TIME TO CLOSE THE GAP:

WOMEN IN THE INDIVIDUAL HEALTH INSURANCE MARKET DESERVE ACCESS TO MATERNITY COVERAGE

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INTRODUCTION

Women seeking health insurance through the individual insurance market[1] are rarely offered plans that include maternity coverage.[2] This Comment argues that denying women maternity coverage in otherwise comprehensive health insurance plans is sex discrimination, and evaluates the Patient Protection and Affordable Care Act with respect to this issue.

In the United States, health insurance helps ensure that individuals have adequate health care when they need it and also protects individuals from the high costs of medical bills.[3] Health insurance is available from a variety of public and private sources.[4] Common public sources of insurance include Medicare, Medicaid, and the State Children's Health Insurance Program (SCHIP).[5] Private health insurance is most commonly provided via employers who purchase the insurance and provide it to their employees.[6] Private health insurance is also available to individuals who do not have access to employer-sponsored coverage and who are able to purchase insurance coverage only directly from the individual health insurance market.[7]

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1. GARY CLAXTON & JANET LUNDY, HENRY J. KAISER FAMILY FOUND., HOW PRIVATE HEALTH COVERAGE WORKS: A PRIMER 2008 UPDATE 1 (2008), http://www.kff.org/insurance/upload/7766.pdf (defining the individual insurance market as a private source from which individuals who are not covered under public or employer-sponsored insurance may directly purchase insurance).

2. BRIGETTE COURTOT & JULIA KAYE, NAT'L WOMEN'S LAW CTR., STILL NOWHERE TO TURN: INSURANCE COMPANIES TREAT WOMEN LIKE A PRE-EXISTING CONDITION 3 (2009), http://www.nwlc.org/sites/default/files/pdfs/stillnowheretoturn.pdf; *see also* KAREN POLLITZ ET AL., HENRY J. KAISER FAMILY FOUND., MATERNITY CARE AND CONSUMER-DRIVEN HEALTH PLANS 2 (2007), http://www.kff.org/womenshealth/upload/7636.pdf (explaining that maternity coverage is the insurance industry's coverage of maternity care treatments). While the medical community agrees on guidelines for maternity care, such as monthly prenatal doctor visits, lab tests, and ultrasound, the insurance industry's coverage of this care varies greatly). *Id*.

3. CLAXTON & LUNDY, *supra* note 1.

4. *Id*.

5. *Id*.

6. *Id*. *See generally* U.S. Dep't of Health & Human Servs., CENTERS FOR MEDICARE & MEDICAID SERVICES, http://www.cms.gov/ (last visited November 13, 2010).

7. *See* CLAXTON & LUNDY, *supra* note 1 (stating that individuals may not have access to employer-sponsored coverage if they work part-time or for an employer who does not provide insurance, and that people who are offered employer-sponsored coverage rarely seek

Federal and state regulations protect individuals covered by insurance from some disparities in coverage in both the private and public market.[8] Many of these regulations maximize the number of people insured and the benefits offered to individuals.[9] This is particularly important for women because statistics suggest women are exceptionally at risk of lacking adequate access to care, and they postpone or delay care more often when they are uninsured than when they are covered by insurance.[10]

Maternity care is an important benefit that all women must have access to, as childbirth and related conditions account for nearly 25% of hospital stays and are the leading reason for hospitalization in the United States.[11] Although laws mandate that pregnancy be covered to the same extent as any other health condition in government and employer-sponsored insurance plans, the decision to provide maternity coverage under individual insurance plans is left solely to the discretion of the individual insurer.[12] When women purchase health insurance in the individual market, they are rarely offered plans that include maternity coverage.[13]

In an attempt to expand and improve health care coverage, the House of Representatives and the Senate each passed their own health care reform bills in 2009.[14] Each bill contained a proposal for a national health insurance exchange in which available health insurance plans must offer maternity coverage.[15] The Affordable Health Care for America Act is the health reform bill that passed the House of Representatives on November 7, 2009 and the Patient Protection and Affordable Care Act is the health reform bill that passed the Senate on December 24, 2009.[16] On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act into law.[17] While

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coverage in the individual market because employer-sponsored coverage is often cheaper and more comprehensive than individual insurance).

8. *Id*.

9. *See, e.g.*, 142 CONG. REC. S4640 (daily ed. May 2, 1996) (statement of Sen. Rockefeller) (explaining that the Newborns' and Mothers' Health Protection Act of 1996, 42 U.S.C. § 300gg-4 (2006), was intended to ensure that maternity healthcare decisions are made by mothers in consultation with doctors rather than by insurance companies concerned primarily with profit).

10. HENRY J. KAISER FAMILY FOUND., WOMEN'S FACT SHEET: WOMEN'S HEALTH INSURANCE COVERAGE 2 (2009), http://kff.org/womenshealth/upload/6000-08.pdf.

11. HENRY J. KAISER FAMILY FOUND., HEALTH REFORM: IMPLICATIONS FOR WOMEN'S ACCESS TO COVERAGE AND CARE 4 (2009), http://kff.org/womenshealth/upload/7987.pdf.

12. COURTOT & KAYE, *supra* note 2, at 7.

13. *Id*. at 6.

14. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Affordable Health Care for America Act, H.R. 3962, 111th Cong. (2009).

15. H.R. 3590, 111th Cong. (2009); H.R. 3962; *see also* HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 1 (describing insurance exchanges as "mini-marketplace[s] of health plans, where small businesses and uninsured individuals can obtain coverage regardless of their health or work status from a choice of private or public plans").

16. H.R. 3590; H.R. 3962.

17. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

this law purports to ensure that the disparity in maternity coverage offered to women in the individual insurance market is addressed, this provision will not be implemented until January 1, 2014, leaving four years between the passage of the law and the provision's implementation for opponents to pursue a change in the law.[18] Thus, discrimination against women in the individual health insurance market will continue until at least January 2014 without certain end.[19]

In this Comment, I outline how the denial of maternity coverage in the individual market is a form of sex discrimination. I evaluate the Patient Protection and Affordable Care Act, arguing that Congress should, as a matter of public policy, impose more immediate restrictions on the individual insurance market to require the inclusion of maternity coverage. Part I provides an outline of how women have come to rely on the individual health insurance market, and what barriers they face in gaining access to adequate benefits in the individual market. It also explores when and to what extent maternity coverage is offered by discussing two federal regulations: the Pregnancy Discrimination Act and the Newborns' and Mothers' Health Protection Act.[20] Then, Part II scrutinizes the individual market's frequent denial of maternity coverage through the lens of sex discrimination. Finally, Part III explores the constitutionality of the exclusion of maternity coverage in the individual insurance market, a benefit that will remain largely absent until the provisions of the Patient Protection and Affordable Care Act go into effect in 2014. In this part, I also evaluate the Patient Protection and Affordable Care Act and its impact on maternity coverage in the individual market, recommending that advocates for change should remain vigilant in the coming years.[21]

I. A CLOSER LOOK AT WOMEN IN THE INDIVIDUAL INSURANCE MARKET

Women are less likely than men to be covered by their employer's health coverage for a number of reasons.[22] This leaves women at a greater risk of turning to the individual health insurance market, where they face gender-based barriers to obtaining individual health insurance coverage in the first place, and then face gender-based limitations on much of the coverage they do obtain.[23] Women also face difficulty obtaining individual health insurance due to the gender-based cost structure, which often imposes higher costs on women.[24] Further, while there are federal and state regulations on health insurance in the public and employer-sponsored private markets, there are currently no

