

# HEALTH CARE REFORM AND REPRODUCTIVE RIGHTS: SEX EQUALITY ARGUMENTS FOR ABORTION COVERAGE IN A NATIONAL PLAN

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## Abstract:

The national health insurance reform effort threatens to reduce the number of women who have health insurance coverage for abortions. Instead of evaluating whether the Supreme Court would invalidate restrictions on coverage, I employ a model of legislative constitutionalism that presents arguments for why Congress must independently consider the constitutionality of imposing restrictions on abortion in national health insurance legislation. I argue that Congress's debate over abortion coverage in a national health insurance scheme should recognize the ways in which state regulation of women's reproductive capacities violates Equal Protection principles.

## TABLE OF CONTENTS

<i>Introduction</i> .....	358
I. <i>Abortion Coverage: The Lay of the Land</i> .....	365
A. <i>Current Restrictions on Coverage</i> .....	365
B. <i>Shifting the Stakes: National Health Insurance</i> .....	367
II. <i>Legislative Constitutionalism</i> .....	371
A. <i>The Value of Legislative Constitutionalism</i> .....	373
B. <i>Examples of Legislative Constitutionalism</i> .....	374
1. <i>The Civil Rights Act of 1964</i> .....	374
2. <i>Sex Discrimination</i> .....	375
3. <i>The Family and Medical Leave Act</i> .....	377
III. <i>Abortion as an Issue of Pregnancy Discrimination</i> .....	378
A. <i>Congressional Visions of Equal Protection at the Time of the PDA</i> .....	378
B. <i>The Legislative History of the PDA</i> .....	380
C. <i>Subsequent Case Law: Abortion's Protections Under the PDA</i> .....	384

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IV. <i>Limiting Geduldig's Reach</i> .....	386
A. <i>Limiting Geduldig's Application to Pregnancy Discrimination</i> .....	389
B. <i>The Sex Equality Grounding of the Abortion Right</i> .....	391
V. <i>Applying a Broadened Vision of Equal Protection to Advocacy for National Health Insurance</i> .....	393
A. <i>Restrictions on the Public Plans</i> .....	395
B. <i>Restrictions on Private Insurers</i> .....	398
<i>Conclusion</i> .....	400

#### INTRODUCTION

In the 2008 election, the platform of now-President Barack Obama proposed a massive overhaul of America's health care system.<sup>1</sup> With Democrats controlling both houses, health care reform has a realistic possibility of succeeding, despite the opposition of many Republicans and the insurance industry.<sup>2</sup> But health care reform also has a realistic possibility of severely curtailing women's equality by singling out abortion and prohibiting its coverage.<sup>3</sup> National health insurance reform presents Congress with a choice: to reverse decades of discrimination against women's reproductive health care needs, or to continue this history of unequal treatment.<sup>4</sup>

There are already a wide variety of federal restrictions on abortion funding and pro-life activists have every intention of continuing to limit abortion funding in the health insurance reform effort. For example, the

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<sup>1</sup> BARACK OBAMA AND JOE BIDEN'S PLAN TO LOWER HEALTH CARE COSTS AND ENSURE AFFORDABLE, ACCESSIBLE HEALTH COVERAGE FOR ALL 6, <http://www.barackobama.com/pdf/issues/HealthCareFullPlan.pdf> (last visited Nov. 1, 2009) [hereinafter OBAMA'S HEALTH CARE PLAN].

<sup>2</sup> Sheryl Gay Stolberg, 'Public Option' in Health Plan May Be Dropped, N.Y. TIMES, Aug. 17, 2009, at A1. This Note presumes that Congress will pass some version of health care reform in the near future, but does not predict the timing or precise details of the final bill.

<sup>3</sup> Opponents of coverage have made it very clear that they will fight health care reform unless the proposal explicitly prohibits abortion coverage. Focus on the Family has stated that they "'will do everything [they] can to ensure this bill either goes down or excludes abortion funding.'" Chris Frates, *Abortion Funding Next Big Showdown?*, POLITICO, Sept. 11, 2009, <http://www.politico.com/news/stories/0909/27008.html>. The National Right to Life Committee's legislative director stated that the group would draw attention to the issue so that by the time the bill was brought to the floor of the House "'anybody who's paying attention is going to know that this bill creates a huge abortion program run by the federal government.'" *Id.* For a discussion of the House floor debate on abortion coverage, see *infra* notes 11 & 206.

<sup>4</sup> This is no surprise: the political history of governmental health care regulation demonstrates that "[s]tate and federal mandates are a double-edged sword when it comes to seeking sexual and reproductive health coverage." Hazel Glenn Beh, *Sex, Sexual Pleasure, and Reproduction: Health Insurers Don't Want You to Do Those Nasty Things*, 13 WIS. WOMEN'S L.J. 119, 175-76 (1998).

Hyde Amendment, first enacted in 1977,<sup>5</sup> restricts Medicaid funding of abortions and was upheld by the Supreme Court in *Harris v. McRae*.<sup>6</sup> Since the Hyde Amendment has to be re-enacted every year as part of the Omnibus Appropriations Bill, its funding restrictions would not be automatically included in any health insurance reform bill. However, Hyde's underlying premise, that federal funding for abortion should be prohibited, has been pointed to throughout the debates as the relevant status quo.<sup>7</sup> Additional federal bans restrict funding for federal employees, military personnel and their dependents, children covered by the State Children's Health Insurance Program, members of the Peace Corps, Native American women, and women in federal prisons.<sup>8</sup> With the majority of employer-based private insurers currently covering abortion in their standard benefits package,<sup>9</sup> a national

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<sup>5</sup> Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

<sup>6</sup> 448 U.S. 297 (1980). The scope of the Medicaid restrictions on abortion funding has varied since its enactment. See Susan Randall, *Health Care Reform and Abortion*, 9 BERKELEY WOMEN'S L.J. 58, 65 n.44 (1994). The current version of the Hyde Amendment only requires abortion funding in cases of rape or incest, or if a woman's life is endangered by a physical disorder, illness, or injury. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 111-8, §§ 507-508, 123 Stat. 750, 802-03 (2009).

<sup>7</sup> Representative Stupak, who was the chief sponsor of the anti-abortion amendment that was added to the House's version of the health care bill, see *infra* note 11, argued that his amendment "does one very simple thing: it applies current law, the Hyde Amendment, in barring federal funding for abortion." David M. Herszenhorn & Robert Pear, *Democrats Gird for Health Debate, With No Deal on Abortion*, N.Y. TIMES, Nov. 7, 2009, at A13. Even pro-choice Democrats who opposed the Stupak amendment, arguing that its language went much further than the Hyde Amendment, seem willing to accept that the reform effort will extend "the Hyde Amendment in current law by ensuring that no Federal dollars can be used to fund abortions." 155 CONG. REC. H12,923 (daily ed. Nov. 7, 2009) (statement of Rep. Nadler).

<sup>8</sup> NARAL PRO-CHOICE AMERICA FOUNDATION, DISCRIMINATORY RESTRICTIONS ON ABORTION FUNDING THREATEN WOMEN'S HEALTH 1-2 (2009), <http://www.prochoiceamerica.org/assets/files/Abortion-Access-to-Abortion-Women-Government-Discriminatory-Restrictions.pdf>; see also *infra* notes 34-41.

<sup>9</sup> Adam Sonfield et al., *U.S. Insurance Coverage of Contraceptives and the Impact Of Contraceptive Coverage Mandates, 2002*, 36 PERSP. ON SEXUAL & REPROD. HEALTH 72, 75 (2004). This 2001-2002 study, sponsored by the Guttmacher Institute, surveyed 205 health care insurers and found that eighty-seven percent of typical employment-based managed care plans covered surgical and medical abortion procedures. *Id.* Importantly, these plans provided comprehensive abortion coverage, and did not restrict coverage to rape, incest, or life endangerment. GUTTMACHER INSTITUTE, GUTTMACHER INSTITUTE MEMO ON INSURANCE COVERAGE OF ABORTION (Jul. 22, 2009), <http://www.guttmacher.org/media/inthenews/2009/07/22/index.html>. A different study by The Kaiser Family Foundation found that forty-six percent of workers with employer-based health insurance had coverage for abortion in 2003. THE KAISER FAMILY FOUNDATION & HEALTH RESEARCH AND EDUCATIONAL TRUST, EMPLOYER HEALTH BENEFITS: 2003 ANNUAL SURVEY 109 (2003), <http://www.kff.org/insurance/upload/Kaiser-Family-Foundation-2003-Employer-Health-Benefits-Survey-Full-Report.pdf>. Both of these studies, however, have limitations. The Kaiser data is based on information provided by human resource managers, "who might not know this level of detail about their coverage." GUTTMACHER INSTITUTE, *supra*. In fact, twenty-six percent of human resource managers answered the question on abortion coverage with "I don't know," which may have skewed the results. *Id.* The Guttmacher study has its own flaws. This study asked insurance providers about

health insurance scheme threatens to reduce the number of women who are enrolled in plans providing abortion coverage.<sup>10</sup> In light of recent developments, it now seems nearly certain that funding will be restricted; it is just a question of how far these restrictions will go.<sup>11</sup>

The first few months of congressional debate over health care reform confirmed that the coverage of reproductive health care would be a point of serious contention. In July 2009, high-profile pro-life advocacy groups launched a campaign to “Stop the Abortion Mandate” and demanded that health care legislation formally exclude abortion from coverage.<sup>12</sup> Although

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typical employer-based plans, and the study did not account for the fact that some employees may select limited plans that do not cover a wide range of services, including abortion. After comparing the evidence in these two studies, the Guttmacher Institute believes “that most Americans with employer-based coverage currently have coverage for abortion.” *Id.* These two studies provide “the best available evidence” about private insurance coverage for abortion services. *Id.*

<sup>10</sup> Beh, *supra* note 4, at 171.

<sup>11</sup> The first drafts of this Note were written in the Spring of 2009. At that time, it was unclear whether abortion funding restrictions would be imposed in the reform effort, and if they were imposed, the precise form that they would take. As the Note approaches publication, it is now nearly certain that if the reform effort creates a public health insurance plan, it will not include abortion coverage. Both the President and Democratic leaders of Congress have stated that the “proposed health care overhaul [will] not direct taxpayer money to pay for elective abortions.” David D. Kirpatrick & Robert Pear, *A Victory in Health Care Vote For Opponents of Abortion*, N.Y. TIMES, Nov. 9, 2009, at A1. The types of restrictions that will be imposed on private insurers in the final version of the bill are less clear.

The version of the health care bill that passed the House included an amendment, offered by Democratic Representative Bart Stupak, which prohibits private insurance companies from including abortion coverage in any plan that accepts federal subsidies. Affordable Health Care for America Act, H.R. 3692, 111th Cong. § 265 (2009). It would require women desiring abortion coverage who are enrolled in these plans to purchase supplemental insurance coverage for abortions using their own money. 155 CONG. REC. H12,921 (daily ed. Nov. 7, 2009) (statement of Rep. Stupak). Progressive Democrats in the House were outraged by the passage of the Stupak amendment. Forty-one House Democrats responded to its passage by sending a letter to Speaker Pelosi threatening that they will vote against a final bill if it includes language similar to the Stupak amendment. Jonathan Allen, *Abortion Activists Call for Backup*, POLITICO, Nov. 11, 2009, <http://www.politico.com/news/stories/1109/29412.html>. President Obama also expressed his displeasure with the Stupak language. Robert Pear, *Obama Seeks Revision of Plan's Abortion Limits*, N.Y. TIMES, Nov. 10, 2009, at A18 (quoting President Obama's statement that “[t]here needs to be some more work before we get to the point where we're not changing the status quo on abortion”).

It is unclear whether a similar restriction will be included in the Senate's version of the bill, but there will “likely . . . be a vote on the issue on the Senate floor.” Allen, *supra*. Senator Barbara Boxer and Senator Max Baucus have both publicly expressed doubts that such a restrictive amendment would pass in the Senate. Sam Stein, *Boxer: Senate Has Votes To Block Stupak Amendment*, HUFFINGTON POST, Nov. 10, 2009, [http://www.huffingtonpost.com/2009/11/10/boxer-senate-has-votes-to\\_n\\_352064.html](http://www.huffingtonpost.com/2009/11/10/boxer-senate-has-votes-to_n_352064.html).

Although I have updated the Note to reflect the most recent developments in the debate, its general tone remains one in which the possibility of public funding for abortion is a realistic option. While comprehensive abortion coverage now seems unlikely to be included in the initial health care bill, the arguments in this Note are equally applicable to Congress's future debates on the scope of coverage.

<sup>12</sup> Ben Smith, *Abortion Roils Already Tense Health Debate*, POLITICO, July 22, 2009, <http://www.politico.com/news/stories/0709/25237.html>.

the health care bills introduced in Congress were initially silent on the abortion issue, funding restrictions were subsequently proposed in both the House and Senate.<sup>13</sup> A significant restriction on private insurance coverage of abortion was included in the version of the bill that passed the House on November 7, 2009.<sup>14</sup> This amendment, which would prohibit private insurance companies from providing abortion coverage in any plan that receives federal subsidies, would significantly reduce private insurance coverage of abortion services if included in the final version of the reform package.<sup>15</sup>

The outcome of this debate remains uncertain, and Congress will undoubtedly consider various amendments and restrictions over the course of the health care debate. This Note, however, is not an attempt to provide a comprehensive account of the current political debate and the various proposals before Congress. Instead, it adopts the premise that reproductive health care coverage will continue to be a contentious topic and presents the constitutional issues that Congress should confront when deciding whether to mandate, prohibit, or limit the coverage of abortion-related services. Moreover, even if Congress fails to include abortion coverage in the initial health care reform effort, this does not absolve Congress from the responsibility of evaluating the constitutional implications of this decision and reconsidering its merits in future legislative sessions.

This is, of course, not the first time that a Democratic administration has proposed health care reform. In 1993, President Bill Clinton's Health

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<sup>13</sup> On July 30, 2009, the House Energy and Commerce Committee approved the Capps amendment, which prohibited federal funds from subsidizing abortion services, but that allowed insurers to choose whether or not to cover abortions in their benefits packages. David M. Herszenhorn & Robert Pear, *House Health Care Bill Criticized as Panel Votes for Public Plan*, N.Y. TIMES, July 31, 2009, at A11. The Capps amendment would allow a public option to cover abortions as long as private premiums were used to fund abortion services in the public plan. The amendment would also require broad abortion coverage in at least one private plan on the national insurance exchange eligible for federal subsidies, and it would require that at least one private plan eligible for federal subsidies not provide these services. Peter Steinfeld, *In Health Care Battle, a Truce on Abortion*, N.Y. TIMES, Sept. 12, 2009, at A12; see also Ricardo Alonso-Zaldivar, *Abortion Coverage Allowed in Health Care Legislation*, HUFFINGTON POST, Aug. 5, 2009, [http://www.huffingtonpost.com/2009/08/05/abortion-coverage-allowed\\_n\\_251605.html](http://www.huffingtonpost.com/2009/08/05/abortion-coverage-allowed_n_251605.html) (reporting on the House Committee's attempt "to balance questions of federal funding, personal choice and the conscience rights of clinicians" through the passage of this amendment). The final version of the bill that was passed by the House rejected the language of the Capps amendment. The Senate Finance Committee, however, has approved a bill that contains language that parallels the Capps amendment. Editorial, *The Ban on Abortion Coverage*, N.Y. TIMES, Nov. 10, 2009, at A34.

<sup>14</sup> Kirpatrick & Pear, *supra* note 1111.

