

Berkeley Journal of Employment and Labor Law

VOLUME 28

2007

NUMBER 1

ARTICLES

How Family Leave Laws Left Out Low-Income Workers

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Recent media attention has focused on professional women who have “opted out” of the paid labor market to care for their children. By contrast, the media has paid less attention to low-income women who have been required to “opt in” to the workforce over the past ten years as a result of the nation’s overhaul of the welfare system. As women’s overall workforce participation has increased, low-wage working women have become much less likely to have access to pregnancy and family leave than their professional counterparts. This Article examines the historical and legal development of this disparity. Ann O’Leary argues that an early and prolonged commitment to a model of strict equality in the development of Title VII, the Pregnancy Discrimination Act, and the Family and Medical Leave Act has left many low-wage workers without pregnancy and family leave. Further, Ms. O’Leary demonstrates that Congress did not fully consider the interplay of pregnancy and family leave laws with the welfare system when it reformed welfare in 1996. Now, as a result of welfare reform, the current gaps in leave coverage affect too many workers for policymakers to ignore. Ms. O’Leary proposes several reforms to correct the inequities in leave protection facing low-wage working women.

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I.

INTRODUCTION

News reports abound of women choosing to stay at home with their children rather than struggling with the demands of balancing work and

family.¹ The number of women making such a choice is perceived to be so large that the media has dubbed the movement from work to home the “Opt-Out Revolution.”² This catchphrase is used to describe highly educated professional women who have chosen to leave their jobs to care for their children or to arrange reduced work hours to have more time at home.³

At the same time that professional women are perceived to be participating in the “Opt-Out Revolution,”⁴ hundreds of thousands of poor women have entered the low-wage workforce as a result of the federal government’s mandatory “opt-in” policy for poor women, otherwise known as welfare reform.⁵ Women living in poverty,⁶ who could once “opt out” of work to care for their young children, are now required to work while receiving welfare⁷ and ultimately to leave welfare permanently with the hope that they will enter the workforce when welfare is no longer available.⁸

1. See, e.g., Eduardo Porter, *Stretched to Limit, Women Stall March to Work*, N.Y. TIMES, Mar. 2, 2006, at A1; Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1; *60 Minutes: Staying at Home* (CBS television broadcast Oct. 10, 2004).

2. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAGAZINE, Oct. 26, 2003, at 42.

3. *Id.* at 42-43; see also BARBARA DOWNS, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: FERTILITY OF AMERICAN WOMEN 6-7 (2002) (“New mothers’ labor force involvement increased or held steady from 1976 through 1998, when it peaked at 59 percent. The 2000 participation level of 55 percent was the first statistically significant decline since 1976 and its level was not different from 2002 (also 55 percent).”).

4. For critical analyses of Belkin’s opt-out theory, see Catherine Albiston, *Anti-essentialism and the Work/Family Dilemma*, 20 BERKELEY J. GENDER, L. & JUST. 30 (2005); Claudia Golden, *Working It Out*, N.Y. TIMES, Mar. 15, 2006, at A27. For a discussion of the racial implications of the opt-out debate, see Lynette Clemetson, *Work vs. Family, Complicated by Race*, N.Y. TIMES, Feb. 9, 2006, at G1.

5. In 1996, Congress passed the most significant overhaul of our country’s welfare system, requiring parents to work for their welfare benefits and to permanently leave the welfare system after five years of aid. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996). By 2004, more than two million adults, mostly women, had left welfare. Nearly 19%, or approximately 380,000, of these recipients left welfare for work. See U.S. Dep’t of Health & Human Services, *Characteristics and Financial Circumstances of TANF Recipients, FY 2004*, <http://www.acf.hhs.gov/programs/ofa/character/FY2004/tab46.htm>. Others left for different reasons but may have later found work in the paid labor market. For an analysis contrasting options for professional women with the lack of options for low-income women with regard to caregiving and paid employment, see Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers’ Decision about Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029 (2004).