18. *See id*.
19. *See id*.
20. 42 U.S.C. §§ 300gg-4, 2000e(k) (2006).
21. 124 Stat. 119.
22. HENRY J. KAISER FAMILY FOUND., *supra* note 10, at 1.
23. *See id*. at 2.
24. COURTOT & KAYE, *supra* note 2, at 3.

regulations on the discriminatory exclusion of maternity coverage in the individual insurance market.[25]

A. *When and Why Women Turn to the Individual Health Insurance Market*

The absence of maternity coverage in the individual insurance market is particularly egregious because women are more likely than men to lack direct access to another form of health care.[26] As of 2007, 7% of women rely on individual health insurance, which equates to fourteen million women.[27] Women are at a unique risk of turning to the individual market for two main reasons: they are less likely to be offered employer-sponsored insurance, in part because they are more likely to work part-time without any employer-provided benefits, and they are more likely than men to be insured through their spouses.[28]

Women often turn to the individual market because they are less likely than men to be offered insurance through their own jobs.[29] In fact, one in six women who works for an employer that offers health insurance coverage is not eligible for the coverage, often because she is a part-time worker.[30] Further, only 38% of women have insurance from their own jobs, compared with 48% of men.[31] When a woman is employed but unable to obtain insurance through her employer, she is likely to be uninsured, seek individual insurance, or be insured through her spouse, unless she qualifies for a government-sponsored program like Medicaid.[32]

Further, 25% of women are insured as dependents on their husbands' health insurance.[33] A woman is considered a dependent on her husband's insurance when her husband has employer-sponsored insurance and adds his wife to the employer-sponsored plan.[34] Thus, women who are dependents on their husbands' health insurance are at an increased risk of entering the individual market should they become divorced or widowed because they rely on their husbands for their health insurance access.[35]

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25. MEENA SESHAMANI, DEP'T OF HEALTH & HUMAN SERVS., ROADBLOCKS TO HEALTH CARE: WHY THE CURRENT HEALTH CARE SYSTEM DOES NOT WORK FOR WOMEN 2 (2009), http://www.healthreform.gov/reports/women/women.pdf.

26. *See* HENRY J. KAISER FAMILY FOUND., *supra* note 10, at 1.

27. LISA CODISPOTI, BRIDGETTE COURTOT, AND JEN SWEDISH, NAT'L WOMEN'S LAW CTR, NOWHERE TO TURN: HOW THE INDIVIDUAL HEALTH INSURANCE MARKET FAILS WOMEN 3 (2008), http://www.nwlc.org/reformmatters/NWLCReport-NowhereToTurn-WEB.pdf; *see also* SESHAMANI, *supra* note 25, at 1.

28. HENRY J. KAISER FAMILY FOUND., *supra* note 10, at 1.

29. *Id*.

30. SESHAMANI, *supra* note 25, at 1.

31. HENRY J. KAISER FAMILY FOUND., *supra* note 10, at 1.

32. *See id*.

33. *Id*.

34. *See id*.

35. HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 1.

When women in these circumstances have the misfortune of entering the individual insurance market, they deserve access to the adequate maternity coverage that their counterparts in the public and employer-sponsored insurance plans receive.[36]

B. Barriers Women Face in the Individual Market

Women applying for health insurance in the individual insurance market find access to maternity care difficult to obtain, not only because it is rarely offered in individual insurance plans, but also because women face numerous sex-based obstacles to obtaining individual health insurance in the first place.[37] For example, there are currently gender- and sex-based pre-existing conditions that prevent women seeking individual insurance from obtaining insurance through the individual insurance market.[38] Once a woman is accepted to an individual insurance plan, she is likely to be charged a higher premium than her male equivalent based solely on her sex.[39] Finally, if she signs on to a plan, she is unlikely to find one that includes maternity coverage.[40]

i. Gender- and Sex-Based Pre-Existing Conditions

Women who apply to the individual market may be immediately rejected because of sex-based pre-existing conditions.[41] For example, some individual insurers deny women insurance based on their status as survivors of domestic violence because they fear that these women are prone to higher medical costs due to an increased risk of physical and mental harm.[42] Women may also be denied insurance in the individual market if they are pregnant at the time of application or have a pregnancy history that indicates they may be more costly to insure.[43] More specifically, high numbers of children, a history of pregnancy complications, or prior cesarean sections may be treated as pre-existing conditions when women apply for coverage in the individual market, and can lead to a rejection of a woman's insurance application.[44]

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36. *See* 42 U.S.C. § 2000e(k) (2006).

37. COURTOT & KAYE, *supra* note 2, at 5.

38. *Id*.

39. *Id*. at 3, 6. The National Women's Law Center surveyed the best-selling plans available in the capital cities of states that allow the use of gender rating in 2009. The Center found that 95% of these plans were charging 40-year-old women more than 40-year-old-men for identical coverage, confirming the pervasiveness of this practice. *Id*.

40. SESHAMANI, *supra* note 25, at 3.

41. COURTOT & KAYE, *supra* note 2, at 5.

42. *Id*. at 5-6 (explaining that today eight states still allow insurance companies to reject applicants based on their status as survivors of domestic violence).

43. *Id*. at 5; *see also* Jennifer Brown, *Fighting for Fairness: Women Protest Health Premiums That Can Be 50% Higher Than Men's*, DENV. POST, Oct. 25, 2009, at A1.

44. COURTOT & KAYE, *supra* note 2, at 5; *see also* Brown, *supra* note 43 (describing a situation in which a woman who sought insurance was told that she must be sterilized to receive health insurance because of her prior c-section).

ii. Gender Rating: When Premiums Go Up for Being Female

It is further difficult for women to find adequate health insurance in the individual market because, even after being accepted to a plan, women are often quoted significantly higher premiums based on their sex. This is true even when maternity coverage is not included in the plan.[45] This practice is known as "gender rating" and is exemplified by insurance companies charging women up to 84% more than men for comparable coverage to men.[46] In the individual market, many companies continue to quote applicants' premiums based on existing health status, age, and sex.[47] This means that individual insurance companies can use an applicant's health status, age, and sex not only to reject his or her application for insurance, but also to decide how much they will charge an individual for coverage.[48] And, insurance companies do not just charge women more than men of comparable age and health status.[49] They also charge women more than men who are significantly less healthy.[50] For example, some individual insurance companies charge non-smoking women more than smoking men of the same age.[51]

Title VII of the Civil Rights Act of 1964 prohibits employers from basing premiums on age or health status.[52] However, while the employer-sponsored market is protected by this federal anti-discrimination protection, the individual market will remain unregulated until the Patient Protection and Affordable Care Act is fully implemented in 2014.[53]

iii. Female-Specific Health Benefits Are Costly and Rarely Offered

Even if a woman is accepted to an individual insurance plan and can afford the higher premiums quoted to women, the plans currently offered to women in the individual market often deny coverage for women's health needs, such as contraceptive coverage, family planning counseling, and maternity care.[54] The medical community has widely agreed that maternity care includes monthly prenatal care visits, standard laboratory tests for complications or abnormalities, and ultrasound to monitor the development of the fetus.[55]

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45. COURTOT & KAYE, *supra* note 2, at 3-4.

46. *Id*. at 7. There is great variability in how much more women are charged than men when gender rating is in effect. Twenty-five year old women are charged between 1% and 84% more than men for plans with similar features, whereas forty-year-old women are charged between 4% and 49% more than men for identical coverage. *Id*.