<sup>15</sup> Editorial, *supra* note 13. Although the Stupak amendment technically only prohibits individuals who receive federal subsidies from purchasing plans providing abortion coverage, it would have far reaching implications on coverage in the private insurance market more generally. Insurers would have little incentive to offer plans providing abortion coverage because this would mean that these plans would be unable to accept customers receiving federal subsidies. Jeffrey Toobin, *Comment: Not Covered*, NEW YORKER, Nov. 23, 2009, at 37. As articulated by Jeffrey Toobin, "[t]oday, most policies cover abortion; in a post-Stupak world, they probably won't." *Id.*

Security Act<sup>16</sup> promised to transform the American health care system.<sup>17</sup> Those who support health care reform obviously hope to have more success this time around.<sup>18</sup> This is also not the first time that women's reproductive health care proponents have recognized the restrictions that may be imposed in a national plan—Clinton's proposal also sparked intense debate over whether reproductive services, particularly abortion, would be covered.<sup>19</sup>

What has changed since 1993, and how should progressives talk about the inclusion of abortion in a national health insurance scheme? How can we make sure that Congress's expansion of national health insurance does not result in constricted coverage for abortion services? It is easy to assume, based on the vast array of public funding restrictions, that no Constitutional rights would be violated if Congress were to pass a plan that prohibited or limited abortion coverage.<sup>20</sup> But this Note argues that the constitutionality of abortion funding restrictions in national health insurance should not be so easily dismissed as a foregone conclusion. Although the Supreme Court has declined to analyze abortion restrictions under the Equal Protection Clause,<sup>21</sup> as Catharine MacKinnon notes, "[a]bortion *is* a sex equality issue. Everyone knows it. Denial of access to abortion denies women, and only women, a final act of control over the reproductive consequences of male sexuality . . . ."<sup>22</sup>

This Note argues for an expanded vision of the meaning of Equal Protection that mandates equal treatment for women's reproductive health care. The argument is based on a model of legislative constitutionalism that looks to Congress to enforce this broader vision by including abortion coverage in the new health insurance scheme. Instead of arguing that the Court would invalidate a plan without coverage, the Note argues that Congress must view the decision to provide coverage as one deeply intertwined with gender justice concerns. At a minimum, members of Congress must evaluate the sex equality implications of limitations on coverage before determining whether

<sup>16</sup> Health Security Act, H.R. 3600, 103d Cong. (1993).

<sup>17</sup> Jonathan Oberlander, *Learning from Failure in Health Care Reform*, 357 *NEW ENG. J. MED.* 1677, 1677 (2007).

<sup>18</sup> Clinton's effort at reform collapsed just a year after its introduction. This was partially the result of the political miscalculations of the Clinton administration, as well as the ambitious scope of the proposed reforms. *See id.* at 1678.

<sup>19</sup> *See* Peter Steinfelds, *Bishops Pass Resolution Warning Against Abortion in Health Plan*, *N.Y. TIMES*, June 19, 1993, § 1, at 47.

<sup>20</sup> Indeed, much of the rhetoric thus far has assumed that maintaining the status quo of prohibitions on federal funding for abortion services does not raise constitutional concerns. *See* David Crary, *Abortion-Rights Forces Vexed by Health Care Debate*, *HUFFINGTON POST*, Sept. 21, 2009, <http://www.huffingtonpost.com/huff-wires/20090921/us-health-care-abortion> (noting that the Obama administration and majority Democrats in Congress have made public comments promising that their health care reform proposals will conform with the Hyde Amendment's preexisting ban on federal funding).

<sup>21</sup> *See* Ruth Colker, *Equality Theory and Reproductive Freedom*, 3 *TEX. J. WOMEN & L.* 99, 100 (1994).

<sup>22</sup> Catharine A. MacKinnon, *Unthinking ERA Thinking*, 54 *U. CHI. L. REV.* 759, 767 (1987).

to include such restrictions in the final bill. Although current Equal Protection doctrine does not necessarily mandate coverage, this Note argues that there is an emerging understanding of abortion as an issue of pregnancy discrimination that Congress cannot ignore in deciding whether to provide coverage. Court doctrine, while highly relevant, should not settle this issue: sex equality arguments for reproductive rights are incrementally transforming the meaning of Equal Protection, and Congress should legislate in recognition of these evolving norms.

More specifically, this Note presents congressional interpretations of Equal Protection and abortion funding at the time of passage of the Pregnancy Discrimination Act (“PDA”) of 1978.<sup>23</sup> It argues that broad restrictions on abortion funding in a national health insurance plan would in fact violate Equal Protection principles as understood by Congress thirty years ago during the debates over the PDA and as currently enforced through the PDA case law. The Note argues that there is an emerging understanding of the connection between women’s reproductive capacity and women’s equal citizenship, evidenced by the Court’s upholding of the Family and Medical Leave Act (“FMLA”) in *Nevada Department of Human Resources v. Hibbs*,<sup>24</sup> and the Court’s grounding of the abortion right in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>25</sup>

Before presenting arguments for congressional recognition of an expanded vision of Equal Protection, Part I of this Note provides an overview of the current restrictions on abortion funding. It then provides a brief historical account of the debate over abortion coverage in 1993 and contemplates some of the ways in which abortion restrictions may be included in the current national health insurance reform effort.

The remainder of the Note explains why Congress, if legislating in line with Equal Protection principles, would include comprehensive abortion coverage. Part II applies a model of legislative constitutionalism that explains why Congress should independently analyze the constitutionality of abortion restrictions.<sup>26</sup> This model is then employed in Part III to reframe

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<sup>23</sup> 42 U.S.C. § 2000e(k) (2006).

<sup>24</sup> 538 U.S. 721 (2003). In this case, the Court upheld the FMLA as a valid Section 5 statute. For a discussion of Section 5 statutes’ role in defining the meaning of Equal Protection, see *infra* Part II.B.2.

<sup>25</sup> 505 U.S. 833 (1992).

<sup>26</sup> It is important to note that I do not claim that my model of legislative constitutionalism requires Congress to reach a particular outcome. Rather, I argue that legislative constitutionalism requires Congress to confront and analyze the constitutional issues that are implicated by this decision and to come to its own determination about the scope of coverage that is constitutionally required. Similarly, I make no attempt to claim that any of the statements made during the congressional debate over the PDA require Congress to reach any particular outcome on the scope of coverage. To the contrary, this history is presented in order to demonstrate that Congress saw the question of broader insurance coverage of abortion to be different-in-kind from Medicaid coverage, that Congress has previously recognized the connection between abortion funding and women’s equality, and that Congress can interpret the meaning of constitutional principles differently from the Supreme Court. Thus, this Note attempts to present a framework of analysis that

abortion as an issue of sex equality and pregnancy discrimination, looking to the legislative and judicial history of the PDA. In passing the PDA, Congress effectively applied its own broad vision of the Equal Protection Clause, amending Title VII<sup>27</sup> to define sex discrimination in employment as including discrimination on the basis of pregnancy, childbirth, and related medical conditions.<sup>28</sup> This Part provides a thorough analysis of the legislative debate on the PDA, showing that legislators contemplated abortion and pregnancy discrimination as interconnected issues. It then demonstrates how abortion and pregnancy discrimination continue to be connected in the PDA case law.

Part IV addresses the major doctrinal hurdle standing in the way of abortion Equal Protection jurisprudence: the Supreme Court's oft-criticized holding in *Geduldig v. Aiello*<sup>29</sup> that treating pregnancy differently from other medical conditions does not constitute prima facie sex discrimination and therefore does not trigger heightened scrutiny under the Equal Protection Clause. Although the PDA effectively overruled *Geduldig*'s application to Title VII, its holding is still binding precedent in the Court's Equal Protection jurisprudence.<sup>30</sup> The Note argues that Congress should read recent developments in the case law, *Casey* and *Hibbs*, to suggest that some classifications based on pregnancy, including abortion, implicate Equal Protection principles, despite the holding of *Geduldig*.<sup>31</sup> National health insurance thus presents Congress with an opportunity to legislate in line with the Court's expanding recognition of pregnancy and abortion as issues of sex equality.

Part V then applies these broadened perspectives to advocacy and congressional debate on national health insurance. It looks to earlier cases challenging funding restrictions for arguments that may be marshaled to support expansive coverage. This Part distinguishes the Court's upholding of Medicaid abortion restrictions in *Harris v. McRae*<sup>32</sup> from the constitutional issues that would be raised by restricted coverage in a national health plan.

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Congress should employ when deciding the scope of coverage. Neither Congress nor the Court is constitutionally required by the current doctrine to reach one particular outcome.

<sup>27</sup> 42 U.S.C. § 2000e-1 to -17 (2006).

<sup>28</sup> The PDA essentially reversed the Supreme Court's holding in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), that discrimination against pregnant women was not prima facie sex discrimination in violation of Title VII. The Supreme Court's analysis of Title VII in *Gilbert* was based on the Court's earlier interpretation of an Equal Protection challenge to discrimination against pregnant women in *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>29</sup> 417 U.S. 484 (1974).

<sup>30</sup> See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-72 (1993).

<sup>31</sup> Reva Siegel has argued that Justice Rehnquist's opinion in *Hibbs* "introduces an important new understanding of when discrimination on the basis of pregnancy is discrimination on the basis of sex under *Geduldig v. Aiello*." Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1873 (2006). She argues that *Casey* and *Hibbs* jointly "open [ ] the door to the next generation of sex discrimination cases." *Id.* at 1874.

<sup>32</sup> 448 U.S. 297 (1980).

This Note employs a model of legislative constitutionalism that reconceptualizes abortion funding as an issue of women's equality in light of an informed historical perspective of abortion as an issue of pregnancy discrimination. Although courts have historically refused to extend heightened Equal Protection scrutiny to abortion regulations, Congress now has the chance to reinvent a broader understanding of women's equality by ensuring that abortion is funded under a new national health insurance scheme.

## I. ABORTION COVERAGE: THE LAY OF THE LAND

### A. *Current Restrictions on Coverage*

Legislative funding restrictions on abortion currently exist at both the federal and state level and in both public and private insurance plans.<sup>33</sup> Women who receive their health care through federal health plans do not receive coverage for abortion, with the caveat that some of these plans provide abortion funding if the woman's life is endangered or if the pregnancy is the result of rape or incest. These federal funding restrictions on the use of public funds affect women on Medicaid<sup>34</sup> and Medicare,<sup>35</sup> adolescents covered by the State Children's Health Insurance Program ("SCHIP"),<sup>36</sup> military personnel and their dependents,<sup>37</sup> Peace Corps volunteers,<sup>38</sup> federal employ-

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<sup>33</sup> For a list of state statutes imposing private insurance funding restrictions, see *infra* note 48.

<sup>34</sup> The Hyde Amendment currently prohibits the use of federal Medicaid funds for abortion services, except in the case of life endangerment, rape, or incest. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 111-8, §§ 507-508, 123 Stat. 750, 802-03 (2009). The Hyde Amendment's restrictions also apply to Indian Health Services facilities, which often provide the only accessible health care to women living on or near reservations. NARAL PRO-CHOICE AMERICA FOUNDATION, *supra* note 8, at 4.

<sup>35</sup> Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 111-8, §§ 507-508, 123 Stat. 750, 802-03 (2009). Although Medicare is primarily a health insurance plan for the elderly, it also provides health coverage for certain disabled persons. NARAL PRO-CHOICE AMERICA FOUNDATION, *supra* note 8, at 3.

<sup>36</sup> SCHIP is a federal program that provides coverage for low-income uninsured children who do not qualify for Medicaid. When SCHIP was enacted in 1997, the Hyde Amendment's limitation on funding for abortion procedures was written into the legislation, so the restriction does not need to be included every year in an appropriations bill. 42 U.S.C. § 1397ee(c)(1) (2006).

<sup>37</sup> 10 U.S.C. § 1093 (2006). The TRICARE program provides health-care coverage to military personnel and their dependents. The program prohibits abortion coverage in all cases except for life endangerment. NARAL PRO-CHOICE AMERICA FOUNDATION, *supra* note 8, at 4.

<sup>38</sup> See, e.g., Department of State, Foreign Operations, and Related Programs Appropriations Act, Pub. L. No. 111-8, tit. 3, 123 Stat. 831, 851 (2009). Since 1979, Peace Corps volunteers have been denied funding for abortion services in all circumstances, even life endangerment. NARAL PRO-CHOICE AMERICA FOUNDATION, *supra* note 8, at 5.

ees and their dependents,<sup>39</sup> women living in the District of Columbia,<sup>40</sup> and women in federal prisons.<sup>41</sup>

The Hyde Amendment is perhaps the most widely known prohibition on the use of federal funds. When the Supreme Court upheld this funding restriction in *Harris*, the Court held that those affected by the regulation, indigent women, were not a protected class.<sup>42</sup> Because the restriction did not affect a protected class, the Court applied rational basis review rather than heightened scrutiny. The Hyde Amendment was found to be “rationally related to the legitimate governmental objective of protecting potential life.”<sup>43</sup>

At the heart of the Court’s reasoning in *Harris* was its failure to view indigent women as a subset of women warranting a heightened degree of scrutiny under the Equal Protection Clause.<sup>44</sup> The Supreme Court framed indigent women’s vulnerability to funding restrictions as a product of their own financial instability: “although government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.”<sup>45</sup> For the past thirty years, the Court’s holding in *Harris* has been used to justify the federal constitutionality of abortion funding restrictions.<sup>46</sup>

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<sup>39</sup> The Federal Employees Health Benefits Program only provides abortion coverage in cases of life endangerment, rape, or incest. *See, e.g.*, Financial Services and General Government Appropriations Act, Pub. L. No. 111-8, § 613, 123 Stat. 630, 676–77 (2009); NARAL PRO-CHOICE AMERICA FOUNDATION, ABORTION COVERAGE FOR WOMEN ENROLLED IN FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM 1 (2009), <http://www.prochoiceamerica.org/assets/files/abortion-access-to-abortion-women-government-federal-employees.pdf>.

<sup>40</sup> *See, e.g.*, Financial Services and General Government Appropriations Act, Pub. L. No. 111-8, § 820, 123 Stat. 630, 700 (2009).

<sup>41</sup> *See, e.g.*, Commerce, Justice, Science, and Related Agencies Appropriations Act, Pub. L. No. 111-8, § 202, 123 Stat. 560, 584 (2009). Inmates at federal correctional institutions are only provided funding for abortions in cases of rape or life endangerment. *Id.*

<sup>42</sup> *Harris v. McRae*, 448 U.S. 297, 323 (1980) (“[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.”). The Court looked to its analysis in *Maher v. Roe*, 432 U.S. 464 (1977), which upheld a Connecticut regulation that prohibited state Medicaid funding of abortions that were not medically necessary. In that case the Court declared that “[a]n indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases.” *Id.* at 470–71.

<sup>43</sup> *Harris*, 448 U.S. at 325.

<sup>44</sup> One might wonder why the lawyers challenging the restriction in *Harris* only advanced an Equal Protection argument on behalf of poor women and did not, in addition, make an Equal Protection claim on behalf of all women. The National Organization for Women (“NOW”) dissuaded the lawyers in *Harris* from making a broader sex discrimination claim under the Equal Protection Clause because of political concerns about how this legal argument might provide further ammunition for opponents of the pending Equal Rights Amendment. *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1398 (2006).

<sup>45</sup> *Harris*, 448 U.S. at 316.

<sup>46</sup> Julie F. Kay, Note, *If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion Under a National Health Care Plan*, 60 BROOK. L. REV. 349, 358–59 (1994). It is important to note that the Hyde Amendment allows states to

Government-imposed funding restrictions also limit the coverage of abortion in private insurance plans. Compared to public funding restrictions and other limitations on the abortion right, “state requirements governing private insurers’ coverage of abortion have, by and large, remained below the radar screen.”<sup>47</sup> Five states currently have laws limiting private insurance coverage of abortion and requiring insurance companies to make abortion coverage a separate, optional rider in the insurance plan that can only be purchased for an additional fee.<sup>48</sup>

Despite these state-level restrictions on private insurance coverage, most employer-based health insurance plans currently provide coverage for abortion.<sup>49</sup> Thus, to the extent that the reforms affect private insurance coverage, there is a realistic possibility that an expanded national health insurance scheme without abortion coverage will decrease the number of women whose insurance provides funding for abortions.

### B. *Shifting the Stakes: National Health Insurance*

Whether abortion would be covered in the Health Security Act sparked intense debates in 1993 and 1994. Although abortion rights supporters attempted to frame coverage in the Health Security Act as simply maintaining the status quo for women who were enrolled in private plans that largely provided abortion benefits,<sup>50</sup> opponents pressured the Administration to leave abortion out of the health care plan.<sup>51</sup> In June of 1993, the nation’s Roman Catholic bishops passed a resolution “underscoring their previous warnings that abortion coverage could jeopardize passage of a national health care plan.”<sup>52</sup> In July of 1994, seventy-five members of the House of Representatives signed a letter to the Speaker of the House stating that they

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provide abortion funding for women enrolled in Medicaid as long as they use the state’s own funds: seventeen states currently provide such funding. NARAL PRO-CHOICE AMERICA FOUNDATION, *supra* note 8, at 3. State-level policies, however, can also impose further limitations on the use of public funds for abortion services. Twelve states restrict abortion coverage in the insurance plans of their state’s public employees. GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: RESTRICTING INSURANCE COVERAGE OF ABORTION I (2009), [http://www.guttmacher.org/statecenter/spibs/spib\\_RICA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf).

