2016

Blind Justice: The Need to Introduce Diverse Perspectives Into Our Legal System

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I. INTRODUCTION

Peggy Young was finally pregnant. This was the third time that she attempted in vitro fertilization. The first time, in 2005, the procedure was successful, but Young suffered a miscarriage. The second attempt at in vitro fertilization, in February 2006, failed. The third round, in July of 2006, was a success. Each time that Young underwent an in vitro fertilization attempt, she requested, and received, a leave of absence from her job at United Parcel Service (UPS).

But what should have been a joyous occasion—a pregnancy resulting in the birth of Young’s daughter Triniti—turned into a battle with UPS that went all the way to the Supreme Court. UPS refused to accommodate Young’s health needs during her pregnancy, compelling her to take an extended unpaid leave of absence, which in turn caused her to lose her health coverage. UPS’ refusal to accommodate Young came despite its policies accommodating other, non-pregnant, employees in similar situations. Young filed a charge with the Equal Employment Opportunity Commission (EEOC) as a result of UPS’ treatment, and, later, filed a charge with the United States District Court for the District of Maryland. Both charges

2. Id. at *3–4.
3. Id. at *3.
4. Id. at *4.
5. Id.
6. Id. at *3–4.
8. See discussion infra Part III.B.3.
9. See discussion infra Part III.A.
10. See infra notes 77–81 and accompanying text.
12. Id.
alleged that UPS discriminated against Young based on her gender and pregnancy.\textsuperscript{13} 

Unfortunately for Young, the lower federal courts agreed with UPS when it came to pregnancy accommodations.\textsuperscript{14} The courts, including both the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit,\textsuperscript{15} ruled against Young.\textsuperscript{16} Finding that there had been no discrimination based on gender or pregnancy, both courts repeatedly deferred to UPS' "pregnancy-blind policies."\textsuperscript{17} These holdings implied that discrimination is fine as long as policy-makers pretend that there are no differences between the way society treats men and women. Ultimately, the Supreme Court remanded the case, calling on the Fourth Circuit to determine whether UPS' reasons for treating Young differently from similarly situated non-pregnant employees was merely pretext.\textsuperscript{18} This was a step in the right direction, but it is unclear whether the ruling indicates a real change for the better, or is merely an outlier in recent jurisprudence.\textsuperscript{19} 

Pregnancy-blind policies, and similarly-termed "gender-neutral" policies,\textsuperscript{20} like those espoused by the lower courts in Young's case, only serve to maintain the status quo. Take, for example, Santa Clara County, California, where women made up 36.4\% of the labor force in 1987.\textsuperscript{21} In Santa Clara at the time, the Transportation Agency employed a workforce composed of only 22.4\% women,\textsuperscript{22} lower than the overall distribution in the labor pool. Within the Agency, women largely occupied positions adhering to gender stereotypes, such as office and clerical workers.\textsuperscript{23} If one were to assess the situation, keeping gender in mind, one could reasonably come to the conclusion

\textsuperscript{13} Id.; see also discussion infra Parts III.B.1–2. 
\textsuperscript{14} See discussion infra Parts III.B.1–2. 
\textsuperscript{15} Young v. United Parcel Serv. Inc., 707 F.3d 437, 442 (4th Cir. 2013). 
\textsuperscript{16} See discussion infra Parts III.B.1–2. 
\textsuperscript{17} See infra note 181 and accompanying text. 
\textsuperscript{18} Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1356 (2015). 
\textsuperscript{19} See discussion infra Part IV.B. 
\textsuperscript{21} These numbers come from Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616, 621 (1987), a case discussed in significantly more detail later. See infra notes 230–44 and accompanying text. 
\textsuperscript{22} Johnson, 480 U.S. at 621. 
\textsuperscript{23} Id. ("[W]omen made up 76\% of Office and Clerical Workers, but only 7.1\% of Agency Officials and Administrators, 8.6\% of Professionals, 9.7\% of Technicians, and 22\% of Service and Maintenance Workers.").
that there was a “manifest imbalance” along gender lines,\textsuperscript{24} which the Agency could correct by increasing the percentage of women it hired in male-dominated positions.\textsuperscript{25} A person adopting a gender-neutral perspective, on the other hand, would see the situation as perfectly reasonable, so long as the company had no policies specifically preventing women from being placed in the male-dominated positions.\textsuperscript{26} While ostensibly treating women equally, the results of gender-neutral policies in such a situation would be the continued dominance of males in certain jobs.

The preference for gender-neutral policies,\textsuperscript{27} while a creation of more recent jurisprudence, is merely the latest in a long legacy of judicial holdings that reinforce traditional gender roles.\textsuperscript{28} Courts largely fail to recognize that gender is a social construct:\textsuperscript{29} one which changes and evolves over time. Less than 150 years ago, Justice Bradley wrote that “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother[,]”\textsuperscript{30} a statement that modern Americans would likely find to be archaic and sexist. And yet, the underlying adherence to normative social ideas of that time still exists today: women are still perceived, to at least some extent, as child-bearers, while men are afforded more freedom and agency.\textsuperscript{31}

In order to combat this attitude, courts must take care to adopt women’s perspectives.\textsuperscript{32} Justices need to be cognizant of the United States’ legal and social history that produced the disadvantaged position in which women still find themselves today. Judges should think critically, asking whether their holdings produce equal results, and not just hypothetically equal treatment. Gender-neutral policies, by definition, are incapable of showing sensitivity towards our nation’s history of gender discrimination. As Justice Ginsburg explained in \textit{United States v. Virginia}, “[i]nherent 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.” 33

This comment will proceed in four parts following this introduction. Part II describes the legal background underpinning the Young decision. Part III discusses the facts and procedural history of Young’s case. It covers the District Court’s ruling, dividing it into analyses of the Pregnancy Discrimination Act and the Americans with Disabilities Act. It also illustrates the Court of Appeals’ holding, and explains the Supreme Court’s ultimate judgment.

Part IV provides an extended genealogy of the American justice system’s evolving attitudes towards gender. It begins with an analysis of the Supreme Court’s rulings on gender prior to the 1970s. It goes on to survey the Court’s great leaps forward in the latter quarter of the 20th century. The genealogy finishes by looking at some recent cases, including the Supreme Court’s holding in Young v. UPS. Finally, Part V contextualizes developing attitudes towards gender in the law using the social sciences and offers suggestions on how courts should proceed. Throughout this comment, courts’ prior decisions and future directions are analyzed and critiqued in light of the need to keep diverse perspectives in mind in order to achieve true gender equality.

II. BACKGROUND

Young’s lawsuit against UPS asserted violations of Title VII of the Civil Rights Act of 1964 (Title VII), 34 as amended by the Pregnancy Discrimination Act of 1978 (PDA). 35 Congress passed the PDA, in

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34. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1344 (2015). Title VII, in relevant part, states that:
   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; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.
35. Id. § 2000e(k).
part, as a response to *General Electric Co. v. Gilbert*,\(^36\) which held that "pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks."\(^37\) The PDA includes pregnancy in the definition of sex discrimination which is proscribed by Title VII.\(^38\) With the PDA, Congress intended to ensure that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."\(^39\) The PDA does not prohibit favorable treatment of pregnancy.\(^40\) It also clarifies that treating pregnancy-related conditions with disfavor relative to other medical conditions is discrimination.\(^41\)

Under the PDA, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ."\(^42\) A plaintiff can establish a pregnancy discrimination claim by showing, either directly or by circumstantial evidence, that pregnancy discrimination motivated her employer's actions.\(^43\) Alternatively, she can demonstrate "pretext" by establishing a "prima facie case of discrimination" and then demonstrating that the employer's actions are actually a pretext for pregnancy discrimination.\(^44\)

Young also brought suit under the Americans with Disabilities Act of 1990 (ADA),\(^45\) which prohibits "discriminat[ion] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."\(^46\) The ADA further proscribes an employer from requiring medical examinations of employees to determine whether the individual has a disability, or to determine the severity of any disability, unless the examination is job

37. 429 U.S. 125, 139 (1976).
38. *Guerra*, 479 U.S. at 284.
44. *Id.* at 285.
46. *Id.* § 12112(a).
related or results from a business necessity. Congress found the passage of the ADA to be necessary in order to address persistent discrimination against individuals with disabilities that resulted in "society . . . tend[ing] to isolate and segregate [those] individuals."

The ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." It further defines "major life activities" as "includ[ing], but . . . not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." In applying the ADA, courts found that a lifting restriction of 23 pounds qualifies as a substantial limitation on the ability to engage in major life activities. Courts also interpreted "disability" to cover a broad array of physical limitations, including a heart condition which caused labored breathing when working in high temperatures.

III. YOUNG V. UPS

Even though Young worked for UPS for years and rarely had to transport any heavy packages, UPS would not permit Young to work as long as her pregnancy affected her ability to lift anything over 20 pounds. UPS also refused to provide Young with light-duty work during the pregnancy, despite offering light-duty assignments to male employees with similar limitations due to medical conditions. As a result, Young had to take an extended unpaid leave of absence.

47. Id. § 12112(d)(4)(A).
48. Id. § 12101(a)(2).
49. Id. § 12102(1)(A).
50. Id. § 12102(2)(A).
51. See, e.g., Burns v. Coca-Cola Enters., 222 F.3d 247, 255–56 (6th Cir. 2000) ("[B]ecause working is generally accepted as a major life activity, and because the determination whether a claimant is disabled depends on an individualized inquiry, . . . Burns was disabled because his back injury precluded him from performing at least 50% of the jobs previously available to him.").
52. See, e.g., Gribben v. UPS, 528 F.3d 1166, 1171 (9th Cir. 2008) ("There was sufficient evidence in the record at the summary judgment proceeding to establish a genuine issue of material fact as to whether Gribben’s impairment was substantial and limited his ability to perform regular daily activities including breathing, thinking and physical activities in temperatures of 90 degrees or more.").
53. See infra notes 68, 71–72 and accompanying text.
54. See infra notes 73–76, 82–86 and accompanying text.
55. See infra notes 76–80, 84–88 and accompanying text.
and lost her health coverage. Young brought suit against UPS in the United States District Court for the District of Maryland, alleging violations of the PDA and the ADA. The court found for UPS, on the grounds that “pregnancy-blind policy” cannot be discriminatory. Young appealed to the United States Court of Appeals for the Fourth Circuit, which also found for UPS, again ruling that UPS’ “pregnancy-blind policy” was not discriminatory. The court also held that it could not expand the protections provided by Title VII. Young appealed again, taking her case to the Supreme Court, which vacated the Fourth Circuit’s ruling and remanded the case. It ruled that when an “employer's policies impose a significant burden on pregnant workers,” and the employer’s reasons for the policy “are not sufficiently strong to justify the burden,” it can create “an inference of intentional discrimination.”

The lower courts’ adherence to pregnancy-blind policies failed to take into account women’s perspectives, and followed a long line of court decisions that, due to an unwillingness to act or affect change on the part of the courts, place women in a disadvantageous position relative to men. The Supreme Court’s decision, while encouraging, only briefly and obliquely addressed the issue of gender-neutral policy, and never conclusively determined whether UPS discriminated against Young on the basis of her pregnancy.

A. Facts of the Case

Young worked at UPS for seven years leading up to her pregnancy. UPS originally hired her in 1999, and she became a driver in 2002. At the time of her pregnancy, Young worked as an

56. See infra notes 93–94 and accompanying text.
57. See infra notes 100–102 and accompanying text.
58. See infra notes 111–12 and accompanying text.
60. Id. at 446.
61. Id. at 451.
64. Id. at 1354.
65. See discussion infra Parts IV.A, IV.C.
66. Young, 135 S. Ct. at 1355.
67. Id. at 1356.
69. Id.
air driver, delivering packages shipped via air carrier.\textsuperscript{70} While air drivers typically did not deliver heavy packages, UPS still required its air drivers to be able to move packages weighing up to 70 pounds.\textsuperscript{71} Young was largely able to circumvent the lifting requirements without interfering with her ability to deliver packages: air delivery is more expensive than ground delivery, so heavier packages are rarely sent by air; Young had access to a hand truck to help move heavier packages; and other drivers would sometimes deliver heavier packages for her.\textsuperscript{72}

Despite the ease with which drivers could get around the weight requirements, UPS still expected employees who could not perform such an "essential function" of their job due to off-the-job circumstances to take a leave of absence.\textsuperscript{73} UPS considered pregnancy to be an off-the-job condition.\textsuperscript{74} While UPS permitted pregnant employees to continue to work, if an employee presented a doctor's note detailing the medical restrictions that interfered with her ability to fulfill the essential functions of her job, she had to take a leave of absence.\textsuperscript{75} Each time Young underwent a round of \textit{in vitro} fertilization, she complied with this requirement.\textsuperscript{76}

UPS allowed employees to take on temporary light-duty assignments,\textsuperscript{77} but only when the employees were unable to perform their jobs due to an on-the-job injury,\textsuperscript{78} were suffering from a qualifying ADA recognized disability,\textsuperscript{79} or failed a Department of Transportation (DOT) medical exam.\textsuperscript{80} Pregnant employees, per UPS’ policies, did not qualify for light-duty assignments.\textsuperscript{81}

Despite the pregnancy, Young’s midwife, Cynthia Shawl, gave her permission to return to work in October 2006.\textsuperscript{82} However, Shawl

\begin{thebibliography}{9}
\bibitem{70} Young v. United Parcel Serv., Inc., 707 F.3d 437, 440 (4th Cir. 2013).
\bibitem{71} \textit{Young}, 2011 WL 665321, at *1.
\bibitem{72} \textit{Id.} After the second round of attempted \textit{in vitro} fertilization, Carol Richardson, the other driver on Young’s route, volunteered to deliver all of the heavier packages for Young due to concerns with Young’s health. \textit{Id.} at *4.
\bibitem{73} \textit{Id.} at *2.
\bibitem{74} \textit{Id.}
\bibitem{75} \textit{Id.}
\bibitem{76} \textit{See supra} note 6 and accompanying text. Young took leaves of absence from July 2005 to October 2005, \textit{Young}, 2011 WL 14266, at *3, February to March 2006, \textit{id.} at *4, and in July 2006, \textit{id.}
\bibitem{77} \textit{Id.} at *2.
\bibitem{78} \textit{Id.}
\bibitem{79} \textit{Id.}
\bibitem{80} \textit{Id.} at *3.
\bibitem{81} \textit{Id.} at *2.
\bibitem{82} \textit{Id.} at *5.
\end{thebibliography}
wrote a note recommending that Young not lift more than 20 pounds as a result of her pregnancy.83 Young requested that UPS allow her to return to work, but disclosed the note from Shawl and asked whether she could be assigned light-duty work due to her pregnancy.84 Carolyn Martin, UPS’ District Occupational Health Manager for Young’s region, was responsible for determining whether Young could return to work and whether she qualified for light-duty assignments.85 Martin refused to permit Young to return to her air driver position due to the weight requirements for that job.86 Martin further decided that pregnancy did not qualify Young for light-duty work.87 According to Martin, she wanted to help Young, but the UPS policy required her to “treat [Young] like [she] would treat anybody who had a note for lifting and couldn’t do their regular job.”88 Had Young provided Martin with a note stating that Young was entirely unable to work, Young would have been eligible for disability, but that was not the case.89