47. SESHAMANI, *supra* note 25.

48. *Id*.

49. COURTOT & KAYE, *supra* note 2, at 6.

50. *Id*.

51. *Id*.

52. 42 U.S.C. § 2000e (2006).

53. SESHAMANI, *supra* note 25; *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)

54. *See, e.g*., HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 2, 4.

55. POLLITZ ET AL., *supra* note 2, at 2.

However, health insurance companies vary in their coverage of this maternity care.[56]

Maternity coverage is important to pregnant women and women planning pregnancies in part because without insurance coverage for maternity care, the financial cost of obtaining proper medical care during pregnancy is high.[57] For example, the cost of childbirth alone is often high, without consideration of the costs of prenatal care.[58] The average bill for a vaginal birth, accounting for variations depending on facility, is $7,500, and the average bill for a cesarean section is $13,200.[59] When maternity coverage is not offered in individual insurance plans, women either have to pay the full price of maternity care or occasionally have the opportunity to purchase additional coverage from the insurer via supplemental coverage plans called "riders."[60] Both of these options are costly.[61] Few plans offer maternity coverage as either a benefit or a rider, and when they do offer it as a rider, it can be prohibitively expensive and can cost up to the price of an average woman's monthly base premium, thereby doubling her total monthly health insurance costs.[62] This leaves most women in the individual market without covered maternity care and stuck paying the full cost of care.[63]

Even when maternity coverage is offered in individual insurance plans or via riders, insurers often limit women's access to maternity care for a designated waiting period.[64] Many of these waiting periods require that women wait up to two years before they can gain access to the maternity care benefits.[65] This means that until the implementation of the new health care reform legislation, even women who have maternity coverage before they become pregnant may not get access to the maternity care benefits for a pregnancy that occurs within a year or two of applying for insurance.[66] These waiting periods also effectively withhold maternity coverage from women who are pregnant at the time of application, thus imposing another barrier to maternity coverage upon the women who are most in need of it.[67]

Maternity care waiting periods differ from waiting periods imposed for sex-neutral pre-existing conditions because waiting periods for pre-existing conditions are imposed only when medical advice, diagnosis, care, or treatment

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56. *Id.*

57. *Id.* at *i*.

58. Brown, *supra* note 43.

59. *Id.*

60. HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 2. Some insurers sell specific coverage, like maternity coverage, separately from their regular health coverage plans for an additional fee. This separate coverage is called a rider. *See* COURTOT & KAYE, *supra* note 2, at 5.

61. *Id.*

62. POLLITZ ET AL., *supra* note 2, at 2, 25.

63. *See* COURTOT & KAYE, *supra* note 2, at 3,7.

64. POLLITZ ET AL., *supra* note 2, at 2.

65. *Id.*

66. *See id.*

67. *See id.*

have been provided within the six months prior to enrollment for insurance.[68] However, maternity care waiting periods may be imposed even on a woman who did not become pregnant until after she had her insurance plan for twelve months, and who did not seek medical advice, diagnosis, care, or treatment for the pregnancy within the six months prior to her enrollment.[69] Thus, maternity care waiting periods are uniquely imposed upon women for their female-specific health needs.[70]

The individual market and legislators justify these discriminatory practices by arguing that women are more expensive to insure, that premiums would rise if maternity care were included in coverage, and that premiums would rise if pregnancy were not treated as a pre-existing condition.[71] In a recent debate over a Colorado bill that sought to end the gender-based differences in costs in the individual insurance market in Colorado, Colorado Representative Jim Riesberg said that women as a group cost insurance companies more, listing higher costs associated with treating women.[72] Representative Riesberg argued that women cost insurance companies more in part based on their reproductive health needs, but failed to acknowledge that most individual insurance companies do not cover prenatal or maternity care.[73] At the same time, Kaiser Permanente, a national health care provider, ended gender discrimination costs in 1969 and recently reported that it "had suffered no significant loss of revenue as a result."[74]

Federal regulations protect individuals with employer-sponsored insurance from being discriminatorily denied maternity coverage.[75] For example, the Pregnancy Discrimination Act (PDA) requires that employers with at least fifteen workers cover maternity benefits as they do any other disability.[76] The Health Insurance Portability and Accountability Act of 1996 "requires all health insurance policies for small employer groups (defined as firms with 2 to 50 employees) to be sold on a guaranteed issue basis. This means that small employers not subject to the PDA nonetheless have the opportunity to buy

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68. CLAXTON & LUNDY, *supra* note 1, at 18.

69. *See* POLLITZ ET AL., *supra* note 2.

70. *See id*.

71. *See* Brown, *supra* note 43.

72. Becca Blond, *Lawmakers Tussle over Bill That Would Ease Health Insurance Gender Discrimination*, COLO. INDEP., Feb. 5, 2010, http://coloradoindependent.com/47106/lawmakers-tussle-over-bill-that-would-ease-health-insurance-gender-discrimination.

73. *Id*.

74. Becca Blond, *Swalm Leads Defense of Men at Health Insurance Hearing*, COLO. INDEP., Feb. 5, 2010, http://coloradoindependent.com/47160/swalm-leads-defense-of-men-at-health-insurance-hearing.

75. 42 U.S.C. §§ 300gg-1, 300gg-4, 2000e(k) (2006).

76. *Id*. § 2000e(k).

policies with maternity benefits sold to larger employers."[77] Unfortunately, these acts do not apply to the individual insurance market.[78]

C. Impact of Maternity Care on Mother and Infant Health

The low rate of maternity coverage in the individual market can impact the health of pregnant women and the infants they carry.[79] Women without insurance "are more likely to lack adequate access to care, get a lower standard of care[,] . . . have poorer health outcomes," and postpone or delay seeking treatment.[80] Most women in the individual insurance market are uninsured when it comes to maternity coverage, and are thus more likely to lack adequate access to maternity care and have a lower standard of care and poorer health outcomes.[81] Women who delay or postpone prenatal care may fail to catch complications in a timely fashion, which not only increases the likelihood for unhealthy infants, but also increases the costs of delivery and post-natal treatment.[82] Thus, while numerous factors contribute to the infant mortality rate, it cannot be denied that the lack of maternity coverage for the fourteen million women insured in the individual market is a likely contributing factor to the persistent infant mortality rate seen from the year 2000 to the year 2005 in the United States. [83]

D. State and Federal Regulations of Maternity Coverage

While mandates at the state level have successfully required that the individual insurance market provide maternity coverage, prior to the passage of the Patient Protection and Affordable Care Act, Congress had failed to federally require that individual insurance companies cover any aspect of maternity care.[84] Congress twice attempted to thwart the insurance industry from denying women adequate female-specific benefits, but the Pregnancy Discrimination Act applies only to employer-sponsored care and the Newborns' and Mothers' Health Protection Act allows individual insurers to

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77. Henry J. Kaiser Family Found., *Mandated Coverage of Maternity Care, January 2010*, STATEHEALTHFACTS.ORG, http://www.statehealthfacts.org/comparetable.jsp?ind=687&cat=10 (last visited Nov. 13, 2010).

78. *See* 42 U.S.C. § 2000e(k).

79. *See* Joseph Boven, *Colorado Maternity Insurance Bill Moves Out of Committee*, COLO. INDEP., Feb. 4, 2010, http://coloradoindependent.com/47065/colorado-maternity-insurance-bill-moves-out-of-committee.

80. HENRY J. KAISER FAMILY FOUND., *supra* note 10, at 2.

81. *See id*.