6. Welfare reform, while cloaked in gender-neutral language, primarily affects women living and working in poverty. In 1996, when the welfare reform bill passed, 87% of the adults receiving welfare were women, approximately 3.4 million recipients out of the 3.9 million total adult recipients on welfare. See U.S. Dep’t of Health and Human Services, *Characteristics and Financial Circumstances of AFDC Recipients, FY 1996*, <http://www.acf.dhhs.gov/programs/ofa/character/indexchar.htm>.

7. Federal law allows states to exempt single parents caring for children less than twelve months old if the state chooses to do so. See 42 U.S.C. § 607(b)(5) (2000). *But see* Peter B. Edelman, *Promoting Family by Promoting Work: The Hole in Martha Fineman’s Doughnut*, 8 AM. U. J. GENDER SOC. POL’Y & L. 85, 87 (2000) (“Adults, generally mothers, are widely required to go to work when their children are as young as twelve weeks old.”).

8. Pamela J. Loprest, *Making the Transition from Welfare to Work: Successes but Continuing Concerns*, in WELFARE REFORM: THE NEXT ACT (Alan Weil & Kenneth Finegold eds., 2002) (“about 50 percent of people who left welfare between 1997 and 1999 were working at the time they were interviewed in 1999”). See also Rebecca M. Blank & David E. Card, *The Labor Market and Welfare Re-*

While highly educated women are opting out and poor women are “opting” in, the federal workplace laws developed to provide job protection and to shield working mothers from discrimination—Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act of 1978, and the Family and Medical Leave Act of 1993⁹—are proving less effective in protecting low-income workers when the demands of family conflict with the demands of work.

In this Article, I argue that Congress, in passing these workplace protections, failed to adequately support low-income parents—primarily single women—in their efforts to work and care for their children. Further, Congress did not fully consider the interplay of family leave and antidiscrimination laws with the safety net provided through the federal welfare system when it reformed welfare in 1996 or when it reauthorized the program in 2006. In interpreting the family leave and antidiscrimination laws, the courts have left little room for arguing that the laws can provide greater protection than currently allowed for low-income workers. As a result, Congress faces the unfinished task of ensuring workplace equity for low-income workers balancing demands of work, pregnancy, and caregiving.

I situate this argument within the debate over whether maternity and family leave laws should be based on a theory of equality or a theory of accommodation for women workers. “Equality feminism” posits that equality for women will be realized only if women have equal access to work and its benefits on the same terms as men.¹⁰ “Accommodation feminism” is the theory that equal opportunity can be realized only if women are provided accommodations based on the real biological difference that only women can give birth to children.¹¹ I argue that the early and continued adherence to strict equality in the development of family leave laws has negatively impacted low-wage working women.

In Part II of this Article, I show that today low-wage working women are much less likely to have access to maternity leave or family leave than their more highly-educated and highly-paid counterparts.

form, in FINDING JOBS: WORK AND WELFARE REFORM 1, 7 (David E. Card & Rebecca M. Blank eds., 2000) (“Welfare reform is expected to add between 1 million and 2 million people to the labor force between the mid-1990s and the middle of the following decade.”).

9. In 1964, Congress passed Title VII of the Civil Rights Act, which prohibits workplace discrimination on the basis of sex. 42 U.S.C. § 2000e (2006). In 1978, Congress amended Title VII with the passage of the Pregnancy Discrimination Act, which defined discrimination “because of sex” to include “because of or on the basis of pregnancy, childbirth or related medical conditions” *Id.* In 1993, Congress passed the Family and Medical Leave Act, providing unpaid job-protected leave to women and men alike for up to twelve weeks to care for their newborn or adopted children. 29 U.S.C. § 2601 (2006).