Young also alleged that she spoke to her supervisor, Myron Williams, about returning to work.90 Williams lacked authority to permit Young to resume her job.91 Nevertheless, Williams allegedly told Young “not to come back in the building until [she] was no longer pregnant because [she] was too much of a liability.”92

Unable to return to her normal job or take on a light-duty assignment, Young had to extend her leave of absence.93 Because Young had already exhausted her medical leave, UPS did not pay her during her leave of absence and she lost her medical coverage.94 On April 29, 2007,95 Young gave birth to Triniti,96 and on June 26, 2007, she returned to her job at UPS.97

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83. Id.
84. Id.
85. Id. at *3.
86. Id. at *4–5.
87. Id. at *5.
88. Id.
89. Id.
90. Id. at *6.
91. Id.
92. Id. Williams denies ever making this statement. Id.
93. Id.
94. Id.
95. Id.
96. Schulte, supra note 7.
97. Young, 2011 WL 665321, at *6. Young delayed her return to work in order to have a maternity leave and in order to better be prepared “physically [and] emotionally” to perform her job. Id.
B. Procedural History

1. The District Court’s Approval of a Pregnancy-Blind Policy

Young filed a charge with the EEOC on July 23, 2007. She alleged that UPS discriminated against her based on her gender and pregnancy. The EEOC issued a right to sue letter, and Young filed suit against UPS in the United States District Court for the District of Maryland on October 3, 2008. Her lawsuit asserted violations of both the PDA and ADA.

a. The Pregnancy Discrimination Act

In arguing that direct evidence of pregnancy discrimination existed, as required by the PDA, Young offered Williams’ alleged remarks that she “was too much of a liability.” While derogatory remarks can constitute evidence of discrimination under some circumstances, a plaintiff cannot demonstrate discrimination through “stray or isolated” remarks unless the remarks “were related to the employment decision in question.” Because Williams was Young’s supervisor but had no authority to supersede Martin’s decisions regarding accommodations, the court held that his remarks could not be “related to the employment decision in question.” The United States District Court of Maryland also found that Williams’ remarks were isolated, as there was insufficient evidence to indicate that a pervasive corporate culture of discrimination existed at UPS.

Young also suggested that UPS’ requirement that she produce a doctor’s note to prove that her pregnancy physically limited her, along with UPS’ policy denying light-duty assignments to pregnant women, constituted direct evidence of discrimination. However,

98. Id.
99. Id.
100. Id.
103. See supra notes 43–44 and accompanying text.
109. Id.
110. Id.
the District Court ruled that no direct evidence of pregnancy discrimination existed, “[b]ecause UPS determines whether accommodations will be offered on . . . gender-neutral criteria, [so the policy is] at least on its face a ‘neutral and legitimate business practice.’” Citing an analogous Sixth Circuit case, the District Court held that UPS’ policy “simply does not grant or deny light work on the basis of pregnancy, childbirth, or related medical conditions” and that such a “pregnancy-blind policy, therefore, cannot serve as direct evidence of . . . alleged discrimination.”

In the absence of direct or circumstantial evidence of discrimination, Young attempted to make the argument that UPS’ policies were merely a pretext for discrimination. To make the pretext argument, Young first had to “establish a ‘prima facie’ case of discrimination.” In order to do this, Young needed to demonstrate that “(1) she [was] a member of a protected class; (2) she was qualified for the job and performed it satisfactorily; (3) she suffered an adverse employment action; and (4) she was treated differently than similarly situated employees outside of the protected class.” As a pregnant woman denied light-duty, Young fulfilled the first and third requirements. As to the fourth requirement, Young needed to demonstrate the existence of “comparators”—other employees in similar situations whom UPS treated differently. For comparators, Young offered examples of employees accommodated under the ADA and under the policy accommodating drivers who failed the DOT medical exam. The District Court rejected these comparators, holding that Young was ineligible for ADA accommodations. The court distinguished Young from the drivers who failed their DOT medical exams, because Young suffered from a “physical impairment” and the drivers merely suffered from a “legal obstacle.”

111. Id. at *11 (quoting Merritt v. Old Dominion Freight Line, Inc., 601 F.3d 289, 297 (4th Cir. 2010)).
112. Id. at *12 (quoting Reeves v. Swift Transp. Co., Inc., 446 F.3d 637, 641 (6th Cir. 2006)).
113. Id.
114. Id.
115. Id.
116. Id.
117. Id. at *13.
118. Id.
119. Id.
120. Id. (holding that “[t]hose inabilities are dissimilar”).
The District Court further ruled that, even if Young established a prima facie case of pregnancy discrimination, she would not have been able to show that UPS’ non-discriminatory explanation was merely pretext.\textsuperscript{121} The court held that Martin genuinely believed that Young could not perform her job, based on the doctor’s note, which sufficiently established the existence of a non-discriminatory explanation.\textsuperscript{122} As a result of this non-discriminatory explanation, the court held that Young could not focus on “minor discrepancies” and “mistakes of fact” in order to show that UPS’ rationale was merely pretext.\textsuperscript{123}

\textbf{b. The Americans with Disabilities Act}

Young also brought suit under the ADA.\textsuperscript{124} Young claimed that UPS’ requirement that she submit a doctor’s note was discriminatory under the ADA.\textsuperscript{125} The ADA prohibits an entity from requiring medical examinations that are not “job-related and consistent with business necessity.”\textsuperscript{126} However, the District Court ruled that, since Young’s job required lifting and moving heavy packages, the request for a doctor’s note was “job-related and consistent with business necessity.”\textsuperscript{127}

Young further argued that UPS regarded her as disabled, but still failed to offer her accommodations under the ADA.\textsuperscript{128} The District Court ruled that, for the purposes of the ADA, “[a] person is not [disabled] merely because she is (a) limited to lifting a few pounds or (b) pregnant.”\textsuperscript{129} The court also ruled that an employer is not obligated to accommodate an employee who is merely “regarded as disabled.”\textsuperscript{130} The court held that “[a]lthough the ADA rightfully

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\textsuperscript{121.} Id. at *14.
\textsuperscript{122.} Id.
\textsuperscript{123.} Id. at *15 (quoting Holland v. Washington Homes, Inc., 487 F.3d 208, 216 (4th Cir. 2007)).
\textsuperscript{124.} Id. at *7.
\textsuperscript{125.} Id. at *16.
\textsuperscript{127.} Young, 2011 WL 665321, at *16–17 (quoting § 12112(d)(4)(A)).
\textsuperscript{128.} Id. at *17.
\textsuperscript{129.} Id. at *18.
\textsuperscript{130.} Id. The court conceded that there was a circuit split regarding this question. The Fourth Circuit had not yet ruled on the question. The Fifth, Sixth, Eight, and Ninth Circuits had previously held that employees regarded as disabled were not entitled to an accommodation, while the First, Third, Tenth, and Eleventh Circuits held that employees regarded as disabled were entitled to an accommodation. Influenced by the rulings of several District Courts in the Fourth Circuit, the court decided that the former interpretation was better. Id.
intends to restore the damages ‘regarded as’ disabled employees suffer because of disability discrimination, it is an entirely different proposition to suggest that these employees deserve additional benefits despite their lack of any actual disability.”131 The court took the stance that it would be inappropriate to require employers to accommodate “regarded as” employees who make it clear that they are not, in fact, disabled.132 Having dispensed with both Young’s PDA claim and her ADA claim, the District Court granted UPS’ motion for summary judgment.133