82. Boven, *supra* note 79.

83. *See* MARIAN F. MACDORMAN & T.J. MATHEWS, U.S. DEP'T OF HEALTH & HUMAN SERVS., RECENT TRENDS IN INFANT MORTALITY IN THE UNITED STATES 1 (2008), http://www.cdc.gov/nchs/data/databriefs/db09.pdf. (while the data was reported in 2008, it only reflected changes from years 2000 to 2005); *see also* Boven, *supra* note 79.

84. SESHAMANI, *supra* note 25, at 2-3.

choose to cover maternity care.[85] Neither of these acts imposes a mandate for maternity coverage in the individual market, but in statements supporting both acts, Congresspersons expressed a broader intent to eliminate discrimination than either act included when it was passed.[86] The impact of leaving maternity care unregulated in the individual market is exemplified by the current low percentage, 6-13%, of individual insurance plans that offer maternity coverage in the absence of a mandate to do so.[87]

i. State Mandates for Maternity Coverage

While there is not presently an implemented federal mandate to cover maternity care, as of January 2010 twelve states have recognized a disparity in coverage and enacted some form of mandatory maternity coverage in the individual market.[88] Alabama, California, Georgia, Illinois, Massachusetts, Montana, New Jersey, New York, Oregon, Vermont, and Washington mandate coverage, while New Hampshire mandates that insurance companies at least offer maternity coverage.[89] Without a federal mandate, state mandates like these are the only assurance that maternity coverage is included or, at a minimum, offered in some states' individual markets.[90]

ii. Federal Regulations Impacting Maternity Coverage

At the federal level, Congress has passed two federal regulations that may provide insight into how acts passed to provide better or more equal medical treatment for women only partially meet Congress's original goal when drafted and implemented.[91] First, the Pregnancy Discrimination Act of 1978 requires "women affected by pregnancy, childbirth, or related medical conditions [to] be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."[92] Second, the Newborns' and Mothers' Health Protection Act of 1996 ensures that women covered by group health insurance via the individual market are provided minimum hospital stays after childbirth.[93]

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85. *See* 42 U.S.C. §§ 300gg-4, 2000e(k) (2006); *see also* 142 CONG. REC. S4636, (daily ed. May 2, 1996) (statement of Sen. Bradley).

86. *See* 42 U.S.C. §§ 300gg-4, 2000e(k) (2006); *see also* 142 CONG. REC. S4636, (daily ed. May 2, 1996) (statement of Sen. Bradley).

87. COURTOT & KAYE, *supra* note 2, at 3, 6; HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 2.

88. Henry J. Kaiser Family Found., *supra* note 77.

89. *Id*.

90. *See* COURTOT & KAYE, *supra* note 2, at 6.

91. *See* 42 U.S.C. §§ 300gg-4, 2000e(k) (2006).

92. *Id*. § 2000e(k).

93. *See id*. §§ 300gg-4, 2000e(k).

a. The Pregnancy Discrimination Act (PDA) of 1978

The Pregnancy Discrimination Act (PDA) provides an example of how Congress has successfully diminished the sex discrimination exhibited in the employer-sponsored market when women were denied maternity coverage.[94] However, while the PDA prohibits discrimination on the basis of pregnancy in the employer-sponsored market, it has not been extended to the individual market.[95]

The PDA is an amendment to Title VII of the Civil Rights Act of 1964.[96] Title VII prohibits discrimination by employers on the basis of protected classifications including sex.[97] The PDA amended the definition of sex discrimination such that "because of sex" or "on the basis of sex" includes discrimination based on "pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."[98] Thus, Title VII via the PDA prohibits employer discrimination based on sex, pregnancy, or pregnancy-related conditions, and requires employer-sponsored health plans to cover pregnancy, childbirth, and pregnancy-related conditions as such plans would cover any other disability.[99]

The PDA remains an important act because it ensures maternity coverage is offered to the two-thirds of women in the nation who are insured through either their own employer or their spouse's employer.[100] Unfortunately, it was enacted in a way that leaves the fourteen million women who are insured in the individual market unprotected from the denial of maternity coverage.[101]

b. The Newborns' and Mothers' Health Protection Act (NMHPA) of 1996

The Newborns' and Mothers' Health Protection Act (NMHPA), passed in 1996, also exemplifies a health care act that, when implemented, fell short of the full intent with which it was passed.[102] Like the PDA, the NMHPA does not cover all women in the individual market and does not provide a mandate for full maternity care.[103]

94. *See id*. § 2000e(k).
95. *See id*.
96. *Id*.
97. *Id*.
98. *Id*.
99. *Id*.
100. *See* HENRY J. KAISER FAMILY FOUND., *supra* note 10, at 1.
101. *See id*.
102. 42 U.S.C. § 300gg-4; *see* 142 CONG. REC. S4640 (daily ed. May 2, 1996) (statement of Sen. Rockefeller).
103. 42 U.S.C. § 300gg-4.

The NMHPA requires individual insurance companies that have chosen to provide maternity coverage to also cover minimum hospital stays after a mother gives birth.[104] However, it has no requirement for the individual insurance companies that have chosen not to provide maternity coverage to begin covering maternity care or minimum hospital stays after childbirth.[105] Thus, the NMHPA continues to leave most women uncovered, because the minimum hospital stay requirement only applies to the now 6-13% of individual insurers that have chosen to cover maternity care in the first place.[106]

This missing requirement is problematic because if a woman's individual insurance company does not offer maternity coverage, the NMHPA condones the denial of maternity coverage by not requiring an increase or alteration in her coverage.[107] Also, if a woman's insurance company already provides such coverage, the NMHPA actually provides an incentive for the company to *drop* maternity coverage, as maternity coverage now comes with the additional cost of mandatory minimum hospital stays.[108] Mandatory minimum hospital stays were intended to resolve a problem that women frequently faced when their insurance companies insisted they shorten their post-childbirth hospital stay—to as little as eight hours—regardless of the recommendation of the doctor.[109] Congress acknowledged and expressed concern that insurance companies' decision to rush hospital stays after childbirth was motivated by an interest in "shaving costs."[110] Despite knowing that insurance companies often favored providing for their shareholders over providing for their customers, Congress still mandated hospital stays only for the individual insurers who choose to cover maternity care.[111] Thus, the NMHPA undermines the mandatory minimum hospital stay by affording the individual insurers the opportunity to avoid offering maternity coverage altogether.[112]

The NMHPA does not fully meet the intent with which it was passed.[113] When the NMHPA was being debated in Congress, Senator Bill Bradley indicated that the intent of the NMHPA was to protect women from insurance policies that provided subpar maternity care and rushed hospital stays after childbirth.[114] Senator John D. Rockefeller, speaking in favor of passing the NMHPA, said the NMHPA was intended to allow mothers and their physicians to "make this critical decision, not an insurance company driven by other

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104. *Id*.

105. *See id*.

106. *See id*.; COURTOT & KAYE, *supra* note 2, at 3, 6.

107. *See* 42 U.S.C. §§ 300gg-4.

108. *See id*.

109. *See* 142 CONG. REC. S4640 (daily ed. May 2, 1996) (statement of Sen. Rockefeller).

110. 142 CONG. REC. S4636, (daily ed. May 2, 1996) (statement of Sen. Bradley).

111. *See* 42 U.S.C. § 300gg-4.

112. *See id*.

113. *See* 142 CONG. REC. S4636 (daily ed. May 2, 1996) (statement of Sen. Bradley).