<sup>47</sup> GUTTMACHER INSTITUTE, *supra* note 46, at 1.

<sup>48</sup> See, e.g., IDAHO CODE ANN. § 41-2210A (2009); KY. REV. STAT. ANN. § 304.5-160 (West 2009); MO. REV. STAT. § 376a.805(1) (2008); N.D. CENT. CODE § 14-02.3-03 (2007); OKLA. STAT. ANN. tit. 63, § 1-741.2 (West 2007). Pennsylvania requires insurers to offer plans that only provide coverage for abortions in the case of rape, incest, or life endangerment. 18 PA. CONS. STAT. ANN. § 3215(e) (2009); see also GUTTMACHER INSTITUTE, *supra* note 46.

<sup>49</sup> See the sources cited *supra* note 9 for the best available data on private insurance coverage for abortion services.

<sup>50</sup> Senator Barbara Boxer defended abortion coverage by arguing that Congress was “not talking about providing women with a new benefit.” Robin Toner, *Groups Push for Abortion Coverage in Health Plan*, N.Y. TIMES, May 28, 1993, at A14.

<sup>51</sup> *Id.*

<sup>52</sup> Steinfels, *supra* note 19.

would only support a health care package that included coverage for abortions.<sup>53</sup>

The fight waged on throughout the health care debates, with the White House adopting the official position that “abortion should be covered ‘where a doctor deemed it medically necessary or appropriate,’”<sup>54</sup> Democratic members of the House stating that they would oppose any bill that did not provide full abortion coverage, and opponents reiterating their willingness to fight any plan that provided abortion as part of the basic benefit package.<sup>55</sup> There were various compromise solutions. President Clinton proposed that individuals who were opposed to participating in plans providing coverage for abortion could choose a plan that did not provide this coverage.<sup>56</sup> The Senate Finance Committee’s version of the bill included a broad conscience clause allowing employers, insurers, and other health plans to refuse to provide abortion coverage on the basis of a moral belief or religious conviction.<sup>57</sup> Legislators also considered providing abortion coverage through a separate optional rider that could be purchased at additional cost,<sup>58</sup> similar to the aforementioned state-level restrictions on private insurance coverage. Although the failure of the Health Security Act was the result of much more than the abortion controversy,<sup>59</sup> this history suggests that reproductive health care will be controversial throughout the current legislative process.

Indeed, the early debates over health care reform confirmed that reproductive health coverage would be a point of contention. The rumblings of opposition to abortion coverage began during the 2008 election. Although during the campaign then-Senator Obama was silent on the scope of abortion coverage in the national plan,<sup>60</sup> interest groups opposed to his election made

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<sup>53</sup> Robin Toner, *House Democrats Support Abortion in Health Plans*, N.Y. TIMES, July 14, 1994, at A1. As argued by Representative Patricia Schroeder: “‘Universal [health care] means universal . . . . Doesn’t universal include women?’” *Id.* at A16.

<sup>54</sup> *Id.* at A16.

<sup>55</sup> *Id.*

<sup>56</sup> Randall, *supra* note 6, at 72.

<sup>57</sup> Toner, *supra* note 53, at A16.

<sup>58</sup> *Id.* Two members of the House proposed allowing women to purchase supplemental coverage for abortion for as little as eighteen cents per month. Randall, *supra* note 6, at 72. A similar proposal has been suggested in connection with the Stupak amendment. The amendment’s supporters argue that women who would be prohibited from choosing a plan providing funding for abortion could purchase separate abortion coverage using their own funds. Kirpatrick & Pear, *supra* note 11.

<sup>59</sup> For a thorough discussion of the demise of the Health Security Act, see Jacob S. Hacker, *Learning from Defeat? Political Analysis and the Failure of Health Care Reform in the United States*, 31 BRIT. J. OF POL. SCI. 61 (2001).

<sup>60</sup> The proposed plan that Obama released during the campaign does not discuss abortion coverage. Indeed, the only mention of women’s reproductive health care in his plan is the coverage of maternity benefits. OBAMA’S HEALTH CARE PLAN, *supra* note 1, at 6. Although Obama himself was vague about his support for abortion coverage in a national plan, his opponents made it very clear that they believed that he intended to provide such coverage. In July of 2008, CBSNews.com reported on an Obama protestor who carried a sign labeling him “The Abortion President” because his health plan would call for expanded coverage for reproductive health services, “including abortion.” Brian

very clear that they would staunchly oppose insurance reform that provided funding for abortion services.<sup>61</sup> During the campaign, Obama stated that he opposed the Hyde Amendment,<sup>62</sup> but he did not explicitly address where he stood on abortion coverage in health insurance reform.<sup>63</sup> Since taking office, however, President Obama has shown a less than steadfast commitment to the pro-choice policy stance that he articulated during the campaign. He included the Hyde Amendment in his 2010 budget proposal,<sup>64</sup> and, much to the disappointment of pro-choice advocates,<sup>65</sup> emphatically stated during his

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Montopoli, *Obama's Call for Unity Faces Abortion Test*, CBSNEWS.COM, July 9, 2008, <http://www.cbsnews.com/stories/2008/07/08/politics/main4243015.shtml>.

<sup>61</sup> During the election campaign, FRC Action, the legislative action group of the Family Research Council, released the results of a 2008 poll showing that fifty-six percent of voters would be less likely to vote for a presidential candidate who proposed “universal coverage of abortion at taxpayer expense.” Joe Carter, *New Poll: Americans Oppose Abortion Coverage in “Universal Health Care Plans,”* FRCBLOG.COM, Jan. 23, 2008, [http://www.frcblog.com/2008/01/new\\_poll\\_americans\\_oppose\\_abor.html](http://www.frcblog.com/2008/01/new_poll_americans_oppose_abor.html). During the Republican presidential primary, candidate and former Massachusetts Governor Mitt Romney faced criticism from his opponents and more conservative Republicans for supporting a universal health care program in Massachusetts that included coverage for abortion services. MassResistance, *Gov. Romney's Universal Health Care Program for Massachusetts Includes Taxpayer-Funded Abortions*, [http://massresistance.org/docs/marriage/romney/health\\_ins](http://massresistance.org/docs/marriage/romney/health_ins) (last visited Nov. 1, 2009); see also Nancy French, *A Record of Conservative Health Care Reform*, EVANGELICALS FOR MITT, Nov. 15, 2007, [http://www.evangelicalsformitt.org/front\\_page/a\\_record\\_of\\_conservative\\_health.php](http://www.evangelicalsformitt.org/front_page/a_record_of_conservative_health.php) (noting that candidate Fred Thompson's Communications Director had criticized Romney for doing “nothing to prevent coverage of abortion on demand for a mere \$50”). In comparison, pro-choice activists were much less vocal during the election campaign about the possibility of expanding reproductive health care through health insurance reform. Although some activists have recently expressed disappointment about the direction the debate is headed, others have expressed a willingness to compromise. Planned Parenthood and NARAL, for example, have not pushed “to make repeal of the Hyde Amendment part of the current debate” in a pragmatic calculus that it is better to push for “passage of a broad reform bill that will enable more low-income women to afford . . . non-abortion services—such as contraception, pregnancy testing, and screenings for breast cancer, cervical cancer and sexually transmitted diseases.” Crary, *supra* note 20.

<sup>62</sup> Andrea Lynch, *Sen. Barack Obama's RH Issues Questionnaire*, RH REALITY CHECK, Dec. 21, 2007, <http://www.rhrealitycheck.org/blog/2007/12/21/sen-barack-obamas-reproductive-health-questionnaire>.

<sup>63</sup> Obama's campaign released the vague statement that the public plan would “provide coverage of all essential medical services. Reproductive health care is an essential service . . . . And private insurers that want to participate will have to treat reproductive care in the same way.” *Id.* President Obama continued to dodge the issue even after taking office. When asked about the scope of abortion coverage during a July 2009 CBS News interview, President Obama remained vague as to the administration's preferences: “I think that it's appropriate for us to figure out how to just deliver on the cost savings and not get distracted by the abortion debate.” James Oliphant, *The Nation: Abortion May Further Stall Health Reform; Some Lawmakers Threaten to Oppose the Bill Unless It Explicitly Restricts Taxpayer Funds for the Procedure*, L.A. TIMES, July 28, 2009, at A11.

<sup>64</sup> Press Release, Center for Reproductive Rights, *Obama Budget Ignores Healthcare Needs of Millions of Women, But Rejects Wasteful Abstinence-Only Funding* (May 7, 2009), <http://reproductiverights.org/en/press-room/obama-budget-ignores-healthcare-needs-of-millions-of-women-but-rejects-wasteful-abstinenc>.

<sup>65</sup> Stephanie Poggi, the Executive Director of the National Network of Abortion Funds, contends that Obama “traded many women's futures away” when he made this statement about limiting federal funding. Crary, *supra* note 20. Poggi argued that, de-

speech to a joint session of Congress that “no federal dollars will be used to fund abortion”<sup>66</sup> in the health care overhaul.<sup>67</sup> Although President Obama stated that the funding restriction included in the House’s version of the Bill went too far by restricting women’s private insurance choices, he clearly supports limitations on the use of federal funds.<sup>68</sup>

Since Congress is currently debating the details of the health care plan, it is impossible to predict the precise type of health insurance scheme that will be put on the table at the end of months of heated debate.<sup>69</sup> As noted in the Introduction, this Note is not an attempt to provide a comprehensive account of this political debate. Because Congress will inevitably consider a wide range of different plans throughout the legislative process, this Note uses the contours of Obama’s initial plan as the baseline in order to consider the various ways that abortion coverage might be restricted.

Obama’s initial plan proposed the creation of a National Health Insurance Exchange that would allow individuals to choose between enrolling in a public plan or enrolling in an approved private insurance plan.<sup>70</sup> Obama’s health care package also proposed to expand eligibility for Medicaid, and to finance the public plan partially through contributions from large employers who do not provide a meaningful contribution toward health insurance for their employees.<sup>71</sup>

Thus, under Obama’s initial plan, abortion coverage could be limited in several different ways: limitations could be imposed on coverage for women who are enrolled in the expanded version of Medicaid, the new public plan, or private insurance plans participating in the exchange. The health care legislation could also impose restrictions on each of these types of plans in a variety of different ways. Some types of restrictions that could be imposed are: an outright prohibition of abortion coverage, restrictions on funding for

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spite Obama’s language, “‘access to abortion is not a bargaining chip or a political football.’” *Id.* Nancy Northup, president of the Center for Reproductive Rights, stated that Obama’s rhetoric in his speech “has been unhelpful.” Patrick O’Connor & Carrie Budoff Brown, *Politics Trumps Policy in Health Debate*, POLITICO, Sept. 14, 2009, <http://www.politico.com/news/stories/0909/27149.html>.

<sup>66</sup> Steinfels, *supra* note 13.

<sup>67</sup> This is not to say that all of Obama’s actions since taking office have run counter to his pro-choice campaign rhetoric. One of his first acts in office was to repeal the so-called global gag rule, which had restricted federal funding for family planning organizations that promoted or provided abortion services abroad. Peter Baker, *Obama Reverses Rule on U.S. Abortion Aid*, N.Y. TIMES, Jan. 24, 2009, at A13. But there have been other actions, beyond his flip-flop on his support for the Hyde Amendment, that have shown his wavering support for abortion rights. Despite his 2007 promise to Planned Parenthood that his first act as President would be to sign the Freedom of Choice Act, which would prohibit the government from interfering with a woman’s right to choose, he later stated that the bill was “‘not [his] highest legislative priority.’” Sheryl Gay Stolberg, *A Debate Obama Hoped to Avoid*, N.Y. TIMES, May 15, 2009, at A14.

<sup>68</sup> Pear, *supra* note 11.

<sup>69</sup> For a brief summary of the debate on abortion coverage thus far, see *supra* notes 11 & 13.

<sup>70</sup> OBAMA’S HEALTH CARE PLAN, *supra* note 1, at 5–6.

<sup>71</sup> *Id.*

certain types of abortion procedures, a prohibition on the use of federal funds for abortion services, and a requirement that abortion coverage be purchased via separate optional riders. No matter what types of restrictions are proposed, Congress must be ready to analyze whether and how these restrictions might violate women's constitutional rights.

## II. LEGISLATIVE CONSTITUTIONALISM

Before presenting arguments that Congress should independently evaluate the constitutionality of the scope of coverage for abortion, it is important to first explain the model of constitutional interpretation underlying my normative framework. This Part thus seeks to provide the historical and theoretical background of legislative constitutionalism as a means of developing constitutional meaning. The appropriate role of the legislature in shaping, articulating, and enforcing constitutional values has been the subject of much academic commentary and debate. Despite the Court's recent language suggesting that Congress has little authority in the realm of constitutional meaning,<sup>72</sup> the reality is that forces outside of the judiciary have long played a fundamental role in shaping the Court's jurisprudence and that Congress often translates emerging understandings of the Constitution by legislating in line with its own understanding of constitutional values.

The broader theory of popular constitutionalism recognizes that the Constitution's meaning can be shaped and influenced by the views of ordinary citizens. Legislative constitutionalism is a particular branch of this the-

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<sup>72</sup> See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) ("[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."); *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) ("No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text."); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Congress does not enforce a constitutional right by changing what the right is."). Larry Kramer has described the Rehnquist Court as adopting a view of judicial sovereignty as opposed to judicial supremacy: "The Rehnquist Court no longer views itself as first among equals, but has instead staked its claim to being the *only* institution empowered to speak with authority when it comes to the meaning of the Constitution." Larry Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001). Kramer argues that this view is "based on a fundamental misunderstanding of constitutional history" that "overlooks the extent to which democratic participation in shaping the Constitution serves both democracy and constitutionalism." *Id.* at 15; see also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 225 (2006) (arguing that the Rehnquist Court has treated "claims of interpretive authority by nonjudicial officials as erroneous and illogical"); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L. & CONTEMP. PROBS. 105, 107, 118–19 (2004) ("[T]he Rehnquist Court has developed a strengthened version of judicial supremacy that denigrates nonjudicial interpretive authority and declares that, in certain contexts, the advancement of independent constitutional views violates the separation of powers."); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 7 (2003) (observing that the Rehnquist Court has repudiated "congressional constitutional interpretation . . . as a danger to the rule of law").

ory that views Congress as an important institutional mechanism for debating and influencing the constitutional vision articulated by the Court.<sup>73</sup> As recognized by the Court, “[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.”<sup>74</sup> Members of Congress take an oath to uphold the Constitution and they are bound by this oath.<sup>75</sup> Congressional enactments enjoy a presumption of constitutionality precisely because we expect members of Congress to uphold the values of the Constitution.<sup>76</sup>

In fact, the Fourteenth Amendment assumes that Congress will be a direct participant in constitutional lawmaking. Section 5 of this amendment explicitly vests Congress with the authority “to enforce, by appropriate legislation, the provisions of this article.”<sup>77</sup> Section 1 of the Fourteenth Amendment, which includes the Equal Protection Clause, is thus enforceable by Congress through Section 5.<sup>78</sup> Professors Robert Post and Reva Siegel have written extensively on the scope of Congress’s Section 5 power to enforce the Fourteenth Amendment,<sup>79</sup> and their theory of legislative constitutionalism grounds my analysis.

Legislative constitutionalism articulates a rationale for why Congress should independently evaluate and debate the meaning of Section 1 of the Fourteenth Amendment in deciding the scope of abortion coverage in a national health plan. When evaluating the constitutionality of abortion restrictions in the health reform package, it is easy to immediately jump to the question of whether or not this legislation would withstand the Court’s scrutiny if it were challenged on Equal Protection grounds. Such a jump, how-

<sup>73</sup> REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 9 (2006); see also Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 1985 (2003) (“[C]onstitutional law has also arisen from shifts in fundamental constitutional values held by dominant segments of the population and registered by legislative constitutionalism.”).

<sup>74</sup> *City of Boerne*, 521 U.S. at 535.

<sup>75</sup> U.S. CONST. art. VI.

<sup>76</sup> *City of Boerne*, 521 U.S. at 535.

<sup>77</sup> U.S. CONST. amend. XIV, § 5.

<sup>78</sup> U.S. CONST. amend. XIV, § 1. Professor Akhil Amar has argued that the most sensible interpretation of the Fourteenth Amendment is that both the judiciary and Congress will be involved “in the task of protecting truly fundamental rights” and that Congress has the authority to provide more protection for fundamental freedoms than the Court. Akhil Reed Amar, *Intratextualism*, 112 *HARV. L. REV.* 747, 826 (1999).