2. The Court of Appeals: Not Unsympathetic, But . . . .

On October 24, 2012, Young challenged the District Court’s grant of summary judgment to UPS on the PDA and ADA claims in the United States Court of Appeals for the Fourth Circuit.134 The Fourth Circuit reviewed the grant of summary judgment de novo.135 In analyzing the PDA claim, the Court of Appeals first looked for direct evidence of pregnancy discrimination.136 The court held that UPS’ policy denying light-duty assignments to pregnant workers was not direct evidence of discrimination, because “[b]y limiting accommodations to those employees injured on the job, disabled as defined under the ADA, and stripped of their DOT certification, UPS has crafted a pregnancy-blind policy.”137 It rejected Young’s suggestion that the PDA created a cause of action distinct from sex discrimination claims,138 holding that interpreting the PDA in such a way would treat pregnancy “more favorably than any other basis . . . covered by Title VII.”139

The Court of Appeals also held that Williams’ remarks did not constitute “corporate animus,” which would be necessary to

131. Id. at *19.
132. Id. “Forcing employers to accommodate ‘regarded as’ employees . . . would ‘create a windfall for . . . employees who, after disabusing their employers of their misconceptions [regarding their disabilities], would nonetheless be entitled to accommodations that their similarly situated co-workers are not, for admittedly non-disabling conditions.’” Id. (quoting Weber v. Strippit, 186 F.3d 907, 917 (8th Cir. 1999)).
133. Id. at *22.
135. Id. at 443.
136. Id. at 446.
137. Id.
138. Id. at 446–47.
139. Id. at 447.
demonstrate direct evidence of discrimination on the part of UPS.\textsuperscript{140} The court found that Williams' remarks were the only instance of pregnancy-related animus coming from UPS, and could not, on their own, demonstrate corporate animus.\textsuperscript{141} Furthermore, Williams lacked the authority to make any decisions about Young’s employment and did not attempt to influence anyone who did have such authority, so his remarks could not establish direct evidence of discrimination on UPS’ part.\textsuperscript{142}

Like the District Court below, the Court of Appeals determined that Young could not prove a prima facie case of discrimination, because Young could not identify appropriate comparators.\textsuperscript{143} It held that comparisons to employees accommodated by the ADA, placed on temporary light-duty due to losing DOT certification, or who suffered on-the-job injuries were inappropriate comparators, because “these accommodations were created by a neutral, pregnancy-blind policy.”\textsuperscript{144}

The Court of Appeals also agreed with the District Court when it came to the ADA claim.\textsuperscript{145} The court held that Young could not establish that she had a disability as defined by the ADA.\textsuperscript{146} Finding that Young could not show that Martin subjectively believed that she was disabled, the court determined that there was no indication that UPS regarded Young as disabled.\textsuperscript{147}

The Court of Appeals affirmed the District Court’s decision without any dissent.\textsuperscript{148} The Fourth Circuit’s opinion focused on the fact that UPS’ policies were non-discriminatory because they were facially pregnancy-blind.\textsuperscript{149} The court admitted sympathies towards Young’s circumstances, but indicated that it held reservations “about the problematic potential of creating rights not grounded in the text and structure of Title VII as a whole.”\textsuperscript{150}

\textsuperscript{140} Id. at 449.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 450–51; see supra notes 117–20 and accompanying text.
\textsuperscript{144} Young, 707 F.3d at 450.
\textsuperscript{145} Id. at 443.
\textsuperscript{146} Id. The ADA defines a disability as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” Id. (quoting 42 U.S.C. § 12102(1) (2012)).
\textsuperscript{147} Young, 707 F.3d at 445.
\textsuperscript{148} Id. at 451.
\textsuperscript{149} See supra notes 137, 144 and accompanying text.
\textsuperscript{150} Young, 707 F.3d at 451.
3. The Supreme Court Gives Young Another Chance

Young appealed the Fourth Circuit’s ruling to the Supreme Court on April 8, 2013.151 The Court granted the writ of certiorari on July 1, 2014, and heard oral arguments on December 3, 2014.152 In a majority opinion written by Justice Breyer,153 the Court vacated and remanded the Fourth Circuit’s ruling.154 It found that the summary judgment in favor of UPS was unwarranted because there was a genuine dispute of material fact as to whether UPS provided light-duty accommodations to other employees who were similarly situated to Young.155

The Court relied on the same framework laid out in McDonnell Douglas that the District Court used.156 However, it differed on its interpretation of that framework,157 especially when it came to the requirement that Young show that UPS accommodated other employees who were similarly situated.158 It held that a “plaintiff may reach a jury on” the issue of whether an employer’s reasons for disparate treatment are the result of pretext “by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers” and then demonstrating that the employer’s “reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.”159 If a plaintiff can show “that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers,” then the plaintiff “create[s] a genuine issue of material fact as to whether a significant burden exists.”160 It held that “a plaintiff can use circumstantial proof to rebut an employer’s apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class.”161

154. Id. at 1356.
155. Id. at 1355.
156. Id. at 1345; Young v. United Parcel Serv., Inc., No. DKC 08-2586, 2011 WL 665321, at *12 (D. Md. Feb. 14, 2011); see supra notes 113–23 and accompanying text.
158. Young, 135 S. Ct. at 1354.
159. Id.
160. Id.
161. Id. at 1355.
The plaintiff can offer the manner in which an employer applies a policy to rebut the employer's reasons for differential treatment. In this case, the Court felt that Young, at minimum, had created a genuine issue of material fact by pointing to the numerous non-pregnant employees who received light-duty accommodations. It remanded to the Fourth Circuit, leaving it up to the lower court to determine whether UPS' reasons for differential treatment were pretext for discrimination. The final outcome of Young's legal struggles still remains to be seen.

IV. A GENEEOLOGY OF MALE PRIVILEGE IN THE LAW

Male privilege was ingrained in the United States' legal system from the very beginning. From the language of the Constitution, all the way up to recent Supreme Court decisions, women have taken a backseat to men. This androcentrism is often unintentional, or well-meaning, but is pervasive nevertheless. Frequently, the courts are reluctant to make necessary changes, either denying their ability to affect change altogether, or leaving the responsibility up to some other party. In essence, it comes down to an inability to recognize artificially-constructed gender stereotypes, the interaction between law and society, and the opportunity the justice system has to make things better. A survey of our legal history shows that Young is the inheritor of the impact of generations of gender discrimination that primarily male justices have foisted on women, as contemporarily encapsulated by "pregnancy-blind policy."

162. Id.
163. Id.
164. Id. at 1356.
165. See discussion infra Part IV.A.
166. See infra notes 182-83 and accompanying text.
167. See discussion infra Part IV.C.
168. See, e.g., infra notes 212-14 and accompanying text.
169. See, e.g., infra notes 201-06 and accompanying text.
170. See discussion infra Parts IV.A-C.
171. See infra note 192 and accompanying text.
172. See infra note 254 and accompanying text.
173. See discussion infra Part V.
174. See infra notes 317-28 and accompanying text.
175. See infra notes 248-49 and accompanying text.
176. See discussion infra Parts IV.A-C.
177. See infra notes 179-81 and accompanying text.
A. An American Legal History of Preserving and Enhancing Male Status

Peggy Young’s case is just the most recent example of the manner in which our legal system maintains male privilege. Ostensibly designed to prevent pregnancy discrimination, the language of the PDA serves to undermine itself: “[W]omen affected by pregnancy... shall be treated the same for all employment-related purposes... as other persons not so affected but similar in their ability or inability to work...” Instead of providing any special protections for pregnancy, the PDA has been interpreted such that it permits employers to deny accommodations to pregnant employees while granting accommodations to employees who are not pregnant, so long as the employers can demonstrate any pregnancy-neutral purpose for their policies, no matter how implausible. This interpretation is reflected in the rulings of the District Court and the Court of Appeals, both of which repeatedly refer to UPS’ “gender- or pregnancy-neutral” and “pregnancy-blind” policies.