114. *Id*.

considerations, including those of their stockholders."[115] He also expressed anger that the individual insurance market's inadequate maternity coverage at childbirth has resulted in "devastating medical consequences, in devastating human consequences and . . . in death."[116] The NMHPA has not met this broad legislative intent, as women in 87-94% of individual insurance plans do not have access to maternity coverage.[117]

When it comes to legislation passed to provide women with increased access to health care benefits, so far neither federal act has been implemented to fully provide women with the benefits they need or to meet the full intent with which the acts were passed.[118] Thus, it is important that Congress follow through in implementing the provisions in the Patient Protection and Affordable Care Act of 2010 that mandate maternity coverage be included in the exchange plans, so as to provide women the full coverage it intended women to have when it passed the Act.[119]

II. DENIAL OF MATERNITY COVERAGE CONSTITUTES SEX DISCRIMINATION

When individual insurance companies choose not to offer maternity coverage in their insurance plans, this act is discriminatory against women based on their sex.[120] In the past, insurers discriminated against women by denying them contraception in the employment sector.[121] The holding in the Supreme Court case *Erickson v. Bartell* serves as a useful model for how sex discrimination in the insurance market should be defined and disallowed.[122] In *Erickson*, an employee sued her employer for providing prescription coverage that excluded contraceptive coverage, and the Court held that to exclude coverage of female-specific health needs was discrimination in violation of Title VII.[123] However, this holding has not yet been applied to the individual market.[124]

A. *Denial of Maternity Coverage as a Form of Sex Discrimination*

Sex discrimination is the denial or conferment of privileges based on a person's sex.[125] Denial of maternity coverage by the individual market is sex

115. 142 CONG. REC. S4640 (daily ed. May 2, 1996) (statement of Sen. Rockefeller).

116. *Id*.

117. *See* COURTOT & KAYE, *supra* note 2 at 3, 6.

118. *See* 42 U.S.C. §§ 300gg-4, 2000e(k).

119. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

120. *See, e.g*., United States v. Virginia, 518 U.S. 515, 534 (1996).

121. *See* Erickson v. Bartell, 141 F. Supp. 2d 1266, 1268 (W.D. Wash. 2001).

122. *See id*.

123. *Id*.

124. *See id*. (holding that the act in this case violated only Title VII).

125. Laura Grenfell, *Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51, 55 (2003). Sex discrimination is defined as focusing narrowly on biology without taking into account social or cultural feminine or masculine aspects. Meanwhile, gender discrimination focuses on the behavioral

discrimination because the insurance companies are denying coverage that only women need, since only women are biologically able to become pregnant.[126] Even though the individual market is unwilling to cover this female-specific health need, it is commonly known to cover procedures or prescriptions that only men need, for example, Viagra, thus upsetting any argument that a denial of maternity care merely leaves men and women with equal coverage.[127]

B. Overcoming the Denial of Contraceptive Coverage in the Employer-Sponsored Market as a Model for Overcoming the Denial of Maternity Coverage in the Individual Market

Denying female-specific benefits from an otherwise comprehensive plan should be considered sex discrimination.[128] In *Erickson*, an employee sued her employer for providing prescription coverage that denied the coverage of contraceptives, a prescription class used only by women.[129] The Court held that "special or increased healthcare needs associated with a woman's unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs" and that "the exclusion of women-only benefits from a generally comprehensive prescription plan is sex discrimination under Title VII."[130]

The principle behind the *Erickson* holding must be extended to the individual market so that maternity coverage by the individual market is met to the same extent and on the same terms as other healthcare needs.[131] The exclusion of maternity coverage from comprehensive individual insurance plans is sex discrimination, in the same way that the exclusion of contraceptives from an employer-sponsored plan is sex discrimination.[132] Both the individual insurance market and the employer-sponsored market serve the same purpose and are equally important to our nation's health, so to distinguish between them with respect to regulation is illogical.[133] Such an exclusion of a female-specific benefit prevents women who are covered by the individual market from obtaining access to adequate maternity care, leaving mothers and infants at risk of poor health care based solely on the mother's sex.[134] Title VII, as amended by the PDA, took great strides to ensure that the employer-sponsored insurance market did not provide women with discriminatory

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characteristics associated with each sex. Unfortunately, in the legal realm, these terms are often used interchangeably. The denial of maternity coverage is sex discrimination, rather than gender discrimination, because women are denied coverage on the basis of their biological ability to become pregnant, not on their behavioral traits. *See id*.

126. *See id*.

127. *See, e.g*., *Erickson*, 141 F. Supp. 2d at 1271-72.

128. *See id*.

129. *Id*. at 1268.

130. *Id*. at 1271-72.

131. *See id*.

132. *See id*.

133. *See* CLAXTON & LUNDY, *supra* note 1.

134. *See Erickson*, 141 F. Supp. 2d at 1271-72.

coverage in the employer-sponsored market.[135] Women in the individual market are equally deserving of such protections.[136]

III. Addressing This Discrimination in the Courts or Via Congress

While Congress has passed the Patient Protection and Affordable Care Act (PPACA) of 2010 with a provision mandating maternity coverage in the national health care exchange plans, the marketplace in which individuals may purchase individual insurance, this provision will not be implemented until 2014.[137] During this time lag, women in the individual market will continue to overwhelmingly lack access to maternity coverage, and the potential for a change or move to repeal the PPACA will increase.[138] Until the implementation of the PPACA provision mandating maternity coverage in health care exchange plans in 2014, the individual market's exclusion of maternity care can be addressed either via the courts, starting with an allegation by a consumer that denial of maternity coverage is unconstitutional, or by Congress immediately mandating maternity coverage in the individual market plans.

A. Using the Courts to Resolve the Individual Market's Exclusion of Maternity Coverage

If a woman has been denied maternity coverage in the individual market and chooses to sue an individual insurance company for its discriminatory behavior, she should allege that such behavior is in violation of the Equal Protection Clause, which is part of the Fourteenth Amendment to the United States Constitution.[139] Such a plaintiff would need to argue either that her case is distinguishable from two unfavorable precedential cases or that the court must overturn those cases.[140] A plaintiff would also have to argue that the insurer's action constitutes a state action.[141] Then, the court could apply the intermediate scrutiny test, the standard of review courts apply to acts of sex or gender discrimination.[142] If the alleged violator fails to show that his or her actions pass intermediate scrutiny, the action will be found in violation of the Constitution.[143] In this case, the major hurdles will be finding a case that can be litigated all the way to the Supreme Court, overcoming precedent, and showing that the action qualifies as state action.

135. 42 U.S.C. § 2000e(k) (2006).

136. *Id*.

137. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

138. *See supra* Part I.

139. U.S. Const. amend. XIV.

140. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (holding that an employer's failure to insure maternity care is also not in violation of Title VII); Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that the failure to insure a normal pregnancy did not result in a violation of the Equal Protection Clause).