<sup>79</sup> See generally Post & Siegel, *supra* note 73 (presenting a theory of polycentric constitutional interpretation that allows Congress to both interpret and enforce the Constitution through the exercise of its Section 5 powers); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *IND. L.J.* 1 (2003) (criticizing a court-focused interpretation of Section 5 powers); Siegel, *supra* note 31 (discussing the evolution of Justice Rehnquist’s Equal Protection jurisprudence and his upholding of the Family and Medical Leave Act as an appropriate exercise of Congress’s Section 5 powers).

ever, ignores the important constitutional role Congress plays when deciding whether legislation should be enacted in the first place. Neither the public nor Congress should assume that the constitutionality of abortion funding restrictions has been settled by previous Court doctrine or that this is a question that only the Court is qualified to answer. This Part argues that legislative constitutionalism is a valuable source of constitutional meaning and presents concrete historical examples to further illustrate its worth.

It is important to first note that legislative constitutionalism does not require the abandonment of judicial supremacy, nor does it reduce the status of the Constitution to a mere legislative act.<sup>80</sup> Under a model of legislative constitutionalism, the Supreme Court still has the authority to review the constitutionality of acts of Congress. Congress still cannot pass a legislative act that violates the Court's understanding of a particular provision of the Constitution. The model simply posits that if Congress adopts an expansive definition of a particular provision and legislates in line with this vision, the resulting statute should not be invalidated solely because the congressional interpretation differs from that of the Court.<sup>81</sup>

#### A. *The Value of Legislative Constitutionalism*

Legislative constitutionalism provides a mechanism for strengthening our constitutional commitments by ensuring a polity that responds to popular understanding of the meaning of the Constitution. The value of legislative constitutionalism lies in its comparative advantages to particular limitations of a court-defined vision of constitutional rights. Courts are better suited to the enforcement of negative rights—although courts may be able to prevent the state from infringing on rights, they are remarkably ill-suited to creating the new positive rights that are sometimes required in order to achieve our constitutional ideals.<sup>82</sup> Furthermore, it is a myth that courts are, can, or

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<sup>80</sup> Legislative constitutionalism does not suggest that Congress can continually alter the meaning of constitutional principles and thereby reduce the value of its terms. The model views Congress as being bound to its prior definition of constitutional principles just as any court would be bound by prior precedent. How Congress interprets a particular constitutional clause in one legislative context should be carried through to future debates on the meaning of this principle. As articulated by Post and Siegel, “[t]he Constitution is a form of higher law for Congress, just as it is for the Court. Whatever interpretation Congress makes of the Constitution is binding on Congress . . . .” Post & Siegel, *supra* note 73, at 2024. Congress, however, can still recognize evolving norms and depart from its prior interpretations—just like any court, Congress can overturn its previous determinations and recognize that today's understanding of the meaning of a particular constitutional provision requires a different outcome than that articulated by a previous Congress. *Id.*

<sup>81</sup> Siegel and Post have stated that Section 5 statutes can be invalidated if they unduly burden states or violate principles of federalism, but not solely because Congress takes a broader view of the Constitution and the scope of Section 1 of the Fourteenth Amendment than that held by the Court. Post & Siegel, *supra* note 73, at 2056.

<sup>82</sup> ZIETLOW, *supra* note 73, at 161–62. Zietlow argues that courts, although well-situated for the protection of individual liberty interests, “are less well-suited for protect-

should be “hermetically insulated from constitutional politics.”<sup>83</sup> The participation of Congress in the debate over the meaning of constitutional values enhances the democratic legitimacy of our government<sup>84</sup> and facilitates the creation of flexible legislative solutions to enhance and enforce constitutional commitments.<sup>85</sup> Legislative constitutionalism has value because it provides a forum for public deliberation on the meaning of constitutional values. Limiting this discussion to the courts has a “stifling effect . . . on deliberation over values and rights in our society.”<sup>86</sup> When Congress deliberates over the meaning of the Constitution, citizens become further engaged in the fight to define fundamental rights and values and to confirm “the understanding that the Constitution is yet, in fact, the People’s.”<sup>87</sup>

## B. *Examples of Legislative Constitutionalism*

### 1. *The Civil Rights Act of 1964*

The Civil Rights Act of 1964, although passed under Congress’s Commerce Clause powers, was also strongly motivated by Congress’s desire to give meaning to the promises of the Fourteenth Amendment by outlawing discrimination in the workplace.<sup>88</sup> Rather than challenging the Court’s ear-

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ing equality-based interests . . . that define the community. Legislatures . . . are elected by the community and thus are intended to reflect the values of the community. The legislative process . . . is likely to result in a more robust vision of equality.” *Id.* at 160. Professor Cass Sunstein has argued that while equality principles are protected by the Fourteenth Amendment, the principle of equality is mainly “for legislative and executive enforcement. Courts are quite ill-suited to respond to any general attack on the translation of morally irrelevant characteristics into systemic sources of social disadvantage.” Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 16 (1992).

<sup>83</sup> Post & Siegel, *supra* note 73, at 1982. Despite the conventional wisdom that the Court serves as a counter-majoritarian body that is insulated from politics, research shows that the Court actually tends to follow public opinion. ZIETLOW, *supra* note 73, at 147–48. Jack Balkin and Sanford Levinson have argued that the Court is not an apolitical counter-majoritarian institution, but rather simply a “temporally extended majority rather than a contemporaneous one.” Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1076 (2001). Furthermore, many scholars have questioned the assumption that limiting constitutional interpretation to the courts will necessarily result in a more stable interpretation of the Constitution. Mark Tushnet posits that statutes interpreting constitutional meaning have “at least as long a shelf-life as the Supreme Court’s constitutional decisions.” Mark Tushnet, *Two Versions of Judicial Supremacy*, 39 WM. & MARY L. REV. 945, 956 (1998).

<sup>84</sup> Post & Siegel, *supra* note 73, at 2026 (“[L]egislative constitutionalism is a structural mechanism of democratic accountability.”). Congress is much more descriptively representative of the American citizenry than the nine Justices of the Supreme Court, and it is much better equipped to respond to changes in constitutional culture. *Id.* at 2030–31.

<sup>85</sup> Courts are limited by their Article III powers. Congress, however, can design creative remedies that give meaning to constitutional values: “Legislative constitutionalism is thus inherently aspirational in ways that judicial constitutionalism is not.” *Id.* at 2006–07. *See id.* at 2031–32.

<sup>86</sup> ZIETLOW, *supra* note 73, at 166.

<sup>87</sup> Post & Siegel, *supra* note 73, at 1983.

<sup>88</sup> ZIETLOW, *supra* note 73, at 113.

lier holding in the *Civil Rights Cases*<sup>89</sup> that Congress could only pass Section 5 legislation directed toward Fourteenth Amendment violations by state actors,<sup>90</sup> Congress instead chose to make explicit that it was legislating in this arena under its powers to regulate interstate commerce.<sup>91</sup> But Fourteenth Amendment principles permeated the debate: “members of the 1964 Congress knew that the 1964 Civil Rights Act had a special constitutional meaning . . . . [T]hey claimed the Constitution for themselves as they legislated to enforce its protections of individual rights and equality norms.”<sup>92</sup> The Civil Rights Act of 1964 serves as an example of the importance of congressional deliberation on the meaning of constitutional principles. Congress legislated in line with its own vision of the meaning of the Fourteenth Amendment, regardless of the particular clause that Congress used to justify the legitimacy of the act.<sup>93</sup>

Interestingly, the Civil Rights Act of 1964 was later upheld as a valid exercise of commerce powers in *Heart of Atlanta Motel, Inc. v. United States*<sup>94</sup> and *Katzenbach v. McClung*<sup>95</sup> with little reference to the congressional debate over the meaning of the Fourteenth Amendment. The Court was evidently not concerned by the fact that Congress saw itself empowered to interpret and debate Fourteenth Amendment principles and to legislate in line with this vision.<sup>96</sup> In fact, the Court would later uphold the Civil Rights Act as a valid exercise of Congress’s Section 5 powers when Congress extended the protections of the act to state employees.<sup>97</sup> The Civil Rights Act of 1964 thus serves as an example of the value of congressional debate over constitutional meaning and demonstrates how multifaceted interactions between the Court and Congress can further develop and define constitutional principles.

## 2. Sex Discrimination

The Court’s sex discrimination jurisprudence has been significantly influenced by congressional debate on a variety of legislation directed toward

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<sup>89</sup> 109 U.S. 3 (1883).

<sup>90</sup> *Id.* at 13.

<sup>91</sup> Although the legislative history demonstrates that Congress thought the legislation was also an exercise of its Section 5 powers, the Senate Commerce Committee noted that Congress’s Commerce Clause powers could achieve the objectives of the act without needing to rely on Section 5 powers. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 249 (1964).

<sup>92</sup> ZIETLOW, *supra* note 73, at 113.

<sup>93</sup> The congressional debates demonstrate that the act had much more constitutional meaning than the regulation of commerce. Even though Congress did not directly challenge the Court’s precedent on the scope of Section 5, “the bill marked a commitment to congressional enforcement of equality norms and to federal protection of minority rights against public and private infringement.” ZIETLOW, *supra* note 73, at 117.

<sup>94</sup> 379 U.S. at 261.

<sup>95</sup> 379 U.S. 294, 304–05 (1964).

<sup>96</sup> ZIETLOW, *supra* note 73, at 121.

<sup>97</sup> *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

women's equal citizenship. In the early 70s, Congress was much more responsive than the courts to the demands of the women's movement. Before the Court made any move toward heightened scrutiny under the Fourteenth Amendment for laws distinguishing on the basis of sex, Congress independently passed a variety of "federal protections for women's rights that were without precedent in American history."<sup>98</sup> In its ninety-second session, Congress passed the Equal Rights Amendment, protected state employees from sex discrimination, prohibited sex discrimination in education programs, and passed childcare legislation.<sup>99</sup> The Court subsequently pointed to this burst of legislative activity when taking the first steps toward applying heightened Equal Protection scrutiny to sex discrimination in *Frontiero v. Richardson*:<sup>100</sup> "Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration."<sup>101</sup>

The Court's recognition of sex discrimination was "a historic shift in the nation's constitutional beliefs" that was precipitated by congressional interpretation of the Equal Protection Clause.<sup>102</sup> Robert Post and Reva Siegel have argued that the "development of Fourteenth Amendment sex discrimination jurisprudence . . . was stimulated by acts of legislative constitutionalism, which illustrates how the structural connection between judicial and legislative interpretation can actually enhance the Court's ability to construe the Constitution."<sup>103</sup> The development of the Court's sex discrimination jurisprudence is striking, given recent Supreme Court language, for its unchallenged presumption "that Congress could act as an agent of constitutional change. . . . [A]ll assumed Congress's interpretive power was substantial enough for it to articulate constitutional norms of sex equality at a time when the Court had yet to subject sex discrimination to heightened scrutiny."<sup>104</sup> Legislative constitutionalism has historically played a central role in the development of sex discrimination jurisprudence and has arguably been the driving force translating the public's commitment toward sex equality into constitutional reality.

The Pregnancy Discrimination Act ("PDA") serves as a particular example of congressional commitment toward a vision of sex equality that differed from that articulated by the Court. Moreover, since Congress amended Title VII after it had been applied to the states using Congress's Section 5 powers, the PDA is arguably a Section 5 statute that explicitly legislates congressional understanding of the meaning of the Fourteenth

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<sup>98</sup> Post & Siegel, *supra* note 73, at 1985.

<sup>99</sup> *Id.*

<sup>100</sup> 411 U.S. 677 (1973).

<sup>101</sup> *Id.* at 687-88.

<sup>102</sup> Post & Siegel, *supra* note 73, at 1997.

<sup>103</sup> *Id.* at 1951-52.

<sup>104</sup> *Id.* at 2003.

Amendment.<sup>105</sup> As evidenced by the PDA, Congress is sometimes better situated to respond to developing norms of sex equality and popular visions of the meaning of Equal Protection.

### 3. *The Family and Medical Leave Act*

In *Nevada Department of Human Resources v. Hibbs*,<sup>106</sup> the Supreme Court upheld the Family and Medical Leave Act (“FMLA”) as a valid exercise of Congress’s Section 5 powers, despite the fact that this statute remedied violations of the Equal Protection Clause beyond those previously recognized by the Court.<sup>107</sup> Section 5 statutes such as the FMLA are an important way for Congress to articulate its vision of the meaning of constitutional principles because they allow “Congress unambiguously to speak the law of the Constitution and hence directly to express the evolving constitutional beliefs of the nation.”<sup>108</sup> Although Section 5 statutes give Congress the authority to sweep broader than the courts to enact “so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct,”<sup>109</sup> *Hibbs* nonetheless signifies the Court’s willingness to transform its Equal Protection doctrine in response to the changing constitutional beliefs of the nation, as articulated by Congress. *Hibbs* presents the FMLA as a congruent and proportional response to state violations of the Equal Protection Clause as interpreted by the Court. The reality, however, is that the FMLA’s “understanding of gender equality was broader than anything the Court had been willing to read into the Constitution.”<sup>110</sup>

While this decision will be analyzed in more depth in Part IV, the FMLA serves as a paradigmatic example of the comparative advantages of legislative constitutionalism in fashioning flexible remedies, and *Hibbs* provides a recent example of the Court’s endorsement of legislative constitutionalism. The statute provides twelve weeks of gender-neutral unpaid leave in an effort to combat gender discrimination in employment. By requiring much more than just equal treatment, the statute provides a completely different remedy from what a court could order for violations of the Equal

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<sup>105</sup> *Id.* at 2012–13. Part III will argue that the PDA demonstrates Congress’s understanding of the sex equality principles raised by abortion restrictions and that Congress must grapple with this history, alongside subsequent case law, when deciding whether to provide coverage in the national plan.

<sup>106</sup> 538 U.S. 721 (2003).

<sup>107</sup> The decision was particularly unexpected in light of the Court’s recent language. See cases cited *supra* note 72 (restricting Congress’s Section 5 powers); see also Siegel, *supra* note 31, at 1883.

<sup>108</sup> Post & Siegel, *supra* note 73, at 2005.

<sup>109</sup> *Hibbs*, 538 U.S. at 727–28.

<sup>110</sup> Daniel A. Farber, *Legislative Constitutionalism in a System of Judicial Supremacy*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 431, 440 (Richard W. Bauman & Tsvi Kahana eds., 2006).

Protection Clause.<sup>111</sup> *Hibbs* was an anomaly in the Rehnquist Court's jurisprudence because it deferred to congressional interpretation of Equal Protection. *Hibbs* "applies a form of sex discrimination jurisprudence that the Court learned from changes in constitutional culture reflected in Congress's constitutional interpretations."<sup>112</sup> Although the FMLA is not required by the Constitution and could be repealed at any time, the statute gives meaning to the Fourteenth Amendment and exemplifies the importance of a strong congressional commitment to pass legislation that embodies its own interpretation of constitutional values.<sup>113</sup>

### III. ABORTION AS AN ISSUE OF PREGNANCY DISCRIMINATION

Regardless of whether the Supreme Court's Equal Protection jurisprudence would require abortion coverage, this Note next presents the argument that Congress must wrestle with the emerging understanding of abortion as an issue of pregnancy discrimination as it debates abortion coverage in the health care reform package. While both the Court and Congress have yet to articulate a coherent and steadfast commitment to this normative framework, the legislative and judicial history of the PDA, the passage of the FMLA and its subsequent upholding in *Hibbs*, and the Court's reasoning in *Casey* suggest that this is an issue that Congress must at least confront and analyze. Even thirty years ago, members of Congress articulated a broad view of Equal Protection's application to abortion regulations during the debates on the PDA. This vision has reemerged in other legislative and judicial contexts, and Congress should recognize and contemplate this history in deciding the scope of abortion coverage in national health insurance.

#### A. Congressional Visions of Equal Protection at the Time of the PDA

The PDA was a congressional response to the Supreme Court's holding in *General Electric Co. v. Gilbert*<sup>114</sup> that the failure of an employer to provide coverage for maternity benefits in an otherwise comprehensive health insurance plan did not violate Title VII's prohibition against sex discrimina-

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<sup>111</sup> Post & Siegel, *supra* note 73, at 1971. Siegel and Post argue that the FMLA "exacted a far more substantial accommodation than a federal court was then (or is now) likely to require under Title VII." *Id.* at 2017.