The concept of gender-neutral legal policy is the contemporary inheritor of an American legal history of preserving and enhancing male status. The genealogy of this status-protectionism can be traced back to the founding documents of this nation: the Constitution, for example, does not include the words “woman,” “women,” “female,” etc.
It does, however, refer to elected representatives as "he" throughout. The result is a document that favors an insular, androcentric point of view.

The Supreme Court echoed this gender elitism in some of its most distressing cases. In *Bradwell v. State*, the Supreme Court held that the plaintiff, a woman from Illinois, did not have the right to practice law. It found that the federal government lacked the power to grant women a license to practice law when such practice was prohibited by a state, and that citizenship did not confer the right to attain a license to practice law. In a concurrence that sheds light on the Court's mindset, Justice Bradley wrote:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

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182. See U.S. Const.

183. *Starting in* U.S. CONST. art. I, § 2, cl. 2 ("No person shall be a Representative who shall not . . . be an Inhabitant of that State in which he shall be chosen.") (emphasis added) and *continuing on through id. amend. XXV, § 4, cl. 2, ("Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office . . . .") (emphasis added). This habit of androcentrism has unfortunately continued through the centuries, and is ironically present in Title VII, which, for example, prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . ." 42 U.S.C. § 2000e-2(a)(1) (2012) (emphasis added).

184. 83 U.S. (16 Wall.) 130 (1873).

185. *Id.* at 130, 139.

186. *Id.* at 139.

187. *Id.* at 141 (Bradley, J., concurring).
Similarly, in *Minor v. Happersett*, the Court ruled that women did not have the right to vote. The Court held that the Fourteenth Amendment did not expand the privileges or immunities of a citizen of the United States. It further held that suffrage was not among those privileges or immunities, since it was not explicitly listed as such in the Constitution. As in *Bradwell*, the Court maintained that it lacked the power to do anything about it, even if it was morally wrong to deny women the right to vote.

Even when the Court attempted to enact positive social change—despite its disavowal of its power to do such a thing—it did so in a paternalistic fashion. In *Muller v. Oregon*, the Court looked at the constitutionality of an Oregon law that prohibited women from working in “any mechanical establishment, or factory, or laundry” more than 10 hours a day. The Court found that the law was constitutional, despite having struck down a 60-hour maximum work week law and establishing “the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary” just three years earlier in *Lochner v. New York*. The Court distinguished *Muller* from *Lochner* by emphasizing that the Oregon law specifically dealt with women, who are “properly placed in a class by [themselves], and legislation designed for [their] protection may be sustained, even when like legislation is not necessary for men and could not be

188. 88 U.S. 162 (1874).
189. Id. at 176 (“[I]t is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.”).
190. Id. at 171, 175.
191. Id. at 170.
192. Id. at 178.
193. See supra note 192 and accompanying text.
194. 208 U.S. 412 (1908).
195. Id. at 416–17.
sustained.” The Court was not acting out of progressive attitudes towards labor; it was protecting “the future well-being of the race” by reinforcing women’s traditional role as child-bearers. It justified its ruling thusly:

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Almost 30 years later, even after the ratification of the Nineteenth Amendment in 1920 granted women’s suffrage, the Court’s paternalistic attitude towards women remained. In *West Coast Hotel Co. v. Parrish*, the Court looked at the constitutionality of a Washington law establishing a minimum wage for women. A hotel owner challenged the Washington law “as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States,” since it deprived women of the right of freedom of contract. The Court held that “the protection of women is a legitimate . . . exercise of state power” that overcomes the right of freedom of contract. The Court asked, “What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?” The implication was that women needed more state protection than men, presumably because of some inherent deficiency. Substantial progress has been made since these cases, and all have been overturned, but they laid

197. *Muller*, 208 U.S. at 422.
198. *Id.*
199. *Id.* at 421.
200. U.S. CONST. amend. XIX.
201. 300 U.S. 379 (1937).
202. *Id.* at 386.
203. *Id.* at 388.
204. *Id.* at 391.
205. *Id.* at 398.
206. *Id.*
the path for things to come and represented the unfortunate history of our legal system's treatment of women.

B. Steps in the Right Direction . . . .

As time passed, the Court managed to consider women as more than just child-bearing objects whose protection is necessary in order to ensure humanity's "strength and vigor" or "future well-being."\(^{207}\) When the Court considers the perspective of women, and remains cognizant of the recent developments in sociology and psychology, as it did in regard to race with *Brown v. Board of Education*,\(^{208}\) it is capable of great strides forward. *Phillips v. Martin Marietta Corp.* was an early example of the Court reluctantly using the law to address and weaken gender stereotypes.\(^{209}\) In *Phillips*, the plaintiff, a woman, contended that Martin Marietta Corporation engaged in gender-discriminatory hiring practices by refusing to accept applications from women with preschool-age children while simultaneously employing men with preschool-age children.\(^{210}\) The Court agreed, finding that Title VII did not permit one hiring policy for men and another, separate, policy for women.\(^{211}\) Martin Marietta's hiring policy adhered to gender stereotypes, framing women as homemakers and mothers and men as bread-winners, and the Court rebuffed those stereotypes.

However, the Court was not completely unequivocal in its ruling. It suggested that "conflicting family obligations" could qualify as "bona fide occupational qualification[s]."\(^{212}\) It was unable to wholly discard perceived gender roles. Only Justice Marshall was bold enough to be so explicit, accusing the majority of falling "into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination."\(^{213}\) He alone maintained that gender stereotypes could not justify discriminatory hiring practices.\(^{214}\)

\(^{207}\) Muller v. Oregon, 208 U.S. 412, 421–22 (1908).
\(^{208}\) 347 U.S. 483, 494 (1954). In finding that segregated educational facilities created a deeply ingrained sense of inferiority that was "inherently unequal," the Court looked at then-modern social science authorities, as discussed in its famous footnote 11. *Id.* at 494–95, 494 n.11.
\(^{209}\) 400 U.S. 542 (1971) (per curiam).
\(^{210}\) *Id.* at 543.
\(^{211}\) *Id.* at 544.
\(^{212}\) *Id.*
\(^{213}\) *Id.* at 545 (Marshall, J., concurring).
\(^{214}\) See *id.* ("Even characterizations of the proper domestic roles of the sexes [are] not to serve as predicates for restricting employment opportunity.").
The Court further undermined long-held gender stereotypes in Reed v. Reed,215 a case on which future Justice Ruth Bader Ginsberg worked as an attorney.216 In Reed, the Court considered whether an Idaho statute violated the Equal Protection Clause.217 The statute in question determined the order of preference in the designation of an individual to administer the estate of a person who died intestate.218 The precise language of the statute read that, “of several persons claiming and equally entitled [under § 15-312] to administer, males must be preferred to females . . . .”219

The Court held that the Equal Protection Clause denies States the authority to craft statutes that treat classes of people differently based on arbitrary grounds “wholly unrelated to the objective of that statute.”220 This was the first time in United States history—almost 200 years after the nation was formed—that the Court ruled in favor of a woman in an equal protection case.221 In the process, the Court asked “whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the statutes].”222 The Court tacitly acknowledged that there is no difference between men and women when it comes to their competency administering estates, and that bureaucratic convenience did not trump equal protection.223 In making its decision, the Court rejected the notion that women were incapable of handling financial responsibilities as effectively as men.