10. See Wendy Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

11. See Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Equality*, 13 GOLDEN GATE U. L. REV. 513, 518 (1983).

In Parts III and IV, I explain how this disparity came to be by tracing the early development of labor protections for women and the subsequent development of Title VII, the Pregnancy Discrimination Act, and the Family and Medical Leave Act. In Part II, I argue that debates over the Equal Rights Amendment, the passage and implementation of Title VII, and the resulting judicial decisions overturning women-only protective labor laws set the stage for the primacy of strict gender equality over accommodation for women who are mothers and caregivers. I further argue that at its inception Title VII did not adequately address workplace equity issues related to childbearing and childrearing. In Part IV, I explain that the Pregnancy Discrimination Act, as a strict equality statute, and the FMLA, as a mixed equality-accommodation statute with too many exemptions, have failed to fully address the needs of low-wage workers.

In Part V, I show that this problem is more acute today than in the past because of the hundreds of thousands of women who have entered the low-wage workforce as a result of welfare reform. Family leave laws were developed with the explicit assumption that when women are without job-protected leave, they rely on welfare. Yet in 1996, Congress transformed the social contract governing low-income women, work, and family without addressing the lack of workplace protections available to women who become pregnant or who assume primary responsibility for childrearing. The lack of such workplace protections has had an adverse impact on women leaving welfare for work. In 2006, Congress reauthorized the 1996 welfare reform program, demanding that more and more welfare recipients leave welfare for work and again failed to address the lack of labor protections for low-income workers.

In Part VI, I suggest that in ignoring the needs of low-wage working women, Congress has not acted to fully promote workplace equality for women. While Congress has no constitutional obligation to avoid passing laws that have a disparate impact on women, in the past Congress has acted upon its own constitutional ideals in promoting substantive equality for women. In *Nevada Department of Human Resources v. Hibbs*, the Court explicitly recognized Congressional power to promote substantive equality through accommodation statutes.¹² The pressing challenge for Congress is to reform federal pregnancy and family leave laws to increase coverage for low-wage workers and to incorporate labor protections for low-wage working women into the continued effort to transform our nation's welfare system into a program that promotes stable work. In this final Part, I put forth policy recommendations that show how Congress can meet these challenges.

12. 538 U.S. 721 (2003).

II. THE PROBLEM

Women leaving welfare primarily enter low-wage service sector jobs.¹³ Yet a woman working as a hotel maid, waitress, or retail employee is much less likely to be able to take leave from her job when she is pregnant or a family member is ill than a woman working as a doctor, lawyer, or professor. Working-class women disproportionately work in environments where they are not covered by maternity or family leave laws.

Before passage of the Civil Rights Act of 1964, working-class women had slightly greater access to maternity and family leave than professional women to the extent that women had access to such leave at all. In the period from 1961 to 1965, more than two-thirds of all women who worked while pregnant either quit after having their first child (63%) or were let go (5%).¹⁴ Only 30% of women who worked while they were pregnant had access to any maternity leave (16% had access to paid leave and 14% had access to unpaid leave).¹⁵ Importantly, the access to paid leave did not differ by education level, a proxy for socioeconomic status. In fact, women with less education had slightly greater access to paid leave. Nineteen percent of women with less than a high school diploma had access to paid maternity leave while 14% of women with a bachelor's degree or higher had access to such leave.¹⁶ The majority of employer maternity leave and pregnancy job protection policies were gained through union contracts in this period.¹⁷ Unionization also afforded working class-women greater protection than their non-unionized counterparts in the professional class.

From the 1960s to the 1990s, however, access to maternity leave for working-class women remained nearly constant, whereas access increased more than fourfold for professional women. From 1971–1975, 18% of women with less than a high-school diploma had access to paid leave; 19% in 1981–1985; and 18% in 1991–1995.¹⁸ By contrast, the percentage of women with a bachelor's degree or more education who had access to paid

13. See HEATHER BOUSHEY & DAVID ROSNICK, CTR. ON ECON. & POL'Y RESEARCH, JOBS HELD BY FORMER WELFARE RECIPIENTS HIT HARD BY ECONOMIC DOWNTURN (2003), http://www.cepr.net/publications/welfare_reform_2003_09.htm ("Nine industries, mostly in the service sector, account for the employment of nearly two-thirds of all former welfare recipients. Overall, these are relatively low-wage industries: in the second quarter of 2003, retail had an average hourly wage of \$10.64 while food establishments averaged \$6.94 per hour (not including tips), both of which were much lower than the \$13.94 average for the private sector as a whole.").