<sup>112</sup> Post, *supra* note 72, at 34; *see also id.* at 23–24 ("*Hibbs* blurs the Court's own account of unconstitutional sex discrimination in order to facilitate congressional legislation that evidences a different understanding of unconstitutional sex discrimination."); Siegel, *supra* note 31, at 1883 ("Despite asserting that Congress was obliged to enforce the Court's interpretation of the Constitution, the Court was actually following Congress's interpretation of the Constitution.").

<sup>113</sup> Post & Siegel, *supra* note 73, at 2005–06.

<sup>114</sup> 429 U.S. 125 (1976).

tion.<sup>115</sup> *Gilbert* applied the Court's earlier interpretation of Equal Protection in *Geduldig v. Aiello*,<sup>116</sup> which upheld a California disability scheme that did not include pregnancy benefits.<sup>117</sup> The PDA was thus an attempt by Congress to reverse the holding of *Gilbert* and apply Congress's own broader vision of Equal Protection to the definition of sex discrimination under Title VII.<sup>118</sup>

Although pregnancy discrimination and abortion restrictions have since diverged in the case law,<sup>119</sup> the legislative debate over the PDA's passage demonstrates a remarkably clear understanding of the relationship between laws regulating abortions and pregnancy discrimination. It is important to revisit this history because it demonstrates how Congress can reason through principles of sex equality in a fundamentally different way than the Court.

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<sup>115</sup> See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 984 & n.112 (1984).

<sup>116</sup> 417 U.S. 484 (1974).

<sup>117</sup> In *Geduldig*, the Court had held that "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . ." *Id.* at 496 n.20. The Court applied this reasoning in *Gilbert*, stating that "*Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Gilbert*, 429 U.S. at 136.

<sup>118</sup> In fact, Professor William Eskridge has framed the PDA as a paradigmatic example of America's long-standing "statutory constitution" that looks to statutory enactments for an enlightened understanding of constitutional principles. Eskridge argues that "legislation and its regulations are, and long have been, the primary source of constitutional structures, rules, and rights in our polity" and "the PDA is a better methodology for constitutional elaboration than the process typified by *Marbury v. Madison*." William N. Eskridge, Jr., *America's Statutory "constitution"*, 41 U.C. DAVIS L. REV. 1, 5 (2007). Under his model, the congressional vision of Equal Protection articulated through the PDA should mean that at least some, if not most, of today's Supreme Court Justices "would be persuaded by the PDA's public record and the nation's elaboration of this super-statute that state discriminations because of pregnancy are not only sex discriminations but pretty invidious sex discriminations." *Id.* at 40.

<sup>119</sup> This separation has occurred "for both doctrinal and political reasons." Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 826 (2007). *Roe v. Wade*, 410 U.S. 113 (1973), found the protection for the abortion right in the liberty prong of the Due Process Clause and did not even mention the Equal Protection Clause as a source for supporting the right. See 410 U.S. at 153, 164. *Frontiero v. Richardson*, 411 U.S. 677 (1973), the first case to apply heightened scrutiny to sex-based state action under the Equal Protection Clause, did not address pregnancy or its related conditions. *Geduldig* then solidified this diverging trajectory by holding that discrimination on the basis of pregnancy was not necessarily discrimination on the basis of sex. 417 U.S. at 496 n.20. During the debates over the ERA in the late 1970s and early 1980s, feminists actually pushed to separate abortion and sex equality talk out of fear that such talk would further undermine the chance of passing the ERA. Siegel, *supra*, at 827–28. Consequently, abortion rights jurisprudence has largely remained within the liberty prong of the Due Process Clause and outside the scope of the Court's Equal Protection jurisprudence. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 375–76 (1985) ("The High Court has analyzed classification by gender under an equal protection/sex discrimination rubric; it has treated reproductive autonomy under a substantive due process/personal autonomy headline not expressly linked to discrimination against women.").

The PDA's abortion exclusion, which allows employers to choose not to cover abortion procedures in their health plans, was included only after heated congressional debate. This debate demonstrates that many members of Congress understood abortion regulations to be a form of pregnancy discrimination.<sup>120</sup>

Robert Post and Reva Siegel have recognized that Congress's debate over the PDA shows that its members contemplated "the meaning of sex equality in the pregnancy context [and that the debate] had clear constitutional overtones. . . . Congress's decision to enact a statute reversing the Court's reasoning in *Gilbert* provided yet another context for Congress to endorse the [women's] movement's constitutional vision of equal citizenship."<sup>121</sup> The PDA articulates a congressional understanding of "discrimination based on pregnancy or other aspects of women's reproductive capacity as discrimination based on sex."<sup>122</sup> Thus, the legislative history of the PDA is not just important as a piece of substantive precedent that the Court might analyze in determining Congress's understanding of Equal Protection as applied to Title VII<sup>123</sup>—it also exemplifies the important role that Congress can play in defining the meaning of constitutional rights, even when congressional interpretation conflicts with that of the Court.<sup>124</sup>

### B. *The Legislative History of the PDA*

The PDA sought to define sex discrimination as including discrimination on the basis of pregnancy, childbirth, and related medical conditions, and to require women affected by these conditions to be treated the same as

<sup>120</sup> See discussion *infra* Part III.B.

<sup>121</sup> Post & Siegel, *supra* note 73, at 2012–13.

<sup>122</sup> Cornelia T. L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 965 (2007).

<sup>123</sup> It bears noting that theories of statutory interpretation, while differing in the amount of weight given to a statute's legislative history, all generally presume that "the statutory text is the most authoritative interpretive criterion," and give less weight to a statute's legislative history. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354 (1990). Eskridge and Frickey argue, however, that historical evidence of a statute's meaning can help the judiciary to enforce the law as Congress intended, and that the "most authoritative historical evidence is the legislative history of the statute." *Id.* at 356. *But see* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 608 (2008) (noting the view of some scholars and judges that legislative history is a poor indicator of legislative intent, and the view of others that only the more credible forms of legislative history, such as committee reports, should be relied upon). Since this Note employs legislative history as evidence that Congress should consider in evaluating its prior interpretation of Equal Protection, I will not provide a detailed analysis of different theories of judicial statutory interpretation.

<sup>124</sup> Post and Siegel argue that the PDA demonstrates an "important disagreement between Congress and the Court about the constitutional meaning of sex discrimination. . . . This discrepancy between Congress's and the Court's understanding of the constitutional nature of sex discrimination persists to this day without causing perceptible damage to either institution." Post & Siegel, *supra* note 73, at 2042–43 (citations omitted).

other persons similar in their ability or inability to work for all employment purposes, including the receipt of fringe benefits.<sup>125</sup> The extensive legislative debate over whether to include a clause excluding abortion coverage from the terms of the act, however, demonstrates that congressional understanding of Equal Protection at the time of the PDA recognized the sex equality principles underlying the abortion right.

Importantly, while the final version of the act did include such limiting language,<sup>126</sup> Congress rejected a broader version of the amendment that would have completely excluded the PDA's application to the abortion right<sup>127</sup> by allowing employers to take adverse employment actions against women who had received abortions.<sup>128</sup> Senators expressed concern that a broadly worded exemption would fail to protect women from employers who "might decline to employ a woman whom they know has had an abortion, or . . . [who] might terminate her or otherwise take adverse action against her in her employment."<sup>129</sup> The amendment that eventually passed was worded much more narrowly, only allowing employers to choose not to cover abortions in their health plans, but otherwise leaving the PDA's broad language intact. Members of Congress made sure that the amendment that was included "in no way affects an employee's right to sick pay or disability benefits, or, indeed, the freedom from discrimination based on abortion in hiring, firing, seniority, or any condition of employment other than medical insurance itself."<sup>130</sup>

The fact that Congress felt compelled to narrow the amendment suggests congressional recognition of the sex equality principles at stake. The debate over whether to include a funding exclusion at all further demonstrates this progressive congressional understanding.<sup>131</sup> Legislators who did

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<sup>125</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

<sup>126</sup> *Id.* ("This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.").

<sup>127</sup> 123 CONG. REC. 29,664 (1977), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 138 (1980).

<sup>128</sup> *Id.* at 29,656, *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 112 (1980).

<sup>129</sup> *Id.* at 29,658 (statement of Sen. Williams), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 117 (1980).

<sup>130</sup> 124 CONG. REC. 36,819 (1978) (statement of Sen. Javits), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 203 (1980).

<sup>131</sup> Interestingly, the two female Representatives in the House who spoke about the PDA, while supporting the act, did not mention the controversy over whether the abortion exemption would be included. *See id.* at 21,440 (statement of Rep. Chisholm), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF

not want to limit the act's scope expressed their displeasure that Congress was contemplating including an abortion exemption in a bill designed to eradicate gender discrimination in the workplace. The remarks of Senator Bayh are particularly illuminating:

I think that a body composed of 100 males albeit conscientious, hard-working, intelligent, and well-intentioned males, is hardly in a position to make this very personal decision for even one woman, let alone to put an unfortunate amendment like this in a bill that is designed to root out discrimination. . . . I hope that the Senate will not cloud a bill that is designed to try to wipe away discrimination in the instances of abortion.<sup>132</sup>

Opponents of the abortion amendment to the PDA argued that it simply added "another limitation on the rights of female employees in a bill designed to free them of discrimination based on sex."<sup>133</sup> They distinguished the PDA, which would apply to private employers, from public funding of abortion services: "Remember, we are dealing now with a subject that is legal and which does not involve the expenditure of any public money."<sup>134</sup> The congressional debate framed the amendment, at least from the perspective of its opponents, as a form of sex discrimination that denied women the full range of their rightfully earned medical benefits.<sup>135</sup> Even those who supported the abortion exclusion framed the amendment in narrow terms, arguing that it was merely an attempt to leave the funding decision up to the

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THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 179-80 (1980); *id.* at 21,442 (statement of Rep. Burke), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 185-86 (1980).

<sup>132</sup> 123 CONG. REC. 29,657 (1977) (statement of Sen. Bayh), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 115 (1980). *See also* H.R. REP. NO. 95-948, at 15 (1978) (statement of Rep. Weiss), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 161 (1980) ("I voted against the bill as reported with the anti-abortion language because it adds a new form of discrimination in place of the one it seeks to eliminate.").

<sup>133</sup> 124 CONG. REC. 21,437 (1978) (statement of Rep. Green), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 173 (1980).

<sup>134</sup> *Id.* at 21,442 (statement of Rep. Whalen), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 184 (1980).

<sup>135</sup> Representative Weiss perhaps put it most succinctly in stating that the "anti-abortion provision will perpetuate unequal treatment for women workers. Health benefits are not gifts . . . . [O]ne-third of all health plans are contributed to solely or in part by employees." H.R. REP. NO. 95-948, at 15 (1978), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 161 (1980).

individual employer.<sup>136</sup> The amendment would avoid coercing those “employers with an ethical, moral, or religious objection into financing, in whole or in part, nontherapeutic abortions for their employees.”<sup>137</sup> While the language of the amendment does not confine the exemption to religious employers, the example given in the Report submitted by the House Committee on Education and Labor was “a church organization . . . [that] harbored religious or moral objections to abortion” and the belief that the PDA “could compromise the religious freedom of such employers.”<sup>138</sup> Both sides appeared to recognize the important values at stake in the decision whether to provide coverage for abortion. Government neutrality on coverage was the compromise position that eventually made its way into the final text of the PDA.<sup>139</sup> The amendment meant that abortion coverage would be “permissive, elective, and a subject of collective bargaining.”<sup>140</sup>

The legislative history of the PDA demonstrates that Congress can form its own judgments about the meaning of constitutional principles. Although the Court has slowly come to recognize abortion as an issue of sex equality,<sup>141</sup> members of Congress articulated this vision during the debates over the PDA. Congress ultimately decided that the PDA, while not requiring employers to provide abortion funding, should otherwise prohibit employers from discriminating on the basis of the decision to have an abortion.<sup>142</sup> The House and Conference Reports both explicitly stated that the PDA prohibited employers from firing or refusing “to hire a woman simply because she has exercised her right to have an abortion.”<sup>143</sup> Congress’s decision to pro-

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<sup>136</sup> 123 CONG. REC. 29,656 (1977) (statement of Sen. Eagleton), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 114 (1980).

<sup>137</sup> *Id.*

<sup>138</sup> H.R. REP. NO. 95-948, at 7 (1978), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 153 (1980).

<sup>139</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2006)). For the final text of the PDA, see *supra* note 126.

<sup>140</sup> 124 CONG. REC. 21,436 (1978), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 169 (1980).

<sup>141</sup> See discussion *infra* Part IV.B.

<sup>142</sup> Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 381 (1998). See 123 CONG. REC. 29,658 (1977), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 117–18 (1980).

<sup>143</sup> H.R. REP. NO. 95-948, at 7 (1978), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 153 (1980); H.R. REP. NO. 95-1786, at 4 (1978) (Conf. Rep.), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 197 (1980). The EEOC, in line with this congressional vision, has also interpreted the PDA to prohibit abortion discrimination: an employer “cannot discriminate in its employment practices against a woman who has had an abortion.” Questions and Answers on the Pregnancy Discrimination Act of 1978, 29 C.F.R. pt. 1604 app., question 34 (2008).

hibit employer discrimination against women for exercising their right to have an abortion shows that Congress has previously connected abortion with pregnancy discrimination, even if it has not always been steadfast in its recognition of the sex equality principles implicated by the abortion right.<sup>144</sup>

C. *Subsequent Case Law: Abortion's Protections Under the PDA*

Both the Sixth and Third Circuits have further validated this congressional vision of Equal Protection principles as applied to abortion and pregnancy discrimination by interpreting the PDA to apply to a woman's decision to undergo an abortion. In *Turic v. Holland Hospitality, Inc.*,<sup>145</sup> the Sixth Circuit held that the PDA's protections extended to women who were merely contemplating whether to have an abortion: "the plain language of the statute, the legislative history and the EEOC guidelines clearly indicate that an employer may not discriminate against a woman employee because 'she has exercised her right to have an abortion.'" <sup>146</sup> The Third Circuit recently held that an employee made a prima facie case of sex discrimination under the PDA in alleging that she was discharged for having an abortion.<sup>147</sup>

The lower courts, however, have been less willing to enforce Congress's intent to allow individual employers to decide whether or not to provide insurance coverage of abortion services. Various states have enacted restrictions on private insurance coverage of abortion that explicitly do not leave this decision up to the individual employer and that conflict with Congress's intent in passing the PDA.<sup>148</sup> These state-level restrictions, requiring insurers to offer abortion benefits via a separate, optional rider to be purchased at additional cost, were pointed to in debates over the Health Security Act as an example of the type of funding restriction that could exist in a public plan.<sup>149</sup> These insurance restrictions, however, directly conflict with congressional understanding of Equal Protection principles at the time of the passage of the PDA.

In the challenge to Rhode Island's restriction on private insurance coverage of abortion, *National Education Association of Rhode Island v. Garrahy*,<sup>150</sup> the Rhode Island District Court held that the PDA did not preempt the state law, which required abortion coverage to be purchased through a

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<sup>144</sup> Congress's support for the Hyde Amendment and other congressional restrictions on federal funding show that this understanding has not necessarily translated into other legislative contexts.

<sup>145</sup> 85 F.3d 1211 (6th Cir. 1996).

<sup>146</sup> *Id.* at 1214 (quoting H.R. Rep. No 95-1786, at 4 (1978) (Conf. Rep.), reprinted in 1978 U.S.C.C.A.N. 4749, 4766).

<sup>147</sup> *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008).

<sup>148</sup> See statutes cited *supra* note 48.

<sup>149</sup> Toner, *supra* note 53, at A16. Requiring women to purchase abortion coverage via a separate, optional rider has also been suggested in the current debate. Kirpatrick & Pear, *supra* note 11 (discussing the Stupak amendment's proposal to allow women to purchase separate abortion coverage).