141. *See, e.g*., Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

142. *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

143. *See id*.

i. Addressing Unfavorable Precedent: Distinguishing the Case at Hand or Arguing for the Courts to Overturn

The Supreme Court addressed the exclusion of maternity care in two pivotal cases in the 1970s, finding such exclusions not to be in violation of the Fourteenth Amendment or Title VII.[144] In addressing whether excluding maternity coverage is a constitutional violation, courts consult precedent.[145] The two pivotal maternity coverage cases decided in the 1970s not only serve as precedent, but also ultimately influenced Congress to pass the PDA.[146] While the Court has found that one of these cases has been functionally overruled by Congress's passage of the PDA, the other may still serve as precedent.[147] Thus, to be successful, a plaintiff alleging that this exclusion in the individual market violates the Fourteenth Amendment must distinguish her case from this unfavorable precedent, argue that both cases have been effectively overruled, or argue that the Court must overrule the prior holding.[148]

In 1974, the Court held in *Geduldig v. Aiello* that the failure to insure a normal pregnancy did not result in a violation of the Equal Protection Clause.[149] In this case, California's disability insurance program provided individuals in private employment with weekly benefit amounts for eligible disabilities.[150] The program explicitly stated that the term disability did not include "any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."[151] The female plaintiff challenged this exclusion in California's disability insurance program as unconstitutional for violating the Equal Protection Clause.[152] The State argued that the inclusion of benefits for disability accompanying a normal pregnancy would be too costly for the State to support using only employer contributions.[153] The Court found that California, in creating its disability compensation program, was not required to cover all risks, and that specifically excluding normal pregnancy from coverage under the program was not in violation of the Equal Protection Clause.[154] The Court reasoned that under the program that excluded normal pregnancy from coverage, "[t]here is no risk from which men are protected and women are not."[155] The dissent reasoned that the State's exclusion of normal pregnancy from coverage "created a double

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144. *Gilbert*, 429 U.S. at 145-46; *Geduldig*, 417 U.S. at 494-95.

145. *See Virginia*, 515 U.S. at 533.

146. *See* Kandice Engle, Note, *Pregnancy Discrimination in the Insurance Industry 1994*, 34 U. LOUISVILLE J. FAM. L. 177, 180-81 (1995-96).

147. Stephanie S. Gold, Note, *An Equality Approach to Wrongful Birth Statutes*, 65 FORDHAM L. REV. 1005, 1023-24 (1996).

148. *Id*. at 1023.

149. *Geduldig*, 417 U.S. at 497.

150. *Id*. at 486-87.

151. *Id*. at 489.

152. *Id*. at 486.

153. *Id*. at 493-94.

154. *Id*. at 494-95.

155. *Id*. at 496-97.

standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex."[156] Two years later, the Supreme Court extended this holding in *General Electric Co. v. Gilbert*, when it held that an employer's failure to insure maternity care was also not in violation of Title VII.[157]

In 1978, Congress passed the PDA amendment to Title VII in response to the *Gilbert* holding.[158] The PDA ensures that women insured via employers have maternity coverage that is comparable to the disability coverage provided to other employees, in direct opposition to the holdings of *Geduldig* and *Gilbert*.[159] In fact, the Court found in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*. that the actions taken by Congress to pass the PDA effectively overturned *Gilbert* and rejected the test employed by the *Gilbert* Court.[160] However, while these cases have been effectively overruled in the employer-sponsored insurance market by the passage of the PDA, courts still may look to *Geduldig* as precedent for individual insurance cases.[161]

It is likely that a plaintiff suing an individual insurer for discriminatorily denying her maternity coverage in the individual market can distinguish her case from the *Geduldig* case because *Geduldig* involved a denial of coverage in the employment realm and this case involves an individual insurer's denial of coverage.[162] Thus, the holding in *Geduldig* does not apply to the situation of an individual insurer failing to offer maternity coverage.[163]

However, a court may also read the holding of *Geduldig* to apply more broadly to say that exclusion of maternity benefits in any context does not constitute sex-discrimination in violation of the Constitution.[164] Some have responded to this broad holding by saying that subsequent cases, such as *Newport News Shipbuilding*, in which the Court held that the PDA overturned *Gilbert* and rejected the test employed by the *Gilbert* Court, have also "functionally overruled" *Geduldig*.[165] Others write that *Geduldig* has been significantly limited by subsequent court cases.[166]

Even if a court does not consider *Geduldig* effectively overruled, a court today must act to do so for at least two reasons. First, the Court considered legislative intent in deciding *Geduldig*, and Congress swiftly rejected the

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156. *Id*. at 501.

157. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

158. 42 U.S.C. § 2000e(k) (2006); *see* Engle, *supra* note 146.

159. 42 U.S.C. § 2000e(k); *see also supra* Part I.D.ii.a.

160. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983); *see also* Gold, *supra* note 147, at 1023-24.

161. *See* Engle, *supra* note 146.

162. *See Geduldig*, 417 U.S. at 486-87; *see also Gilbert*, 429 U.S. at 127-28.

163. *See Geduldig*, 417 U.S. at 486-87; *see also Gilbert*, 429 U.S. at 127-28.

164. *See Geduldig*, 417 U.S. at 486-87; *see also Gilbert*, 429 U.S. at 127-28.

165. Gold, *supra* note 147, at 1023-24.

166. Julie B. Ehrlich, *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, 407 (2008).

Court's evaluation of its intent.[167] Second, women in the individual market are, at least until January 1, 2014, unlikely to obtain maternity coverage.[168] While Congress limited the PDA to an amendment to Title VII, its intent was to proclaim that denial of maternity coverage was sex discrimination and to ensure women were federally protected.[169] Further, it is a fundamental role of the Court to protect those least able to defend themselves from discrimination, such as the women who find themselves in the individual market without health benefits on the basis of their sex.[170]

ii. Finding State Action in a Contract Between the Individual Insurance Provider and the Consumer

After evaluating the precedent, a court must find state action to apply the Equal Protection Clause, and *Shelley v. Kraemer* has provided courts broad discretion in finding state action.[171] State action exists when a government entity has intruded on a person's rights or enforced such an intrusion.[172]

In *Shelley*, the facts provided no clear state action, but the Supreme Court applied the broadest definition of state action to find a violation of the Equal Protection Clause.[173] The Court found that a restrictive covenant, which denied individuals access to a neighborhood on the basis of their race, had violated the Equal Protection Clause.[174] The restrictive covenant was an agreement among private individuals, and appeared to have no state involvement, but the Court found state action from the residents' use of the local and federal courts to enforce the covenant.[175] Thus, *Shelley* provides precedent that a court can find state action when a seemingly private action is even tenuously enforced or supported by a government entity.[176]

Based on the holding in *Shelley*, a court may find such broad state action in comparably egregious examples of discrimination, such as the individual market's denial of health benefits on the basis of sex.[177] The individual insurance market has likely had a brief connection with state action comparable

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167. *See Gilbert*, 429 U.S. at 137; *Geduldig*, 417 U.S. at 494-95. *See generally* 42 U.S.C. § 2000e(k) (2006).

168. *See* SESHAMANI, *supra* note 25, at 3.

169. *See* Daniela M. de la Piedra, *Flirting with the PDA: Congress Must Give Birth to Accommodation Rights That Protect Pregnant Working Women*, 17 COLUM. J. GENDER & L. 275, 280 (2008).

170. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

171. U.S. CONST. amend. XIV, § 1; *see* Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

172. *See* Shelley Ross Saxer, Shelley v. Kraemer*'s Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away"?*, 47 U. KAN. L. REV. 61, 68-69 (1998).

173. *Shelley*, 334 U.S. at 19; *see also* Saxer, *supra* note 172, at 82-83.

174. *Shelley*, 334 U.S. at 4-5, 20 (deciding that the court's enforcement of a restrictive covenant in a residential property deed that prohibited the owner from selling the property to anyone but a Caucasian constituted sufficient state action to warrant intervention on constitutional grounds).

175. *Id*. at 19.

176. *Id*.