In an opinion owing much to Reed, the Court finally recognized the changing perception of gender roles in Stanton v. Stanton.224 In Stanton, the Court found that a Utah statute setting the age of majority for women at 18 and for men at 21 violated the Equal

216. See Brief for Appellant, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4).
217. Reed, 404 U.S. at 74.
218. Id. at 72–73.
219. Id. at 73 (alteration in original) (quoting Idaho Code § 15-312 (repealed 1972)).
220. Id. at 75–76.
222. Reed, 404 U.S. at 76. This language eventually influenced the creation of the “intermediate scrutiny” test laid out in Craig v. Boren. See Craig v. Boren, 429 U.S. 190, 197–99 (1976) (citing Reed, 404 U.S. at 75) (describing the intermediate scrutiny test).
223. Reed, 404 U.S. at 76–77. The Idaho Supreme Court ruled that the statutes were constitutional because they improved bureaucratic efficiency by eliminating hearings on the merits of two or more petitioning relatives. Id. at 76.
Protection Clause.\textsuperscript{225} The lower court found the statute acceptable because “it is the man’s primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females tend to marry earlier than males.”\textsuperscript{226} This interpretation would have legitimized traditional gender roles, but the Supreme Court disagreed.\textsuperscript{227} Instead, it recognized that “[a] child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”\textsuperscript{228} At long last, the Court explicitly acknowledged that gender stereotypes are insufficient to justify discriminatory treatment.\textsuperscript{229}

Slightly over a decade later, in \textit{Johnson v. Transportation Agency, Santa Clara County},\textsuperscript{230} the Court moved from simply responding to gender stereotypes to actually trying to address gender imbalance. In \textit{Johnson}, the petitioner challenged an affirmative action plan developed by the Transportation Agency of Santa Clara County, California, which accounted for the gender of job applicants.\textsuperscript{231} The petitioner claimed that this plan violated Title VII by impermissibly taking gender into account.\textsuperscript{232} The Agency, however, argued it needed the plan in order to address employment discrimination.\textsuperscript{233} The Agency further contended that “mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of . . . women.”\textsuperscript{234} To achieve this equitable representation, the Agency crafted a plan designed to proactively place women and other minorities into positions where they were underrepresented.\textsuperscript{235}

The Court upheld the Agency’s plan as constitutional, praising it for making progress in “eliminating the vestiges of discrimination in the workplace.”\textsuperscript{236} This decision was anything but gender-neutral. It

\textsuperscript{225} \textit{Id.} at 9, 17.
\textsuperscript{226} \textit{Id.} at 14.
\textsuperscript{227} \textit{Id.} at 14–15.
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.} at 17.
\textsuperscript{230} 480 U.S. 616 (1987).
\textsuperscript{231} \textit{Id.} at 619.
\textsuperscript{232} \textit{Id.}
\textsuperscript{233} \textit{Id.} at 620 n.3.
\textsuperscript{235} \textit{Id.} at 620–21.
\textsuperscript{236} \textit{Id.} at 642.
intentionally condoned gender-sensitive hiring procedures when those procedures sought to correct "a 'manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories.'" 237 This was a huge step forward. Not only did the Court acknowledge that there was a "manifest imbalance," but it actually recognized that showing favoritism towards women was necessary to counteract years of gender discrimination. 238

Johnson also contained an ominous reference to gender-neutral policy that would presage the direction the Court would take in the future. 239 In a fervent dissent, Justice Scalia admonished the Court for "complet[ing] the process of converting [Title VII] from a guarantee that race or sex will not be the basis for employment determinations, to a guarantee that it often will." 240 In the dissent, Justice Scalia seemed to accept gender-neutral policies, but was appalled by the notion that policies might actually advance women's positions in society. 241 He reminded the Court that the Agency designed its plan to correct gender discrimination due to the effects of gender stereotypes in society, not to correct gender discrimination by the Agency itself. 242 This he saw as an insufficient reason to uphold the Agency's plan. 243 In the end, he accused the majority of "impos[ing] . . . sexual tailoring that would, in defiance of normal expectations and laws of probability, give each protected . . . sexual group a governmentally determined 'proper' proportion of each job category." 244 In essence, Justice Scalia unwittingly laid out the argument as to why gender-neutral policies are inadequate to do anything more than ensure that the "manifest imbalance" does not get any worse.

Justice Ginsburg answered Scalia's criticism another decade later, in United States v. Virginia. 245 In a majority opinion written by

237. Id. at 631 (quoting United Steelworkers of Am. v. Weber, 443 U.S. 193, 197 (1979)).
238. Id. at 631, 636.
239. Id. at 658 (Scalia, J., dissenting).
240. Id.
241. See id. ("[W]e effectively replace the goal of a discrimination-free society with the quite incompatible goal of proportionate representation . . . by sex in the workplace.").
242. See id. at 664 ("The most significant proposition of law established by today's decision is that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs.").
243. Id.
244. Id. at 660.
Justice Ginsburg and once again referring to Reed,246 the Court in United States v. Virginia held that the Virginia Military Institute (VMI) violated the Equal Protection Clause by denying admission to women.247 Justice Ginsburg made it clear when gender-based classifications were, and were not, permissible:

Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to promote equal employment opportunity, [and] to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.248

This may be the high-water mark of Supreme Court jurisprudence when it comes to recognizing the effect of society and the law on gender roles and realizing the need for courts to take women’s perspectives into account. Not only did Ginsburg seek to ensure equal protection; she actually sought to use the Court to ensure that women received an “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”249 Here, the Court made a proactive change designed to improve the situation for women, and not just maintain the status quo.

Once again, however, Justice Scalia wrote a scathing dissent hinting at things to come. He called for the application of rational-basis review, not intermediate scrutiny, to gender-based classifications, and claimed that, since women “constitute a majority of the electorate,” they are more than capable of exerting political power.250 He praised the “pride and distinction” with which VMI served the people of Virginia and lamented the Court’s rejection of tradition.251 He even went so far as to accuse the Court of “ignoring] the history of our people.”252 He hearkened back to the nineteenth century Court’s language in Minor v. Happersett,253 absolving the

246. Id. at 519, 532.
247. Id. at 519.
248. Id. at 533–34 (alteration in original) (footnote omitted) (citations omitted).
249. Id. at 532.
250. Id. at 574–75 (Scalia, J., dissenting).
251. Id. at 566.
252. Id.
253. See supra note 192 and accompanying text.
Court from any obligation to affect positive change. He stripped agency from women, opining that just because some women might want to attend VMI doesn't mean that all women should be permitted to do so. He pointed to the unsubstantiated "fact" that men and women have "deep-seated" developmental differences. He ended his dissent by quoting, with great admiration, from a piece in a VMI booklet entitled The Code of a Gentleman, which endorsed the very gender-stereotypes that the majority addressed:

A Gentleman . . . .
Does not speak more than casually about his girl friend [sic]
 . . . .
Does not go to a lady's house if he is affected by alcohol . . .
 .
Does not hail a lady from a club window.
A gentleman never discusses the merits or demerits of a lady
 . . . .
Does not slap strangers on the back nor so much as lay a finger on a lady . . . .

Unfortunately, Justice Scalia's dissent, like his dissent in Johnson, heralded the future decisions of the Court.

254. Justice Scalia simultaneously abdicates judicial responsibility for improving the law and places that responsibility with the people:

The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law.

United States v. Virginia, 518 U.S. at 567 (Scalia, J., dissenting).

