law—at least to a point. Perhaps surprisingly, the nation's largest feminist political organization, the National Organization for Women, filed a brief in the Supreme Court arguing *against* singling out pregnancy for benefits. NOW worried that benefits specifically for women would hurt the feminist cause.<sup>12</sup> Instead, women should prove themselves in the workplace on the same terms as men. Any special accommodations would only entrench stereotypes and help to justify discrimination.

The NOW feminists had reason to believe that family-friendly policies in the workplace could inadvertently encourage discrimination against women.<sup>13</sup> For example, when Neil Gorsuch was nominated to the Supreme Court, a minor scandal erupted about a class he had taught at my law school at the University of Colorado. According to some of the students in the class, then-Judge Gorsuch had argued that young women lawyers behave unethically if they take law firm jobs while planning to become pregnant and take maternity leave at the firm's expense.<sup>14</sup> Setting aside the mystery of how it could be unethical to accept a benefit designed and offered by your employer, this argument implied that it would be reasonable for law firms not to want to hire young women. For some feminists worried about this reaction by employers, sex equality should mean only that women be allowed their fair

chance to compete on the same terms as men.<sup>15</sup> To the extent the workplace has problems—such as being hostile to family obligations of workers—maybe that should change, but it isn't a matter of sex equality. These feminists are wary of treating the conflict between work and family as a “women's issue,” even when it comes to pregnancy. Not only in the workplace but in life generally, women are often defined by and reduced to the role of mothers. Surely breaking down that stereotype is a worthy feminist project.

Still, even feminists who were wary of “special treatment” for pregnancy recognized that women would have a tough time achieving equality at work without some sort of maternity leave. They therefore offered the Supreme Court a different solution to Lillian Garland's case against CalFed. CalFed's argument went like this:

- The PDA says pregnancy must be treated the same as other temporary disabilities.
- We don't allow temporary disability leave, so we don't allow pregnancy leave either. California is trying to make us offer pregnancy leave, but that would violate the PDA because pregnancy would be treated differently from other temporary disabilities.
- Therefore, the California law is invalid because when a state law (pregnancy leave) conflicts with a federal law (the PDA), the federal law always wins.

The NOW feminists responded:

- California law requires employers to provide pregnancy leave.
- The federal PDA requires employers to treat pregnancy the same as other temporary disabilities.
- Employers can obey both laws by allowing leave for all temporary disabilities, including pregnancy. Therefore, there is no conflict between the California law and the PDA.

Thus, these feminists argued that the Supreme Court should resolve the case not by eliminating maternity leave but by expanding it to other temporary disabilities.

This argument drew on ideas that contributed to what we know today as the reproductive justice movement. Centering the experiences of Black women like Lillian Garland, advocates for reproductive justice analyze race,