<sup>150</sup> 598 F. Supp. 1374 (D.R.I. 1984).

separate, optional rider. The court's opinion, however, failed to acknowledge Congress's intent that the PDA would leave this decision up to the employer, the PDA's prohibition on discrimination on the basis of the decision to have an abortion, and Congress's broader purpose to use the PDA to ensure equal treatment of women in the employment sphere. The court rejected the plaintiff's argument that the PDA's statement that "nothing herein shall preclude an employer from providing abortion benefits"<sup>151</sup> means that the PDA is a "congressional command that no law, enacted by *any* legislative body, shall bar or operate to restrict the provision of these benefits. . . . [T]he language of the PDA states only a position of deliberate federal statutory neutrality with respect to these benefits."<sup>152</sup> The court looked at the House Report<sup>153</sup> and concluded that since the PDA was not intended to alter any other laws, this meant that the PDA did not prohibit state legislation limiting private insurance coverage of abortion benefits.<sup>154</sup>

*Garrahy*, however, was decided before the Supreme Court held in *California Federal Savings & Loan Association v. Guerra*<sup>155</sup> that the PDA was intended by Congress to articulate "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."<sup>156</sup> In *Guerra*, the Supreme Court cited to statements in the House and Senate Reports that the PDA was not intended to alter state laws, but the Court understood this as evidencing the congressional intent to ensure that existing state laws requiring employers to provide reasonable leave for pregnant women would not be preempted by the PDA.<sup>157</sup>

Under the Court's reasoning in *Guerra*, a state law that provides additional benefits for pregnant women is consistent with the purpose of the PDA. But a new type of state law that was never considered by Congress during the legislative debate and that imposes additional burdens on pregnant women cannot possibly be in line with the PDA's broader intent. These private insurance restrictions fall below the PDA's baseline level of protection, especially since the PDA otherwise protects the decision to have an abortion. Funding restrictions that require abortion coverage to be pur-

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<sup>151</sup> 42 U.S.C. § 2000e(k) (2006).

<sup>152</sup> *Garrahy*, 598 F. Supp. at 1381. The court did, however, invalidate the insurance provision on other grounds. The court found the provision to be an unconstitutional burden on a woman's right to choose as protected by *Roe*. *Id.* at 1385.

<sup>153</sup> H.R. REP. NO. 95-948 (1978), reprinted in 1978 U.S.C.C.A.N. 4749.

<sup>154</sup> *Garrahy*, 598 F. Supp. at 1382. The court did not find it relevant that at the time of the passage of the PDA there were no state laws in place similar to the Rhode Island insurance restriction. Although the House Report stated that the exemption was not intended to alter the affects of other laws, the supporters of the exemption did not necessarily intend it to be incapable of affecting the validity of future, hypothetical laws that could conflict with the exemption or the broader purpose of the PDA.

<sup>155</sup> 479 U.S. 272 (1987).

<sup>156</sup> *Id.* at 285 (quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

<sup>157</sup> *Guerra*, 479 U.S. at 287–88 (citing S. REP. NO. 95-331, at 3 (1978) and H.R. REP. NO. 95-948, at 10–11 (1978)).

chased through a separate, optional rider should *not* be used as an example of a restriction that could be included in a national plan while still upholding the principle of sex equality.<sup>158</sup> These restrictions single out abortion from other medical procedures, require women desiring abortion coverage to pay a higher premium without adequate justification,<sup>159</sup> and remove from the individual insurance provider the decision whether to provide coverage for abortion.

As evidenced by *Garrahy*, the lower courts have not necessarily been steadfast in their endorsement of Congress's view of abortion as an issue of pregnancy discrimination. But this does not mean that Congress should allow earlier court decisions to dictate and control its own understanding of Equal Protection. Moreover, the legislative debate over the PDA merely shows Congress's understanding of Equal Protection principles in 1978. Since that time, subsequent developments in the case law show that the Court has expanded its own vision of Equal Protection. Both Congress and the Court have incrementally developed a stronger Equal Protection jurisprudence as applied to laws implicating women's reproductive capacity. In deciding the scope of coverage in the national plan, Congress should therefore at least consider this history and the constitutional implications of its decision.

#### IV. LIMITING *Geduldig's* Reach

Although the PDA effectively reversed the Supreme Court's holding that pregnancy classifications were not sex-based classifications with respect to Title VII, the PDA did not overrule *Geduldig's* holding that pregnancy classifications are not sex-based classifications with respect to the Fourteenth Amendment.<sup>160</sup> *Geduldig*, though widely criticized,<sup>161</sup> has not been

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<sup>158</sup> Moreover, on a practical level, many women might decline to purchase these riders since "no one plans on having an unplanned pregnancy." Sharon Lerner, *Healthcare Reform—At the Price of Women's Health?*, NATION, Sept. 24, 2009, <http://www.the.nation.com/doc/20091012/lerner>. As a result, insurance companies might not even offer the riders, unless forced to do so. Indeed, the insurance provider with ninety-one percent of the market share in North Dakota, one of the states limiting private insurance coverage of abortion, does not offer the optional rider, "citing a lack of demand." *Id.*

<sup>159</sup> The Third Circuit noted the higher cost of policies providing abortion coverage when it invalidated Pennsylvania's restriction on private insurance coverage for abortion. The Pennsylvania statute required policies with abortion coverage to be more expensive than those without coverage, despite the fact that the state conceded that the actual cost of the policies providing abortion coverage might actually be lower. *Am. Coll. of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 303 (3d Cir. 1984).

<sup>160</sup> See Ginsburg, *supra* note 119, at 379; see also discussion *supra* Part III.A.

<sup>161</sup> Law, *supra* note 115, at 983 & n.107 (noting that "[c]riticizing *Geduldig* has since become a cottage industry" and listing over two dozen law review articles critiquing the decision). See, e.g., Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1290 (2007) ("*Geduldig's* dichotomy between sex equality and reproductive biology has begotten a form of doctrinal analysis that approaches equal protection as if 'notions of sex equality are irrelevant to the constitutional

overruled, and the case has traditionally been viewed as a major barrier to achieving heightened scrutiny for abortion classifications.<sup>162</sup> This Part will argue that recent Supreme Court cases, most notably *Casey* and *Hibbs*, can be read as limiting *Geduldig*. These cases show an emerging recognition of Equal Protection's application to laws regulating pregnancy and abortion—the exact interpretation that was articulated in the debate over the PDA. Congress should not dismiss the Equal Protection issues raised by abortion coverage in the national plan under the rationale that *Geduldig*'s 1974 holding settles the controversy.

Before describing the evolution of the Court's Equal Protection doctrine as applied to pregnancy and abortion restrictions, it is worth articulating more fully some of the reasons why an Equal Protection analysis makes sense in this particular context. Intuitively, this approach appeals to the

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rights of pregnant women.'"); Shannon E. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of Geduldig and Suggestions for Forcing Its Reversal*, 23 N.Y.U. REV. L. & SOC. CHANGE 59, 62 (1997) (noting that many commentators have called on the Court to overrule *Geduldig*, and that the decision "creates a conceptual barrier to the development of a more progressive feminist approach in the Supreme Court's jurisprudence"); Reva B. Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN L. REV. 261, 354 (1992) (arguing that the Court should revisit its holding in *Geduldig* to "accord with the common social understanding and the amended terms of the Civil Rights Act of 1964, that regulation concerning women's capacity to gestate categorically differentiates on the basis of the sex, and so is facially sex-based").

<sup>162</sup> Law, *supra* note 115, at 985 ("Doctrinally, however, *Geduldig* has made it more difficult to claim that reproductive freedom is an aspect of sex-based equality. . . . Since 1973, literally hundreds of legal challenges to restrictive abortion laws have been brought, and only a very few of the cases have argued that the restrictions violated sex equality norms."). Although this paper is not an attempt to argue that the Court would hold that funding restrictions are a violation of the Equal Protection Clause, it is worth briefly articulating how the Court would approach such an analysis in order to fully comprehend the limitations posed by *Geduldig*. Under current Court doctrine, there are three ways of conceptualizing how abortion restrictions, such as any hypothetical funding restriction in the national plan, might trigger heightened scrutiny: (1) as a facial class-based deprivation of rights; (2) as restrictions that impose significant harms and burdens on women that are not similarly imposed upon men; or (3) as restrictions that are motivated by unconstitutional and discriminatory stereotypes about women's roles. See Kay, *supra* note 46, at 369–72. The clearest route to heightened scrutiny is option (1): only women become pregnant, and only women undergo abortion procedures. *Geduldig*, however, has been read as precluding this option. Option (2) is virtually foreclosed by the Court's holding in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), that the disparate impact of a policy on one gender is not enough to trigger heightened scrutiny. Instead, the plaintiff must show that the legislature acted with a discriminatory purpose. *Id.* at 272. This requirement often proves fatal for Equal Protection challenges since legislative intent "may be impossible to determine and once determined can contain subtle gender stereotypes harmful to women." Kay, *supra* note 46, at 383. Although option (3) offers a potential route to heightened scrutiny, it would require the Court to recognize the sex-stereotyping underlying abortion regulations. Reva Siegel's 1992 article *Reasoning from the Body* presents a detailed historical account of the unconstitutional sex stereotyping that is intertwined with support for abortion restrictions, but it is not clear that the Court would be willing to engage in such a thorough analysis of the covert gender biases motivating legislative deliberations. See Siegel, *supra* note 161, at 379. Limiting the reach of *Geduldig* thus carries significant weight for the future of the Court's Equal Protection scrutiny of abortion regulations.

common understanding of pregnancy as a gender-linked condition. Although this view has yet to resonate with a majority of the Court, the dissenting Justices in *Gonzales v. Carhart*<sup>163</sup> recognized that the decision whether to bear a child has profound implications for a woman's "autonomy to determine her life's course, and thus to enjoy equal citizenship stature."<sup>164</sup> This suggests that a majority of the Court might one day be more receptive to recognizing the common understanding of pregnancy and abortion as gendered concepts.

More practically, attacking funding restrictions on sex equality grounds has strategic appeal because it centers the legal inquiry on equality values rather than substantive rights. The Equal Protection Clause pursues equality directly and "manifests no concern with the fundamental rights citizens must possess."<sup>165</sup> Instead of raising questions about whether abortion is a substantive right protected by the Constitution, Equal Protection doctrine "protects citizens from governmental discrimination and subordination."<sup>166</sup> The fact is that "[a]nti-abortion laws, very simply, force pregnant women to be mothers. They deny women the ability to shape their destiny, and determine the course of their lives and the family they want to have."<sup>167</sup> Restricting funding for abortion perpetuates the stereotype that women are "'breeders' whose primary function is to bear and rear children. Such gender stereotypes . . . negatively affect *all* women regardless of income level or whether they are capable of conceiving children."<sup>168</sup> The relevant question under Equal Protection is not whether abortion is a fundamental right that the government must provide, but rather whether Congress can enact legislation that undermines women's equality.

Legislative constitutionalism requires a "continuing dialogue"<sup>169</sup> between Congress and the Court on the meaning of constitutional values. This Part is not an attempt to argue that the Supreme Court would necessarily invalidate a health insurance scheme that did not include funding for abortion as a violation of Equal Protection.<sup>170</sup> Rather, this Part argues that recent

<sup>163</sup> 550 U.S. 124 (2007).

<sup>164</sup> *Id.* at 172 (Ginsburg, J., dissenting).

<sup>165</sup> David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 921 (2007).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 934.

<sup>168</sup> Kay, *supra* note 46, at 378–79.

<sup>169</sup> Post, *supra* note 72, at 37.

<sup>170</sup> Past scholars have questioned whether an Equal Protection framework would necessarily mean that the courts would overturn a national health insurance law excluding abortion coverage. See, e.g., Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419, 454 (1995) (arguing that it is "an open question how the Court would decide the contest" and that "[i]t seems probable that the Court would find the [health insurance] law constitutional"); Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 896–98 (2007) (positing that an "[E]qual [P]rotection analysis is unlikely to offer greater prohibitions on abortion targeting than are available under abortion-specific jurisprudence rooted in due process").

case law has demonstrated the Court's willingness to be influenced by legislative interpretations of the Fourteenth Amendment and to analyze abortion restrictions from sex equality grounds. Congress therefore should recognize the constitutional implications of its decision whether to restrict coverage in the health care reform package.

#### A. *Limiting Geduldig's Application to Pregnancy Discrimination*

It seems likely that *Geduldig's* holding that pregnancy classifications are not prima facie sex discriminatory<sup>171</sup> will remain valid law. The Court has had the opportunity to overrule *Geduldig*, and it has explicitly declined to do so. In the 1993 case *Bray v. Alexandria Women's Health Clinic*,<sup>172</sup> the Court renewed the validity of *Geduldig's* construction of Equal Protection,<sup>173</sup> particularly as applied to abortion. Under the Court's reasoning, disfavoring abortion is not ipso facto sex discrimination: "there are common and respectable reasons for opposing abortion other than a derogatory view of women as a class."<sup>174</sup> Although the Court has been unwilling to overrule *Geduldig*, recent doctrine<sup>175</sup> calls for limiting *Geduldig's* reach and recognizing a broader vision of Equal Protection that implicates laws regulating pregnancy and abortion.<sup>176</sup>

First and foremost, the language of *Geduldig* is not as catastrophic for Equal Protection doctrine as is commonly assumed. The Court stated that "[while] it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification."<sup>177</sup> This means that some legislative classifications concerning pregnancy could still require a heightened standard of review as sex-based classifications.<sup>178</sup> Cornelia Pillard, who argued *Hibbs* before the Supreme Court, has argued that the best strategic approach may be to "continue to minimize the significance of *Geduldig* and [its] desiccated theory of sex discrimination."<sup>179</sup> Given congressional willingness to pass legislation that interprets the Equal Protection Clause more broadly than the Court, there may now be "less practical need to push to overrule *Geduldig*."<sup>180</sup>

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<sup>171</sup> 417 U.S. 484, 496 n.20 (1974).

<sup>172</sup> 506 U.S. 263 (1993).

<sup>173</sup> *Id.* at 271 (citing *Geduldig* for the proposition that not "every legislative classification concerning pregnancy is a sex-based classification").

<sup>174</sup> *Id.* at 263.

<sup>175</sup> Most notably, *Casey* and *Hibbs*. See discussion *infra* Part IV.B.

<sup>176</sup> Gilian Metzger has recognized that "[w]hile the Court has never overruled *Geduldig*, it has since acknowledged the gender equality concerns raised by measures targeting reproduction and abortion." Metzger, *supra* note 170, at 886.

<sup>177</sup> *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

<sup>178</sup> Siegel, *supra* note 31, at 1891 ("It leaves open the possibility that *some* legislative classifications concerning pregnancy are sex-based classifications . . .").

<sup>179</sup> Pillard, *supra* note 122, at 972.

<sup>180</sup> *Id.* Pillard's view is in contrast to that advanced by Sylvia Law, who believes that *Geduldig* is "not so easily confined through the manipulation of doctrine. The Court

Regardless, *Geduldig* should not be read as constraining Congress from viewing abortion restrictions as a prima facie form of sex discrimination.<sup>181</sup>

*Hibbs* provides recognition that the Court's understanding of pregnancy discrimination has significantly transformed since *Geduldig*. In upholding the FMLA as a valid Section 5 Statute, *Hibbs* frames the FMLA as a congressional attempt to prevent states from violating the Equal Protection Clause in the provision of leave benefits by giving more benefits to mothers and mothers-to-be.<sup>182</sup> *Hibbs* provides recognition that laws regulating pregnancy can be based on sex stereotypes that violate Equal Protection—the Court's interpretation of Equal Protection has broadened since *Geduldig* and has been influenced by legislative interpretations of the Constitution.<sup>183</sup> Reva Siegel has written a seminal article on the transformative power of *Hibbs*.<sup>184</sup> She argues that the Court “introduces an important new understanding of when discrimination on the basis of pregnancy is discrimination on the basis of sex under *Geduldig v. Aiello*. . . . [W]here regulation of pregnant women rests on sex-role stereotypes, it is sex-based state action within the meaning of the Equal Protection Clause.”<sup>185</sup> Thus, reading *Hibbs* and *Geduldig* together confirms that the PDA is appropriate legislation under the Court's Section 5 powers to enforce the Equal Protection Clause.<sup>186</sup> *Geduldig* left open the possibility that some legislative classifications concerning pregnancy might violate Equal Protection. Thus, in passing the

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should simply overrule *Geduldig*, recognizing it as the false step that Congress, nearly every commentator, and the Court itself have regarded it.” Law, *supra* note 115, at 1037.

<sup>181</sup> In a 1985 law review article, now-Justice Ruth Bader Ginsburg argued that congressional understanding of pregnancy classifications in the PDA, while not “controlling in constitutional adjudication . . . might stimulate the Court one day to revise its position that regulation governing ‘pregnant persons’ is not sex-based.” Ginsburg, *supra* note 119, at 379. In 1992, Cass R. Sunstein argued that, despite the continued validity of *Geduldig*, “restrictions on abortion should be seen as a form of sex discrimination. . . . A statute that is explicitly addressed to women is of course a form of sex discrimination. A statute that involves a defining characteristic or a biological correlate of being female should be treated in precisely the same way.” Sunstein, *supra* note 82, at 32.