255. Id. at 579.

256. Id. at 576 (quoting United States v. Virginia, 766 F. Supp. 1407, 1434 (W.D. Va. 1991)).

257. Id. at 602–03.

258. See supra notes 239–44 and accompanying text.
C. . . . And Steps Backwards\textsuperscript{259}

Justice Scalia’s dissents in Johnson\textsuperscript{260} and United States v. Virginia\textsuperscript{261} demonstrate the gender-stereotyping undercurrent in the courts that still exists today, despite the 123 years of advancement between the eras of Bradwell\textsuperscript{262} and United States v. Virginia.\textsuperscript{263} In more recent years, the Court made several missteps, failing to recognize when its rulings “create[d] or perpetuate[d] the legal, social, and economic inferiority of women.”\textsuperscript{264} Two cases which exemplify this failure are Tuan Anh Nguyen v. I.N.S.\textsuperscript{265} and Burwell v. Hobby Lobby Stores, Inc.\textsuperscript{266}

In Nguyen, the Court addressed the constitutionality of a statute applying differing requirements for a child to become a citizen of the United States based on whether the child’s citizen parent was male or female.\textsuperscript{267} Under the statute in question, a child born to a citizen mother outside of the United States and out of wedlock gains citizenship if the mother had U.S. nationality at the time of the birth and had been present in the United States for a continuous period of at least one year.\textsuperscript{268} A child born to a citizen father outside of the United States and out of wedlock, on the other hand, has several other requirements to fulfill in order to become a citizen.\textsuperscript{269} The Court

\begin{itemize}
  \item \textsuperscript{259} See also supra Part III.C.3 (describing the Supreme Court’s ultimate ruling in Young).
  \item \textsuperscript{260} See supra notes 239–44 and accompanying text.
  \item \textsuperscript{261} See supra notes 250–57 and accompanying text.
  \item \textsuperscript{262} See supra notes 184–87 and accompanying text.
  \item \textsuperscript{263} See supra notes 245–49 and accompanying text.
  \item \textsuperscript{264} United States v. Virginia, 518 U.S. 515, 534 (1996).
  \item \textsuperscript{265} 533 U.S. 53 (2001).
  \item \textsuperscript{266} 134 S. Ct. 2751 (2014).
  \item \textsuperscript{267} 533 U.S. at 56–57.
  \item \textsuperscript{268} 8 U.S.C. § 1409(c) (2012).
  \item \textsuperscript{269} Id. § 1409(a). These requirements include:
    \begin{enumerate}
      \item a blood relationship between the person and the father is established by clear and convincing evidence,
      \item the father had the nationality of the United States at the time of the person’s birth,
      \item the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
      \item while the person is under the age of 18 years—
        \begin{enumerate}
          \item the person is legitimated under the law of the person’s residence or domicile,
          \item the father acknowledges paternity of the person in writing under oath, or
    \end{enumerate}
  \end{enumerate}
found that the statute was constitutional, acknowledging that there is a "significant difference" between a child's relationship with the child's unmarried father and the child's unmarried mother.\textsuperscript{270}

This holding, in a majority opinion written by a man and not joined by any of the women on the Court,\textsuperscript{271} validated stereotypical gender roles in child-rearing. The Court found that it was an "important governmental interest furthered in a substantial manner" that the government "ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."\textsuperscript{272} The implication was that mothers, by necessity, will develop "real, everyday ties that provide a connection [with the] child,"\textsuperscript{273} whereas fathers are assumed not to develop such a relationship without some form of written proof. This attitude lends legal legitimacy to the idea that women are by nature nurturing, while men need to be coerced into relationships with their own children.

As Justice O'Connor pointed out in her dissent, "[t]here is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms [with mothers]."\textsuperscript{274} She criticized the majority for denying opportunities to individuals and ignoring our history of gender discrimination.\textsuperscript{275} These criticisms fell on deaf ears, however; it seems that in the 128 years since \textit{Bradwell}, the Court hadn't entirely gotten past the idea that "divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."\textsuperscript{276}

Even more recently, the Court in \textit{Burwell v. Hobby Lobby Stores, Inc.}\textsuperscript{277} lent additional credence to long-standing notions about proper gender roles. In \textit{Hobby Lobby}, the Court found that it is an unconstitutional burden on the free exercise of religion to require closely held corporations to provide health insurance that covers

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\textsuperscript{270} \textit{Id.}
\textsuperscript{271} Nyugen, 533 U.S. at 62.
\textsuperscript{272} \textit{Id.} at 56.
\textsuperscript{273} \textit{Id.} at 64–65.
\textsuperscript{274} \textit{Id.} at 65.
\textsuperscript{275} \textit{Id.} at 87 (O'Connor, J., dissenting).
\textsuperscript{276} \textit{Id.} at 74.
\textsuperscript{277} Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).
\textsuperscript{278} 134 S. Ct. 2751 (2014).
contraception when the corporation holds sincere religious beliefs opposing contraception.278 Once again,279 the majority opinion was written by a man, and none of the female members of the Court joined the majority.280 Instead, Justices Kagan and Sotomayor joined in Justice Ginsburg’s dissent,281 in which Justice Ginsburg repeatedly emphasized that the majority’s holding would have a disproportionate impact on women.282 Justice Ginsburg noted that women have to pay more than men for preventative care,283 citing a report showing the increased burden on women resulting from excluding contraception from health coverage.284 She stressed that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”285

But the Hobby Lobby ruling not only ignored women’s needs and denied women agency; it actually placed men in a position of greater advantage. The Court removed the contraception mandate, forcing female employees of companies like Hobby Lobby to go elsewhere for comprehensive health coverage.286 However, nothing in the Hobby Lobby ruling affected insurance coverage for men’s sexual health; in fact, Hobby Lobby intends to continue offering insurance covering erectile dysfunction treatments and vasectomies for male employees.287 This hypocrisy may be staggering to some, but it reflects enduring assumptions about traditional gender roles: society perceives women as being destined for motherhood.288

278. Id. at 2759.
279. See supra note 271 and accompanying text.
280. Hobby Lobby Stores, 134 S. Ct. at 2758.
281. Id. Justice Kagan joined Justice Ginsburg’s dissent as to all but Part III-C-1. Id.
282. See, e.g., id. at 2787 (Ginsburg, J., dissenting) (“In the Court’s view, RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby . . . .”) (emphasis added).
283. Id. at 2788.
284. Id. at 2789.
285. Id. at 2787–88 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992)).
286. See id. at 2787; see also id. at 2780–82 (majority opinion) (describing potential alternative sources of contraception coverage for women).
288. See Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (“The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.”).
other hand, are permitted, if not encouraged, to engage in as much sexual promiscuity as they would like, sincere religious beliefs notwithstanding, even if it cannot possibly result in pregnancy.

The rulings in *Nguyen* and *Hobby Lobby* might set a dangerous precedent and indicate a step backwards by the Supreme Court, or reveal a gender bias that has been festering under the surface for quite some time. On the other hand, they may simply be outliers in Supreme Court jurisprudence.

The Supreme Court’s holding in *Young v. UPS* does little to reveal the path the Court may take in future. The Court gave Young another opportunity to make a disparate treatment argument on a slightly different basis, but it did not actually make a final determination, instead leaving that up to the Fourth Circuit. Promisingly, the Court ruled that an employer cannot use the fact that accommodating pregnant employees would be expensive or inconvenient as justification for differential treatment. It also clarified that when Congress crafted the PDA in order to overturn *General Electric Co. v. Gilbert*, it did so with the intention of preventing things like General Electric’s disability plan in that case, which “den[ied] coverage to pregnant employees on a neutral basis.” The Court’s holding does not outright prohibit gender-neutral policy justifications, but it does place those justifications in a negative light.