177. *See id*.; *see also* Saxer, *supra* note 172, at 82-83.

to that found in *Shelley*, and if a court is as compelled by the egregiousness of this sex discrimination as the *Shelley* Court was compelled by the egregiousness of the race discrimination, it could find state action.[178]

iii. Applying Intermediate Scrutiny to the Individual Market Denial of Maternity Coverage

Should a court find state action, it must next apply the intermediate scrutiny test to determine whether denying women maternity coverage in the individual market is in violation of the Fourteenth Amendment.[179] The Supreme Court outlined the intermediate scrutiny test for sex discrimination in *United States v. Virginia* (*VMI*).[180] In *VMI*, a woman sought to enroll in a school that allowed only men to enroll and, based on her sex, was not accepted.[181] The Court found state action, due to the fact that the school was a state public school funded by taxpayer dollars, which meant that sex discrimination was being enforced by a government entity.[182] The Court then applied intermediate scrutiny, as appropriate for sex discrimination analysis.[183] For sex discrimination to be found constitutional, there must be an "exceedingly persuasive" justification by the state that the "classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[184] Applying this review, the Court held that the policy that disallowed women to enroll was in violation of the Equal Protection Clause.[185]

In the case of denial of maternity care by an individual health insurer, it is likely that an individual insurer's actions would fail the intermediate scrutiny test, deeming its actions in violation of the Constitution.[186] First, it is unlikely that an individual insurer could successfully argue that its denial of maternity coverage serves an important governmental objective.[187] Insurance companies' primary arguments for denying maternity coverage include an interest in decreasing costs and increasing profits for their shareholders.[188] Insurance

178. *Shelley*, 334 U.S. at 19; *see also* Saxer, *supra* note 172, at 82-83.

179. *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

180. *Id*.

181. *See id*. at 523 (showing that this case is classified as gender discrimination rather than sex discrimination, because the school denied women admission based on behavioral, cultural, and psychological traits typically associated with being female (i.e., the state did not think women could physically or psychologically handle the adversative educational approach, nor did the state think it appropriate to subject them to such approach)).

182. *See id*. at 531.

183. *Id*.

184. *Id*. at 533 (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

185. *Id*. at 539.

186. *Cf*. *id*. (applying heightened scrutiny to state policies adversely impacting women based on an alleged "important governmental objective").

187. *Cf*. *id*. at 532-33 (quoting *Wengler*, 446 U.S. at 150, requiring states to show "important governmental objectives" behind gender-discrepant policies).

188. *See* Brown, *supra* note 43.

companies argue that to include maternity coverage, they would have to increase costs to their other customers, which in turn would result in a loss of profits, as the cost of maternity care is high for them to cover.[189] Even though keeping costs down for other customers and profits up for shareholders are important interests to the company, it is hard to argue that they serve important state objectives compared with providing health benefits to the fourteen million women covered by the individual market.[190] Further, the individual market notoriously increases costs for all customers annually and for women based on their sex, even without the inclusion of maternity coverage, so the argument that exclusion of maternity coverage is keeping costs down is difficult to believe.[191]

It is also unlikely that an individual insurer can successfully claim that its exclusion of maternity coverage is substantially related to reducing customer premiums and increasing profits.[192] Even if the court found an important governmental objective, there are other ways to increase profits and decrease costs that avoid discrimination and are more substantially related to the objective.[193] For example, an individual insurance company could exclude or reduce coverage for any number of sex-neutral health treatments, be it a reduction in percentage of coverage or exclusion of specific treatments or medications, thereby reducing costs by reducing a covered item without doing so based on sex. Thus, it is likely that if a court applied intermediate scrutiny to the individual market's sex discrimination, the accused individual insurance provider would be found in violation of the Equal Protection Clause.[194]

iv. Hurdles to Resolving this Discrimination via the Courts

There are hurdles to resolving this discrimination in the courts via constitutional analysis. First, it will be a challenge to find a case that fits the issue well enough to argue all the way to the Supreme Court.[195] Second, *Shelley*'s broad definition of state action has not been widely adopted, making it more difficult for a woman to find a court willing to extend *Shelley* to the sex discrimination exhibited by the individual insurance market.[196] In light of Congress's passage of the PDA, NMHPA, and PPACA, a court may be more encouraged today than courts were in the past to find the individual market's discrimination egregious enough to overturn *Geduldig* and *Gilbert* and find

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189. *Id*.

190. *See id*.; SESHAMANI, *supra* note 25, at 1.

191. *See* Ricardo Alonso-Zaldivar, *Double-Digit Spike in Health Premiums: Insurers Blame Older, Sicker Pool of Customers As Young People Drop Coverage*, GRAND RAPIDS PRESS, Feb. 19, 2010, at A12.

192. *See, e.g*., *Virginia*, 515 U.S. at 533.

193. *See, e.g*., *id*.

194. *See, e.g*., *id*.

195. *See, e.g*., Douglas S. Wood, *Who is 'Jane Roe'?*, CNN.COM, June 18, 2003, http://www.cnn.com/2003/LAW/01/21/mccorvey.interview/ (reflecting that Roe's attorneys in *Roe v. Wade* attempted to find the most desirable case and plaintiff for the cause).

196. *See* Saxer, *supra* note 172, at 82-83.

state action.[197] However, resolving this discrimination in the courts would likely require finding the appropriate case, which would amount to a long and arduous path that may require more time than it would take for the PPACA's provisions to go into effect.[198] Then again, if the PPACA is repealed or significantly altered, a resolution via the courts may be a more appealing path.

B. Resolving the Individual Market's Exclusion of Maternity Care via Congress

While resolving the individual market's denial of maternity care via the courts requires seeking a case that is likely to sustain litigation all the way to the Supreme Court, Congress has discretion to initiate bill proposals to address discriminatory acts in a more timely fashion. Passing a bill through Congress is an ideal solution because the time is ripe to ensure that women's access to maternity coverage is adequately protected under any new health care reform passed.[199] Fortunately, on March 23, 2010, President Obama signed into law the PPACA, which, when implemented, intends to address many current problems women face when purchasing insurance in the individual market.[200] If the PPACA retains the mandate for maternity coverage in the national exchange by the time the provision is set to be implemented in 2014, this form of sex discrimination found in the individual market will likely be addressed.[201]

The PPACA requires individuals to have some form of health insurance and that employers provide coverage to their workers or face a fee.[202] The PPACA will establish national or state-level insurance exchanges that will serve as a "marketplace" of health plans from which individuals who are not otherwise insured can obtain coverage.[203] In establishing the exchanges, the PPACA outlines minimum benefits that must be provided by plans offered in the exchange.[204] Reproductive benefits mandated for coverage include maternity coverage, but do not include family planning counseling or contraceptive devices.[205] The mandate for maternity coverage is a victory and a likely end to the sex discrimination caused by the exclusion of maternity coverage in the individual market.[206] The PPACA also supports women's reproductive needs by increasing support for nurse midwives and free-standing

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197. *See, e.g.*, HENRY J. KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL: PUBLIC OPINION ON HEALTH CARE ISSUES 1 (2010), http://www.kff.org/kaiserpolls/upload/8042-F.pdf (explaining that the majority of the country still wants health care reform).

198. *See, e.g.*, Saxer, *supra* note 172.

199. *See* HENRY J. KAISER FAMILY FOUND., *supra* note 197.

200. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *see* KAISER FAMILY FOUND., *supra* note 11, at 2.

201. *See* HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 2.

202. 124 Stat. 119; *see* HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 2.

203. HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 1.

204. 124 Stat. 119.

205. *Id.*; *see* HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 4.

206. HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 2.

birth centers, and by requiring employers with at least fifty employees to provide nursing mothers with break time and space to nurse their newborns.[207]

The PPACA's downsides for women are that it does not extend a mandate for coverage to female-specific health needs, such as family planning counseling and contraceptive devices.[208] These benefits *are* found in the employer-sponsored market and Medicaid, so it is surprising and unfortunate that women in the individual market will make headway in terms of maternity coverage, yet will continue to be denied other reproductive benefits on the basis of their sex.[209]

Yet another concern is that legislative bodies may repeal the bill before much of it is enacted in 2014, a goal which opponents to the PPACA have threatened to pursue.[210] For example, two days after the new bill was signed into law, Wisconsin Representative Paul Ryan urged opponents of recent reform to work to repeal it.[211] Also, as of April 7, 2010, 67 incumbent House and Senate members and 283 candidates for office have signed the Club for Growth's online pledge to "sponsor and support legislation to repeal any federal healthcare takeover passed in 2010, and replace it with real reforms that lower healthcare costs without growing government."[212] These efforts are troublesome because they suggest a desire to repeal the entire Act without signaling an interest in upholding any part of the recently passed legislation.[213] Also, supporters of repeal are often interested in decreasing government control over the insurance industry, which may translate to repealing the government mandate to cover essential health benefits like maternity coverage.[214] Women and families must be concerned about the possibility of repeal, and should consider keeping in contact with their senators and congresspersons to communicate their support for expansive maternity coverage.[215]

Even if the Act remains intact until 2014, the definition of maternity coverage will be important in determining how much maternity care will actually be covered.[216] Insurance companies currently define maternity care differently from the medical community.[217] Even individual states differ in their definition of maternity coverage. In fact, under the government-run Medicaid program, maternity coverage varies widely by state because each state

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207. 124 Stat. 119; *see also* HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 4.

208. *See* 124 Stat. 119; HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 4.

209. *See* HENRY J. KAISER FAMILY FOUND., *supra* note 11, at 2.

210. Molly K. Hooper, *Internal Grumbling over Republican Healthcare Message Intensifies*, THEHILL.COM, (Apr. 7, 2010), http://thehill.com/homenews/house/91047-internal-grumbling-on-gops-healthcare-message-intensifies.

211. Paul Ryan, Op-Ed., *Fix Health Reform, Then Repeal It*, N.Y. TIMES, Mar. 26, 2010, at A27.

212. Hooper, *supra* note 210.

213. *See id*.

214. *See id*.

215. *See id*.

216. *See* POLLITZ ET AL., *supra* note 2.

217. *See id*. (defining medical community to include doctors such as pediatricians, obstetricians, and gynecologists).

administers its own program under broad federal guidelines.[218] To ensure that women consistently receive comprehensive maternity coverage under the new law, the insurance companies offered in the exchange must be required to cover all treatments encompassed in the medical community's definition of maternity care nationwide.[219]

There is much to be learned from the implementation and impact of the PDA and the NMHPA, which were proposed with the intent to provide expanded coverage to all women, but implemented in a way that left many women still uncovered.[220] With four years until the implementation of the PPACA, and basic terms such as maternity coverage still undefined, it is uncertain whether the mandatory benefits provision of the PPACA will be implemented as intended: in a way to provide maternity and other benefits to all who buy from the national exchange.[221] Further, the four years between the PPACA's passage and the provision's implementation spans a presidential election, and as President Obama's approval numbers decline, it is uncertain whether the party that passed the PPACA will even remain in the majority.[222] Again, the time lag before the implementation of the mandatory benefits provision leaves time for possible change and even repeal of the PPACA.[223] Thus, to ensure the intent of the PPACA is met and women are granted maternity coverage in the individual market, Congress should be encouraged to impose regulations on the individual market *now*.

While the United States has yet to implement its mandate recognizing the importance of maternity coverage for women's health in the individual market, it has recognized the importance of maternal and child health on a global scale.[224] President Barack Obama approved $525 million in funding in the 2010 budget for Maternal and Child Health programs and another $475 million in funding in the 2010 budget for Family Planning and Reproductive Health programs in developing countries.[225] This funding goes in part to help women receive at least some care during pregnancy and to treat infants and children at

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218. USHA RANJI ET AL., HENRY J. KAISER FAMILY FOUND. & GEO. WASH. UNIV. MED. CTR., STATE MEDICAID COVERAGE OF PERINATAL SERVICES: SUMMARY OF STATE SURVEY FINDINGS 2-3 (2009), http://kff.org/womenshealth/upload/8014.pdf.

219. *See* POLLITZ ET AL., *supra* note 2.

220. *See supra* Part I.D.ii.

221. *See supra* Part I.D.ii.

222. *See, e.g*., Jeffrey M. Jones, *Obama Approval Slips Further in Fifth Quarter to 48.8%*, GALLUP.COM (April 20, 2010), http://www.gallup.com/poll/127466/Obama-Approval-Slips-Further-Fifth-Quarter.aspx.

223. *See* Ryan, *supra* note 211.

224. HENRY J. KAISER FAMILY FOUND., U.S. GLOBAL HEALTH POLICY FACT SHEET: THE U.S. AND GLOBAL MATERNAL & CHILD HEALTH 2 (2009), http://www.kff.org/globalhealth/upload/7963.pdf.

225. *Id.*; *see also* U.S. DEP'T OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION: FOREIGN OPERATIONS 29 (2009), http://www.usaid.gov/policy/budget/cbj2010/2010_CBJ_Book_1.pdf.

risk of disease.[226] The President's allocation of funding for maternity and infant health care at a global level shows the importance of health care to maternal and natal health. [227] It is time to ensure that all women within the United States have immediate access to such health care.

CONCLUSION

The individual insurance market's pervasive practice of denying women maternity coverage in otherwise comprehensive health insurance plans is sex discrimination that must be remedied. The PPACA provides hope for women in the individual market, but with four years between passage and implementation, it is too soon to be confident that it will adequately address this sex discrimination.[228] While the PPACA requires that women covered by national exchange plans must be provided maternity coverage, this mandatory coverage does not go into effect until January 1, 2014.[229]

Therefore, until that time, there will continue to be an overwhelming absence of maternity coverage in the current individual market.[230] The individual market's denial of maternity coverage will continue to create devastating health costs for the fourteen million women who rely on the individual market for their health insurance.[231] Also, the individual market's denial of maternity coverage will continue to be discrimination based on sex.[232]

Those who support providing maternity care for women in the individual market must remain vigilant in the coming years.[233] Not only must supporters be aware that maternity coverage in the individual market will continue to be largely absent for the next four years, but supporters must also be wary of the threats to repeal the PPACA before it goes into effect in 2014.[234] Finally, supporters must carefully scrutinize the PPACA while the Secretary of Health and Human Services defines terms to ensure that women will receive the comprehensive maternity coverage that their doctors agree maternity care encompasses.[235] Thus, the road ahead is hopeful, but uncertain, for women in the individual insurance market.

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226. USAID, TWO DECADES OF PROGRESS: USAID'S CHILD SURVIVAL AND MATERNAL HEALTH PROGRAM 2-3 (2009), http://pdf.usaid.gov/pdf_docs/PDACN044.pdf.

227. *See id*.

228. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

229. *See id*.

230. *See id*.

231. *See supra* Part I.C.

232. *See supra* Part II.A.

233. *See supra* Part III.B.

234. *See* 124 Stat. 119; Hooper, *supra* note 210.

235. *See* POLLITZ ET AL., *supra* note 2.