<sup>182</sup> See Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 734 n.10 (2003).

<sup>183</sup> Siegel, *supra* note 31, at 1883 (“Despite asserting that Congress was obliged to enforce the Court's interpretation of the Constitution, the Court was actually following Congress's interpretation of the Constitution.”).

<sup>184</sup> See generally Siegel, *supra* note 31.

<sup>185</sup> *Id.* at 1873; see also Siegel, *supra* note 119, at 832. Various scholars have argued that abortion regulations are based on sex role stereotypes. See, e.g., Buchanan, *supra* note 161, at 1295–96 (stating that “[s]tate action that imposes burdens on women's sexual activity that are not imposed on men” rests on gender stereotypes that reinforce women's traditional sexual and reproductive roles); Kay, *supra* note 46, at 378 (arguing that abortion restrictions serve “to perpetuate gender stereotypes of women as ‘breeders’ whose primary function is to bear and rear children”); Siegel, *supra* note 119, at 834 (arguing that state restrictions on reproductive liberty can “reflect or enforce gender stereotypes about women's agency or their sexual and family roles”).

<sup>186</sup> Siegel, *supra* note 31, at 1893; see also Buchanan, *supra* note 161, at 1294 (“[T]he Court now recognizes that at least some pregnancy-based classifications that reinforce sex stereotypes constitute sex-based state action for the purpose of equal protection. . . . [T]he Court's scrutiny of gender-based Equal Protection claims, at least with regard to claims to equal workforce participation, is now stronger than ever.”).

PDA, Congress used its Section 5 powers to enact congruent and proportional legislation that Congress felt was necessary in order to deter unconstitutional regulation of pregnant women that rested on sex-role stereotypes. Reading these cases together also further underscores why the congressional debate over the PDA should inform our understanding of the meaning of Equal Protection.

### B. *The Sex Equality Grounding of the Abortion Right*

*Hibbs* does not explicitly mention laws regulating abortion, but its analysis of pregnancy classifications as sex-based action implicating the Equal Protection Clause can be extended to this context. In *Tucson Women's Clinic v. Eden*,<sup>187</sup> the Ninth Circuit extended the reasoning of *Hibbs* to abortion regulations. The court stated that *Hibbs* "strongly supported the plaintiffs' argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender."<sup>188</sup> But the Ninth Circuit also recognized that legislation passed under Congress's Section 5 powers can respond to unconstitutional state action "regardless of whether a court would be capable of adjudicating that unconstitutionality,"<sup>189</sup> and that *Hibbs* thereby does not require the court to conclude that abortion restrictions and regulations violate Equal Protection.<sup>190</sup>

Although the congressional understanding of Equal Protection recognized in *Hibbs* may not currently compel a court to conclude that abortion restrictions are a form of unconstitutional sex discrimination, *Hibbs* and *Casey* certainly suggest that the courts are moving in this direction. In *Casey*, the Supreme Court recognized that abortion restrictions can be based on inappropriate visions of women's appropriate roles.<sup>191</sup> *Hibbs* has now explicitly recognized that state regulation of pregnant women that enforces gender stereotypes violates Equal Protection principles.

Although *Casey* upheld the abortion right under the privacy framework of *Roe*, the Court's opinion linked abortion rights to a vision of sex equality: "[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 repro-

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<sup>187</sup> 371 F.3d 1173 (9th Cir. 2004).

<sup>188</sup> *Id.* at 1190. For a discussion of *Eden's* interpretation of *Hibbs* as limiting *Geduldig's* reach, see Julie B. Erlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 408–09 (2008).

<sup>189</sup> *Eden*, 371 F.3d at 1190.

<sup>190</sup> The Ninth Circuit applied the undue burden standard articulated in *Casey* instead of subjecting the law to intermediate scrutiny under the Equal Protection Clause. *Id.* at 1191.

<sup>191</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) ("Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role . . .").

ductive lives.”<sup>192</sup> Justice Stevens’s concurring opinion explicitly stated that *Roe* forms an “integral part” of our understanding of “the basic equality of men and women.”<sup>193</sup> While upholding the privacy framework, Stevens recognized that abortion restrictions appear to rest upon a “conception of women’s role that has triggered the protection of the Equal Protection Clause.”<sup>194</sup> In *Eden*, the Ninth Circuit recognized that the Supreme Court’s earlier reasoning in *Casey* supported the proposition that “the right to obtain an abortion is tied to the right to be free from sex discrimination in a manner unlike any other medical service that only one gender seeks.”<sup>195</sup> Equality concerns run throughout the opinion in *Casey* and present an alternative sex equality rationale for invalidating abortion restrictions that has been further validated by the Court’s recognition of a broader view of Equal Protection in *Hibbs*.

Since *Casey*, Justice Ruth Bader Ginsburg—a strong proponent of sex equality arguments for reproductive rights—has joined the court. Justice Ginsburg’s “view is that gender inequality is perpetuated by abortion restrictions and that the Equal Protection Clause of the Fourteenth Amendment is a strong basis for claiming abortion rights under the Constitution.”<sup>196</sup> While the majority of the current Court does not share Justice Ginsburg’s view, progressives should point to her understanding of Equal Protection in any debate over national health insurance coverage. Her view, as articulated in her dissent in *Gonzales v. Carhart*,<sup>197</sup> situates abortion in a sex equality framework<sup>198</sup> that parallels the broad congressional view of equality articulated in the debates over the PDA. Ginsburg recognizes that abortion implicates “a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”<sup>199</sup> Although sex equality arguments, as evidenced by *Casey*, do not necessarily need to be grounded in the Equal Protection Clause,<sup>200</sup> these arguments are nevertheless based on a fundamental recogni-

<sup>192</sup> *Id.* at 856.

<sup>193</sup> *Id.* at 912 (Stevens, J., concurring).

<sup>194</sup> *Id.* at 928.

<sup>195</sup> *Eden*, 371 F.3d at 1190–91.

<sup>196</sup> Allen, *supra* note 170, at 437.

<sup>197</sup> 550 U.S. 124 (2007).

<sup>198</sup> Reva Siegel has described Ginsburg’s dissent as emphasizing:

that the Constitution limits government efforts to regulate women’s choices and women’s roles, and would continue to do so, even if the Court were to reverse *Roe* and *Casey*. The dissent, in short, summons an understanding of women as equal citizens that is vindicated through cases interpreting both the Constitution’s liberty and equality guarantees.

Siegel, *supra* note 119, at 838; see also Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 432 (2007) (“By grounding their objections in guarantees of equality as well as liberty, the dissenting Justices make clear their view that constitutional controversy will persist even if *Roe* is reversed.”).

<sup>199</sup> *Carhart*, 550 U.S. at 172 (Ginsburg, J., dissenting).

<sup>200</sup> Siegel, *supra* note 119, at 815.

tion of “control over the timing of motherhood as crucial to the status and welfare of women, individually and as a class.”<sup>201</sup>

*Casey* and *Hibbs* signal that the Supreme Court might one day recognize abortion regulations as triggering heightened scrutiny under the Equal Protection Clause. Recent developments in the case law thus give reason to advocate for congressional legislation that will continue to support a general trend toward enhanced scrutiny of abortion regulations on sex equality grounds.

Although it is not clear that grounding abortion rights in Equal Protection will necessarily make these rights less susceptible to attack,<sup>202</sup> it is clear that these arguments will help to reconnect abortion to larger struggles for women’s equality. It is also clear, from *Hibbs*, that the Court has been willing to expand its understanding of Equal Protection based upon the congressional understanding of the principle. Advocating for expanded national health insurance on these grounds therefore may mean that any restrictions that are adopted would be more closely scrutinized by the Court. The analysis in this Part demonstrates that the Court has been willing to gradually expand upon its vision of Equal Protection. Progressives should thus continue to advocate for legislation in line with this expansive vision.

#### V. APPLYING A BROADENED VISION OF EQUAL PROTECTION TO ADVOCACY FOR NATIONAL HEALTH INSURANCE COVERAGE

This Part provides recommendations for how this informed understanding of the gradually expanding scope of Equal Protection should influence the debate on national health insurance. There could be a wide range of coverage for abortion depending on the precise details of the reform package. Coverage could be mandated, prohibited, or restricted in the public plan,<sup>203</sup> Medicaid, or the plans of private insurers accepting federal subsidies.<sup>204</sup> Given recent proposals before Congress, funding restrictions might

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<sup>201</sup> *Id.* at 818.

<sup>202</sup> Allen, *supra* note 170, at 424 (“If it is true that privacy jurisprudence has delayed women’s journey toward first-class citizenship, it is unclear that an Equal Protection doctrine would serve as a surer ticket.”).

<sup>203</sup> Whether restrictions are placed in a public plan, of course, depends on whether the final bill includes a public option. Robert Pear & David M. Herszenhorn, *Health Overhaul Is Drawing Close to Floor Debate*, N.Y. TIMES, Oct. 4, 2009, at A1 (“The more liberal House will probably not pass a health care bill without such a public insurance option, while the Senate appears unlikely to pass one with it.”).

<sup>204</sup> This Note does not attempt to predict what type of health insurance regime will be proposed or enacted, nor does it predict which funding restrictions are most likely to be included. This Note also does not address whether a reformed health insurance scheme would be required to provide funding for abortion in the case of life endangerment, rape, or incest. Given that the current version of the Hyde Amendment provides funding in these instances, I will assume that any restrictions on coverage would nevertheless include coverage in these narrow circumstances. See Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 111-8, § 508(a), 123 Stat. 750, 803 (2009).

be placed on any federal dollars, regardless of whether these federal dollars are spent in a public or private plan.<sup>205</sup> Although it is likely that health insurance will be passed under the Commerce Clause or the Taxing and Spending Clause, Congress must still legislate in line with its vision of Equal Protection. Legislative constitutionalism requires Congress to evaluate the Fourteenth Amendment values implicated by its actions<sup>206</sup> even if the health

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<sup>205</sup> Steinfelds, *supra* note 13. As discussed in Part II.B, President Obama has reiterated that “no federal dollars will be used to fund abortion.” *Id.* The Capps amendment placed funding restrictions on federal dollars in both the public and private plans. *Id.* A similar amendment was included in the Senate Finance Committee’s version of the bill. Editorial, *supra* note 13. The final bill that passed the House included the Stupak amendment, which restricts abortion coverage for any public plan, and for any private plan that accepts federal subsidies. 155 CONG. REC. H12,921 (daily ed. Nov. 7, 2009) (statement of Rep. Stupak). See discussion *supra* notes 11 & 13.

<sup>206</sup> The early evidence from the debate on the House floor over the passage of the Stupak amendment shows that sex equality principles are already playing a role in the debate. The Democrats who spoke out against the amendment framed their opposition by highlighting the ways in which its terms would restrict women’s equality. See, e.g., 155 CONG. REC. H12,922 (daily ed. Nov. 7, 2009) (statement of Rep. DeLauro) (“It attempts an unprecedented overreach of women’s basic rights and freedoms in this country. . . . It invades women’s personal decisions, discriminates against working women, and, put simply, violates the law of the land.”); *id.* (statement of Rep. Capps) (arguing that the goal of the Stupak amendment is to “strip women of their right to choose altogether” and that the amendment is “the only language in the entire legislation that actually restricts coverage of a legal medical procedure”); *id.* at H12,923 (statement of Rep. Nadler) (“[T]his amendment adds a new discriminatory measure against women.”); *id.* at H12,924 (statement of Rep. Quigley) (“For over 8 months, this body has strived to overcome the health care inequalities in our country, but this amendment disrupts that sense of equality. . . . This amendment will serve only to hurt low-income women, and it will restrict their ability to access reproductive health care even with their own money.”); *id.* (statement of Rep. Baldwin) (arguing that reproductive freedom is the “one thing that has contributed the most to the empowerment of women in our society” and that the Stupak amendment “is an erosion of a woman’s reproductive freedom”); *id.* (statement of Rep. Maloney) (expressing her opposition to the Stupak amendment, “which plainly discriminates against women, puts women’s health at risk, and marks an unprecedented restriction on people who pay for their own health insurance”); *id.* at H12,925 (statement of Rep. Schakowsky) (“[The health care bill] is not about further marginalizing women by forcing them to pay more for their care. This amendment is a disservice and an insult to millions of women throughout this country.”); *id.* at H12,926 (statement of Rep. Jackson-Lee) (“This is an unacceptable violation of a woman’s personal sovereignty.”); *id.* at H12,924 (statement of Rep. Hirono) (arguing that the amendment “is not only discriminatory but dangerous to women’s health”); *id.* at H12,926 (statement of Rep. Harman) (“This is not chipping away at a woman’s right to choose, this is an outright assault on my constitutional rights . . . . Its passage would pair us with the government of Afghanistan in sending women’s rights back to the Stone Age.”); *id.* at H12,927 (statement of Rep. Farr) (“This amendment ignores the constitutionally protected right for women to choose their reproductive health care. It makes women, and only women, have to purchase an additional policy with their own money . . . . When will we stop treating women like second class citizens? When will we admit that they have the right to determine their health care like anyone else? . . . Shame on us for being so disrespectful of their humanity and for attempting to disenfranchise them in this way.”). Although the House ultimately voted in support of the Stupak amendment, the preceding language demonstrates that at least some members of Congress are evaluating the equality implications of limitations on coverage. Whether these principles will prevent the final bill from including such restrictive language remains to be seen. Nevertheless, members of Congress should continue to evaluate the sex equality implications of the scope of coverage

insurance legislation is not passed under its Section 5 powers.<sup>207</sup>

### A. *Restrictions on the Public Plans*

The Court's upholding of the constitutionality of Medicaid restrictions on abortion funding in *Harris v. McRae*<sup>208</sup> does not preclude Congress from finding a national health insurance scheme restricting abortion coverage to violate today's understanding of Equal Protection: *Harris* was decided early in the development of sex discrimination jurisprudence, Medicaid restrictions affect far fewer women than a hypothetical national health insurance scheme, and a public plan would likely include both individual and employer contributions.

It may finally be time for Congress to revisit the Supreme Court's thirty year-old holding in *Harris*. Justice Ginsburg, before joining the Court, questioned what the outcome of the public funding cases might have been if the Court had applied a sex equality analysis instead of focusing on indigency.<sup>209</sup> It is important to recognize that *Harris* was not just a decision about the government's duty to provide positive rights. It was a decision that was influenced and limited by an antiquated view of Equal Protection that viewed pregnancy as a fundamental biological difference between men and women that should remain outside of the Court's sex equality framework.<sup>210</sup> Indeed, it seems highly probable that, had the Court instead been presented with a

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during the current debate. If restrictions are imposed on a final bill that is enacted into law, members of Congress continue to have the duty to evaluate the constitutionality of this restricted coverage in subsequent legislative sessions.

<sup>207</sup> For example, Congress considered Fourteenth Amendment principles when passing the Civil Rights Act of 1964, even though this statute was passed under its Commerce Clause powers. Post and Siegel have recognized that Congress expanded the meaning of Equal Protection as applied to sex discrimination through a variety of lawmaking powers outside of Section 5: Congress did not just use "one form of lawmaking, but multiple kinds of statutes, with varying relationships to the constitutional agenda of the movement." Post & Siegel, *supra* note 73, at 2001.

<sup>208</sup> 448 U.S. 297 (1980).

<sup>209</sup> Ginsburg, *supra* note 119, at 385 ("If the Court had acknowledged a woman's equality aspect, not simply a patient-physician autonomy constitutional dimension to the abortion issue, a majority perhaps might have seen the public assistance cases as instances in which, borrowing a phrase from Justice Stevens, the sovereign had violated its 'duty to govern impartially.'").

<sup>210</sup> In Sylvia Law's 1984 article, *Rethinking Sex and the Constitution*, she documents the results of the Court's inability to recognize that "laws governing reproductive biology also implicate equality concerns and demand careful scrutiny." Law, *supra* note 115, at 1002; *see, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 476 (upholding California's statutory rape law—which only imposed criminal liability on men—on the grounds that the statute "reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male" since the female will bear the burden of pregnancy). It is important to note, however, that while the Court's Equal Protection jurisprudence has evolved since its holding in *Harris*, *see* Siegel, *supra* note 31, at 1887–88, the Court still shows deference to statutory distinctions that rest on biological difference. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 63 (2001) ("Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to

Medicaid plan that did not provide coverage for sickle cell anemia—a medical condition affecting mainly black men<sup>211</sup>—the Court would have applied heightened scrutiny and overturned the restriction as an unconstitutional form of race discrimination.<sup>212</sup> *Harris* focused on indigency because the Court was unwilling to confront the gender justice concerns raised by a health care plan that declined to provide benefits for a condition that solely affects women.