Unfortunately, the Supreme Court’s ruling did not go far enough, failing to determine whether employers are required to provide the same accommodations to pregnant employees as they do for similarly situated non-pregnant employees. It did not decide whether UPS discriminated against Young based on her pregnancy. It even limited its new approach to the disparate treatment analysis to the context of cases involving the PDA. The majority opinion barely even mentioned the long history of gender discrimination and stereotyping in our justice system.

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289. See supra notes 267–76 and accompanying text.
290. See supra notes 277–87 and accompanying text.
292. *Id.* at 1354.
293. See supra notes 35–37 and accompanying text.
294. *Young*, 135 S. Ct. at 1355.
295. *Id.* at 1350.
296. *Id.* at 1356.
297. *Id.* at 1354–55.
298. Compare *id.* at 1343–56 with *id.* at 1367 (Kennedy, J., dissenting).
entirely on statutory interpretation, and avoided making any policy decisions.\textsuperscript{299}

The only acknowledgement of the negative repercussions of gender stereotyping ironically appeared in Justice Kennedy’s dissent.\textsuperscript{300} Despite his recognition that, even today, “pregnant employees continue to be disadvantaged—and discriminated against—in the workplace,”\textsuperscript{301} Kennedy failed to see where Young could “point to a class of her co-workers that was accommodated and that would include her but for the particular limitations imposed by her pregnancy.”\textsuperscript{302} He at least demonstrated awareness that discriminatory treatment of women in the workplace is the result, in part, of harmful gender stereotyping.\textsuperscript{303}

Justice Scalia’s dissent, on the other hand, not only failed to acknowledge the disadvantages that women face in the workplace, but doubled down on the approval of gender-neutral policy.\textsuperscript{304} Scalia completely rejected the notion of trying to view the situation from a woman’s perspective, arguing that the PDA “does not prohibit denying pregnant women accommodations, or any other benefit for that matter, on the basis of an evenhanded policy.”\textsuperscript{305} It would be generous to assume that he simply did not realize that he is espousing an “evenhanded policy” from a male perspective. He went on to reject the very idea that the Supreme Court should take policy considerations into account or attempt to do anything more than “choose the best possible reading of the law,”\textsuperscript{306} hearkening back to the language in \textit{Bradwell}\textsuperscript{307} and \textit{Happersett}.\textsuperscript{308} There is a schism in the Court currently, and it remains to be seen whether the Court will make an effort to include women’s perspectives, as it did in cases like \textit{U.S. v. Virginia},\textsuperscript{309} or whether it will undermine the progress it has

\textsuperscript{299} \textit{Id.} at 1349–50 (majority opinion).
\textsuperscript{300} \textit{Id.} at 1366–68 (Kennedy, J., dissenting).
\textsuperscript{301} \textit{Id.} at 1367.
\textsuperscript{302} \textit{Id.} at 1366.
\textsuperscript{303} \textit{Id.} at 1367.
\textsuperscript{304} \textit{See id.} at 1362 (Scalia, J., dissenting) (“If a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she has been ‘treated the same’ as everyone else.”).
\textsuperscript{305} \textit{Id.} at 1363.
\textsuperscript{306} \textit{Id.} at 1366.
\textsuperscript{307} \textit{See supra} note 186 and accompanying text.
\textsuperscript{308} \textit{See supra} note 192 and accompanying text.
\textsuperscript{309} \textit{See supra} notes 245–49 and accompanying text.
made with rulings like those in Nguyen v. I.N.S.\textsuperscript{310} or Burwell v. Hobby Lobby Stores, Inc.\textsuperscript{311}

V. THE SOCIAL CONSTRUCTION OF GENDER AND THE NEED FOR A DIVERSE PERSPECTIVE IN THE LAW

Social scientists recognized some time ago that gender is a social construction.\textsuperscript{312} Gender does not occur independently, in a vacuum, but is the result of historical, cultural, and other environmental factors.\textsuperscript{313} Whenever we encounter a new person, we ascribe a gender to the person based on certain social cues embedded within our culture.\textsuperscript{314} By default, Americans will attribute maleness to someone unless they make a determination to the contrary.\textsuperscript{315} In such an androcentric system, women are inherently the “Other.”\textsuperscript{316}

Our culture, and by extension, our legal system, adopts the perspective of the white male as “normal,” the “self” from which the Other is viewed. Gender is developed through interaction within the framework of our social structure.\textsuperscript{317} Our language reinforces gender norms through the use of gendered pronouns and certain concepts, like masculinity and femininity.\textsuperscript{318} Gender carries with it status values and stereotypes.\textsuperscript{319} Gender has its “own distinctive set of stereotypical traits . . . but also shares with other status characteristics beliefs of greater competence in those with more valued states of the characteristic. For instance, men are widely judged more generally competent than women . . . despite other differences between the stereotypes.”\textsuperscript{320}

In this manner, our legal system both reflects and shapes our view of gender. When the Court discusses “[t]he natural and proper

\begin{footnotesize}
\begin{enumerate}
\item See supra notes 267–76 and accompanying text.
\item See supra notes 277–88 and accompanying text.
\item Id.
\item Betsy Lucal, What It Means to Be Gendered Me: Life on the Boundaries of a Dichotomous Gender System, 13 GENDER & SOC’Y 781, 783 (1999).
\item Id.
\item Id.
\item Candace West & Don H. Zimmerman, Doing Gender, 1 GENDER & SOC’Y 125, 147 (1987).
\item Id. at 369.
\end{enumerate}
\end{footnotesize}
timidity and delicacy which belongs to the female sex," it isn’t just echoing the sentiment of the time; it is making a normative statement with a real social impact. Gender-neutral policies are the contemporary equivalent of those normative statements. Gender-neutral policies serve only to maintain the status quo; when gender is ignored, no advancements for women can be made.

If our country had strictly adhered to gender-neutral policies in the past, women would have no right to vote. Women with pre-school-age children could legally be passed over for employment, even when men with pre-school-age children were not. Men could be preferred to women when it comes to administering the estate of a person who died intestate. The law would endorse the view that women ought to be homemakers and child- rearers. It would be unconstitutional to take actions to fix gender imbalance in employment. Women could legally be excluded from prestigious institutions of higher education. All of the advances that women have made over the last century would be eliminated because our courts would not be able to consider gender. In the words of Justice Scalia, it would be up to “the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly,” not the courts.

The courts should actively embrace diverse perspectives when it comes to gender-related decisions, and endeavor to avoid the fallacy of gender-neutral policies. Gender is “a continuous, variable, and tenacious process that, while usually leading to women’s disadvantage, is challenged, negotiated, subverted, and resisted.”

322. See Minor v. Happersett, 88 U.S. 162, 178 (1875) (“[T]he Constitution of the United States does not confer the right of suffrage upon anyone, and that the constitutions and laws of several States which commit that important trust to mean alone are not necessary void . . . .”).
325. Cf. Stanton v. Stanton, 421 U.S. 7, 14–15 (1975) (“No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”).
328. Id. at 567 (Scalia, J., dissenting).
Even UPS eventually saw the error of its ways and amended its policy, offering light-duty accommodations to pregnant employees.\textsuperscript{330} This came too late for Young,\textsuperscript{331} but it doesn’t have to be too late for the rest of the women in this country, as long as the courts eschew their preference for gender-neutral policies. When the courts take a gender-neutral position, they only reinforce the existing social situation—a situation in which women are very much disadvantaged. We have risen too far as a society to afford to fall so far down.


\textsuperscript{331} In fact, UPS did not announce the policy change until it filed its brief with the Supreme Court. \textit{Id.}
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