Response:
Young v. United Parcel Service
575 U.S. ___ (2015)
Naomi Cahn[*] *& June Carbone*[**]

At the core of the Court's decision in *Young v. United Parcel Service* is a fundamental question of feminist jurisprudence: should women be treated the same as men, or should they receive special treatment?[1] Which strategy would better achieve gender equality?[2] The debate itself is decades-old, and the Court has—appropriately enough—zigged and zagged in its resolution of the issues.[3]

Liberal feminists have sought to emphasize women's similarities to men, arguing that women do not need special treatment to "compensate" for the physical reality that women can become pregnant; on the other hand, women should not be treated differently and penalized when they do become pregnant.[4] Thus, in a case that helped served as a catalyst for the Pregnancy Discrimination Act's enactment, General Electric Co. excluded pregnant workers from its temporary disability benefits plan, and liberal feminists argued that the deliberate exclusion of pregnant workers constituted sex discrimination. The Court, however, held that the policy did not discriminate on the basis of sex because (ahem), "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all. Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability."[5] This reasoning echoed an earlier opinion, in which the Court noted that a program which divided people "into two

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[1] *E.g.*, Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the California Law Review*, 100 CAL. L. REV. 381, 391 (2012); Keith Cunningham-Parmeter, *(Un)equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 3 (2014); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 418 (2011).

[2] Joan Williams, "*It's Snowing Down South*"*: How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 815 (2002).

[3] *E.g.*, Cunningham-Parmeter, *supra* note 1, at 24.

[4] Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatent Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985). This position is also associated with Justice Ginsburg, who joined the majority in *Young*. *See* Bartlett, *supra* note 1, at 392; Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 23 (1975); Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 459 (1978).

[5] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976).

groups—pregnant women and nonpregnant persons"—did not necessarily constitute discrimination under the Equal Protection Clause.[6]

Radical and cultural feminists have sought to make the law account for womenuse.m which divided people "into two groups—pregnant women and nonpregnant plan proviubstantive equality: that might mean, for example, creating accommodations for pregnancy and childbirth with the goal of equal outcomes rather than equal processes.[7] Laws that require special accommodations for pregnant women—in place in some jurisdictions—provide an example.[8] (Of course, there are numerous other strands of feminist jurisprudence that modify and refine these basic positions and these positions themselves are more nuanced than necessarily dichotomous,[9] but concepts of sameness and difference between and among men and women have framed much of feminist jurisprudence over the past half-century.)

In *Young*, the Court reiterated that the PDA does not grant pregnant women any special treatment. It rejected a claim that all female workers who cannot perform their normal jobs should receive the same accommodation as any other worker for *any other* condition that prevents them from performing their jobs. Indeed, the Court labeled this a "most-favored-nation" approach, such that a pregnant worker would not need to prove that her disparate treatment was intentional. Thus, for example, it is not discriminatory for an employer to treat an employee injured on the job better than a pregnant worker because the employer has a legitimate, nondiscriminatory reason for doing so. On the other hand, as even Justice Alito conceded, UPS had not shown it had "any neutral business ground for treating pregnant drivers less favorably than at least some of its nonpregnant drivers."[10]

Consequently, to show discrimination, a pregnant worker can use the traditional *McDonnell Douglas*[11] framework. So, a woman who claims pregnancy discrimination must show that she is in the protected class, that she requested accommodation but the employer refused, and that the

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6 Geduldig v. Aiello, 417 U.S. 484, 494, 497 n.20 (1974).

7 Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 604 (2010); Deborah Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS. L. REV. 961, 1002 (2013).

8 *See generally* National Partnership for Women and Families, http://www.nationalpartnership.org/issues/fairness/pregnant-workers-fairness-act.html.

9 *See* NANCY LEVIT & ROBERT R.M. VERCHIK, FEMINIST LEGAL THEORY: A PRIMER (2d ed. Forthcoming 2015).

10 Young v. United Parcel Service, No. 12-1226, slip op. at 10 (U.S. Mar. 25, 2015) (Alito, J., concurring).

11 McDonnell Douglas v. Green, 411 U.S. 792 (1973).

employer did make accommodations for those who are "similar in their ability or inability to work."[12] At that point, the employer can seek to show that it had a legitimate, nondiscriminatory reason for failing to accommodate the pregnant worker; and then, the plaintiff can show that the alleged legitimate reason was simply pretextual.

In other words, the Court held that pregnant women can show disparate treatment under the PDA, notwithstanding a facially neutral policy. The case definitively ratifies an equal treatment approach to pregnancy discrimination under federal law—that is, similarly situated workers (pregnant women) are treated differently from other similarly situated workers (other disabled employees)—and continues the somewhat contested analogy of pregnancy as a disability to be treated like any other disability. Moreover, states and municipalities remain able to adopt a special treatment approach.[13] We still don't know, however, which will better achieve the overall goal of gender equality.

Ultimately, underlying the sameness/difference debate are two long-term trends. First, women have become a much more permanent part of the workplace. Allowing women to become equal members of the workplace, however, requires acknowledging women's differences. The physical changes associated with pregnancy are central among them as all women who would like to give birth unlike men who would like to become fathers will experience a period where they cannot perform physically demanding jobs. It is hard to imagine women's full and equal inclusion in the workplace without accommodations for the experience of pregnancy. Note that only 4% of truck drivers—Peggy Young's job—are female.[14] Women still face a motherhood penalty, and the wage gap between male and female college graduates has actually increased over the past quarter-century. Indeed, it is hard to imagine that if men became pregnant such accommodations would not already be routine.

Second, employment has become less secure. Employers expand and contract workforces in response to short-term needs, invest less in employee training and retention, and continually seek to trim labor expenses. As a result, employers who in a different era would have voluntarily sought to retain experienced employees have become less likely to do so. What does equality mean in such a world? And what does the PDA require?

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[12] Young, slip op. at 20–21 (quoting the Pregnancy Discrimination Act).

[13] See Cal. Fed. Sav. & Loan Ass''n v. Guerra, 479 U.S. 272, 289 (1987).

[14] Philip Cohen, *Pregnancy Discrimination and the Gender Gap, Involuntary Job Choice Edition, Family Inequality* (Oct. 20, 2014), https://familyinequality.wordpress.com/2014/10/20/pregnancy-discrimination-and-the-gender-gap-involuntary-job-choice-edition/.

Yes, formal equality gives women legal tools to challenge overt discrimination when they can identify it, but these legal tools have not yet resulted in achieving equality. For that to occur, women need to change more than the law.

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