The Court's antiquated vision of sex discrimination in *Harris*, however, does not need to govern the way that Congress approaches debates on health insurance coverage of abortion. An informed view of Equal Protection should require that both Medicaid and the public option provide coverage of abortion services—as public plans begin to cover more and more women, abortion restrictions within such plans should be viewed as affecting all women as a class. The argument advanced in *Harris* that Medicaid restrictions only affect indigent women, not women as a class,<sup>213</sup> will be much harder to apply to an expanded version of Medicaid and a public plan. Restrictions in the national health insurance scheme will harm all women.<sup>214</sup>

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fathers and mothers is neither surprising nor troublesome from a constitutional perspective.”).

<sup>211</sup> National Heart Lung and Blood Institute, Who Is At Risk for Sickle Cell Anemia?, [http://www.nhlbi.nih.gov/health/dci/Diseases/Sca/SCA\\_WhoIsAtRisk.html](http://www.nhlbi.nih.gov/health/dci/Diseases/Sca/SCA_WhoIsAtRisk.html) (last visited Nov. 1, 2009).

<sup>212</sup> Interestingly, two amicus briefs in *Geduldig* drew parallels between the hypothetical denial of insurance coverage for sickle cell anemia and the denial of coverage for pregnancy, arguing that restricted coverage for sickle cell anemia would be a clear Equal Protection violation as a form of invidious racial discrimination. Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789, 1811 (2008). The Court's dicta gives reason to believe that government action targeting sickle cell anemia would trigger strict scrutiny as an overt racial classification. *Bush v. Vera*, 517 U.S. 952, 984 (1996) (“[W]e subject racial classifications to strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign—as Justice Stevens’ hypothetical of a targeted outreach program to protect victims of sickle cell anemia . . . would, no doubt, be . . .”). Although the EEOC’s interpretation of Title VII does not mandate heightened scrutiny under the Fourteenth Amendment, it bears noting that the EEOC’s Compliance Manual defines race discrimination as encompassing discrimination based on race-linked illnesses, and it explicitly notes that this includes sickle cell anemia, “a genetically-transmitted disease that affects primarily persons of African descent.” Eq. Empl. Compl. Man. (CBC) § 15-II (April 19, 2006), available at <http://www.eeoc.gov/policy/docs/race-color.pdf>. For these reasons, it seems probable that the Court would have applied heightened scrutiny to a Medicaid restriction on coverage for sickle cell anemia. The fact that only indigent black men were affected would likely not have summarily settled the Equal Protection issue before the Court because, unlike pregnancy, sickle cell anemia is not a definitional biological difference.

<sup>213</sup> 448 U.S. 297, 323 (1980).

<sup>214</sup> See Randall, *supra* note 6, at 60 (“[B]ecause most private health insurance presently provides coverage for abortion, excluding coverage from a national plan will deprive many women of part of their existing benefits, possibly resulting in financial hardship and in increasing numbers of delayed abortions with attendant health risks.”); Kay, *supra* note 46, at 401 (“If all Americans are covered by a single form of health care—regardless of what plan this coverage ultimately follows—it will be more difficult to treat low-income people’s health care needs differently.”). Of course, how many women will be harmed depends on whether a public option is part of the final plan, how many women enroll in the public option, and whether restrictions are placed on the use of

If progressive members of Congress continue to frame abortion restrictions as implicating Equal Protection principles, other members may be more willing to consider the real world consequences of restricted coverage on women's daily lives. Progressives should not allow restrictions on coverage to be summarily dismissed as a necessary evil of health insurance reform. Any restrictions on abortion funding threaten to impose real harms on women, particularly women who currently have coverage for abortion and would otherwise be unable to afford the procedure. If progressive reformers frame health insurance reform as an opportunity to remove the current inequities in access to adequate health care, introducing a funding scheme that discriminates against women threatens to reintroduce inequities. Restrictions on coverage will mean that abortion will become a procedure that is only available to the wealthy. If the goal of health insurance reform is to "eliminate the two-tiered system of health care,"<sup>215</sup> failing to provide coverage runs counter to this goal and places women, and particularly poor women, on a lower tier.

Equality concerns are particularly strong in the funding context since studies have shown that a lack of funding may lead to "detrimental health and economic consequences as a lack of financial resources may lead to dangerous delays in securing an abortion."<sup>216</sup> If laws singling out abortion are prima facie sex discrimination, Congress has a duty to ensure that these laws are substantially related to important governmental objectives,<sup>217</sup> and that these laws are in line with congressional interpretations of sex equality under the Fourteenth Amendment. Congress must confront the ways in which understanding of the abortion right has evolved both inside and outside of the Court in the years since *Geduldig* and *Harris*.

In addition to grappling with the arguments that these types of restrictions are prima facie sex discriminatory, Congress must consider the way in which the funding sources for a public option would raise different constitutional concerns than *Harris*. For instance, under Obama's proposed public option, individuals and employers would contribute toward the cost of coverage.<sup>218</sup> Thus, any restriction or lack of coverage in the public plan would

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federal funds outside of the public option. Regardless, the women harmed and affected by these restrictions will be more than just "indigent" women. If all plans participating in the National Health Insurance Exchange are prohibited from providing abortion coverage, the number of women harmed will be even larger. See Steinfelds, *supra* note 13. Steinfelds notes that pro-choice activists have emphasized that restrictions on the use of federal subsidies for abortion services will mean that many of the millions of women who are currently covered by insurance plans providing abortion benefits will lose their current coverage if they qualify for subsidized private plans or the public option. *Id.*

<sup>215</sup> Barbara Radford & Gina Shaw, *Beyond Roe and Abstract Rights: American Public Health and the Imperative for Abortion as a Part of Mainstream Medical Care*, 13 ST. LOUIS U. PUB. L. REV. 207, 217 (1993).

<sup>216</sup> Beh, *supra* note 4, at 169–70.

<sup>217</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976). This is the intermediate standard of review that the Court applies to sex-based classifications.

<sup>218</sup> Individuals will purchase coverage in the public plan, with income-based sliding scale tax credits for those who cannot cover the full cost of coverage. Large employers

be a refusal to provide benefits that women have paid for or earned, either through their own monetary contributions or contributions by their employer. In the debate over the PDA, the abortion funding exclusion was argued to raise different concerns than Medicaid funding precisely on these grounds—the exclusion did not concern the use of public funds.<sup>219</sup> While the public plan will clearly involve the use of some public funds, the plan is assuredly not the same as the “public *subsidy* of abortions through welfare assistance programs.”<sup>220</sup> Thus, *Harris* again fails to answer whether restrictions in a national plan would withstand the Court’s scrutiny.

### B. *Restrictions on Private Insurers*

The health insurance overhaul, however, could also provide an opportunity to place restrictions on the coverage of abortion in private health insurance plans that participate in the Exchange. Coverage could be mandated in all private plans on the Exchange, outright prohibited, limited in its scope, or private plans could be required to provide coverage via a separate, optional rider. Restrictions could also be placed on public funds that are contributed toward private plans, prohibiting these public funds from being used for abortion services. Or the restrictions could go even further by prohibiting any plan receiving public subsidies from providing abortion coverage.<sup>221</sup> Any proposed national restriction on private health insurance coverage of abortion should be informed by an understanding of how these restrictions might violate Equal Protection principles. The debate over the funding exclusion in the PDA is particularly relevant in the context of private insurance restrictions and highlights the equality concerns implicated by these laws. Congress understood the PDA’s abortion exclusion to ensure that the decision to provide coverage would be left up to the individual employer, and that the government should not be involved in mandating coverage either way.<sup>222</sup> A restriction on private insurance coverage would do just that—it

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who do not provide meaningful contributions toward the health care coverage of their employees will be required to contribute funding to the public plan. OBAMA’S HEALTH CARE PLAN, *supra* note 1, at 5–6.

<sup>219</sup> 124 CONG. REC. 21,442 (1978) (statement by Rep. Whalen), *reprinted in* S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 184 (1980).

<sup>220</sup> Nat’l Educ. Ass’n of R.I. v. Garrahy, 598 F. Supp. 1374, 1387 (D.R.I. 1984). In the current debate, distinctions have been made between the use of public versus private funds. The Capps amendment imposed restrictions on the use of federal funds, regardless of whether these funds were in a private or public plan. Some House members, however, evidently felt that this did not go far enough, and that coverage had to be completely prohibited in any plan that received federal subsidies. This evidence suggests that the use of public versus private funds will remain a salient distinction throughout the health care debate. *See* discussion *supra* note 13.

<sup>221</sup> *See* discussion *supra* note 13.

<sup>222</sup> *See* discussion *supra* Part III.B.

would infringe on the right of individual insurance companies to choose to provide coverage for abortion services.

Women who have earned or paid for their own health insurance coverage, or who have received coverage through their employment, deserve to receive the same comprehensive coverage offered to men. Any type of federal restriction on private insurer's coverage of abortion should be understood by Congress as *prima facie* sex discrimination in violation of Equal Protection principles. Private insurance restrictions pose different constitutional questions than public plans for two reasons: first, although *some* public funds may be contributed toward these plans,<sup>223</sup> many individuals in these plans will pay their own premiums; and second, most private insurers currently provide abortion benefits,<sup>224</sup> so this restriction would remove a benefit from these plans that women would otherwise have.

Past challenges to state-level restrictions on private insurance coverage of abortion dealt with the precise constitutional issues that would be raised if similar private insurance restrictions were to be passed at the federal level. In *Garrahy*, the Rhode Island District Court recognized that while the public funding cases may stand for the proposition that the state is not "constitutionally compelled to pay to remove financial burdens it did not impose, the cases clearly gave no license to the converse, the idea that government is free to *create* financial obstacles to abortion."<sup>225</sup> The court found that the statute, which imposed an additional fee on women who desired insurance coverage for abortion, was "precisely the sort of affirmative 'obstacle' which *Maher* and *Harris* stated the government was prohibited from creating."<sup>226</sup> The fact that the statute was placing a new burden on access to abortion in the context of women's private funding decisions led the court to invalidate the statute. The Third Circuit invalidated a similar Pennsylvania statute using the same rationale.<sup>227</sup> Any federal-level restriction on private insurance coverage of abortion should similarly be invalid.

While neither the Rhode Island nor the Pennsylvania case was decided on Equal Protection grounds, these cases demonstrate that lower courts have been willing to extend federal constitutional protections to private funding of abortion services, even if these protections would not apply to public funding. Congress's decision whether to restrict private insurance coverage must also confront the sex equality concerns raised by these restrictions. The ar-

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<sup>223</sup> Those who cannot afford to purchase their own health insurance may be offered federal subsidies to assist them in purchasing coverage in a private plan. Robert Pear & David M. Herszenhorn, *Finance Panel Wraps Up Its Work on Health Care Bill*, N.Y. TIMES, Oct. 3, 2009, at A16.

<sup>224</sup> Sonfield et al., *supra* note 9, at 74–75.

<sup>225</sup> *Garrahy*, 598 F. Supp. At 1384.

<sup>226</sup> *Id.* Although these statements were made during the court's analysis under *Roe's* trimester framework, the same concerns apply to an Equal Protection analysis.

<sup>227</sup> *Am. Coll. of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 303 (3d Cir. 1984) (invalidating private insurance restrictions that increased the cost of insurance for women desiring abortion coverage as an undue burden on the abortion right).

guments advanced in these cases help to flesh out the precise burdens that are placed on women, and only women, when these types of private restrictions are imposed.

Furthermore, these cases articulate an argument about new burdens that also applies to restrictions on the public plan: many women who would elect to participate in the public option would likely be coming from private plans that currently provide coverage. The Supreme Court has explicitly recognized that scrutiny of sex discrimination under Title VII is heightened when an employer has “imposed on women a substantial burden that men need not suffer” as compared to merely refusing to extend to women “a benefit that men cannot and do not receive.”<sup>228</sup> If the decision to provide funding for abortion is framed not as a question of providing a benefit for women, but rather as taking a benefit away and thereby imposing a burden on women that is not suffered by men, the argument for applying heightened Equal Protection scrutiny to both private and public funding decisions is further strengthened.

Mandating that insurance providers cannot provide coverage for abortion in their health plans, or restricting coverage in any way, ignores the emerging recognition of sex equality arguments for reproductive rights. Restrictions on coverage in a national health insurance scheme will affect all women as a class, limit the reach of private insurance expenditures, and impose new burdens on women who currently receive abortion coverage. Congress is in the best position to broaden our constitutional vision of the reach of Equal Protection by recognizing how both Congress and the Court have come to understand the ways in which abortion restrictions can serve as a form of pregnancy discrimination. Progressives must ensure that members of Congress recognize the relevant social, legal, and political history connecting abortion to struggles for gender equality when contemplating abortion coverage in the national plan.

#### CONCLUSION

This Note attempts to situate abortion funding within an understanding of Equal Protection that recognizes the interconnection between abortion and discrimination against pregnant women—a vision that has been articulated by Congress in the past, and that has been increasingly validated by the Supreme Court. The fact that other funding restrictions have been imposed and upheld in the past should not discourage pro-choice advocates from pushing Congress to recognize the serious constitutional implications of this decision.

Public funding of abortion has historically rested beyond the reach of the pro-choice legal framework. Laws prohibiting public funding for abor-

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<sup>228</sup> *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977) (“The distinction between benefits and burdens is more than one of semantics.”).

tion have been upheld since these laws supposedly do not pose an undue burden on poor women's right to choose. The rational interest of legislators in privileging childbirth over abortion supposedly legitimates these funding restrictions because they are not imposing any affirmative obstacles, and the restrictions only affect indigent women. Importantly, however, these funding decisions have yet to be viewed as affecting all women as a class.

One who adopts a narrow view of court-defined Equal Protection might be skeptical that the Constitution requires a national health insurance scheme to include abortion coverage. But the stakes of the debate can and should change once the federal government begins to play a role in the provision of health care for a larger number of citizens. Restrictions in a public health insurance plan would affect all women as a class; the debates over coverage thus provides an opportunity for Congress to legislate in line with its own expanded vision of Equal Protection.

Under the sex equality approach, the relevant inquiry is no longer whether the lack of funding poses an undue burden on a woman's right to choose, but rather a question of whether the government imposes legislative distinctions based on prohibited sex-role stereotypes that discriminate against women. Given the Court's recent willingness to endorse congressional interpretations of Equal Protection,<sup>229</sup> now is the time to continue to advocate for legislation in line with this vision. As evidenced by the legislative debate over the PDA, Congress has been willing to understand restrictions on abortion as violations of sex equality and Equal Protection, and has strived in the past to keep private employer's abortion funding decisions independent from government control. As public funding covers more and more individuals and becomes intertwined with private contributions from both individuals and employers, progressive members of Congress should consider using the doctrinal and historical arguments advanced in this Note to support widespread insurance coverage of abortion in the national health insurance scheme.

It is incredibly important for progressives to advocate for this continued vision: "*Geduldig's* coexistence with the PDA is a reminder that protection against discrimination based on reproductive distinctiveness remains an optional matter of legislative policy that Congress could repeal tomorrow, not a bedrock, constitutional protection that all official actions must respect."<sup>230</sup> Optional matters of legislative policy, such as the PDA, have influenced the Court's understanding of the meaning of Equal Protection; progressives must ensure that congressional legislation continues to solidify the Court's expanding view.

The debate on national health care could have widespread implications beyond the context of health insurance funding for abortion services. Justice Rehnquist's opinion in *Hibbs* demonstrates that the Court has been willing to

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<sup>229</sup> See discussion *supra* Part IV.

<sup>230</sup> Pillard, *supra* note 122, at 973.

look to congressional understandings of Equal Protection to inform its own understanding of the principle. Rehnquist “applies the prohibition on . . . sex discrimination in the provision of family leave in ways that reflect judgments forged in several decades of debate under the Constitution and federal employment discrimination law.”<sup>231</sup> Accordingly, a debate on health insurance coverage of abortion may have far-reaching consequences for the Court’s understanding of Equal Protection more generally.

If we view abortion regulations through a sex equality framework, we begin to understand these regulations as just one element in a collection of state and private mechanisms relegating women to second-class citizenship. Providing funding for abortion in a national health insurance scheme obviously will not address the whole host of other barriers to sex equality. But this does not mean that progressives should give up the fight to transform our constitutional principles of equality.

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<sup>231</sup> Siegel, *supra* note 31, at 1884.