14. KRISTIN SMITH ET AL, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: MATERNITY LEAVE AND EMPLOYMENT PATTERNS: 1961-1995, at 70-79 (2001).

15. *Id.*

16. See *id.* at 14 fig.4.

17. REPORT OF THE INTERDEPARTMENTAL COMM. ON THE STATUS OF WOMEN, AMERICAN WOMEN 1963-1966, at 20 (1968).

18. SMITH, *supra* note 14, at 70-79. These statistics are based on five-year averages to increase the reliability of the data.

leave for the birth of their first child nearly doubled from 14% during 1961–65 to 27% during 1971–75. In 1981–85, after the passage of the Pregnancy Discrimination Act, 47% of working women in this highest education bracket had access to paid leave, increasing further to 63% in 1991–95.¹⁹

Today, women with less education and correspondingly low wages²⁰ leave their jobs or are fired after the birth of their first child at a much higher rate than more educated women workers. Workers with less than a high school education are two and a half times more likely to quit their jobs upon the birth of their first child than women with a bachelor's degree or higher (46% compared to 19%), and they are three times more likely to be fired upon the birth of their child (6.2% compared to 1.9%).²¹

Numerous studies on employer-provided benefits for low-wage workers confirm this modern-day lack of paid leave for low-income parents. A survey of entry-level employees consisting of women leaving welfare for work found that only 17% had access to paid leave.²² In 2005, the National Partnership for Women and Families reported that 75% of low-income workers do not have any sick leave at all and about 40% of low-income working parents had no paid leave of any kind, including sick pay, vacation pay or personal days off.²³ Even when low-wage workers do have access to paid leave, the leave is often for shorter periods than that available to higher-income workers.²⁴

Not only do low-wage working women have little access to paid maternity leave, but they also have less access to unpaid family leave. Unpaid

19. *Id.*

20. See SUNHWA LEE, INST. FOR WOMEN'S POL'Y RESEARCH, WOMEN'S WORK SUPPORTS, JOB RETENTION, AND JOB MOBILITY: CHILD CARE AND EMPLOYER-PROVIDED HEALTH INSURANCE HELP WOMEN STAY ON JOBS 2 (2004) (finding that nearly two-thirds (62%) of all low-income working mothers have only a high school education or less, compared with less than one-third (32%) of high-income working mothers; whereas, more than two-thirds of high-income working mothers (68%) have some college education or more compared with only 38% of low-income working mothers); see also Marlene Kim, *Women Paid Low Wages: Who They Are and Where They Work*, MONTHLY LAB. REV., Sept. 2000, at 26, 27 (finding that among women without a high school education, 74% work in low-wage jobs whereas among college graduates, only 14% work in such jobs).

21. SMITH, *supra* note 14, at 70-79.

22. See Demetra Smith Nightingale, *Work Opportunities for People Leaving Welfare*, in WELFARE REFORM: THE NEXT ACT (Alan Weil & Kenneth Finegold eds., 2002) (citing MARTHA REGENSTEIN ET AL., THE URBAN INSTITUTE, JOB PROSPECTS FOR WELFARE RECIPIENTS: EMPLOYERS SPEAK OUT (1998)).

23. See JODI GRANT ET AL., NAT'L P'SHIP FOR WOMEN & FAMILIES, EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF PARENTAL LEAVE PROGRAMS 8 (2005), <http://www.nationalpartnership.org/portals/p3/library/PaidLeave/ParentalLeaveReportMay05.pdf>.

24. Using data from the National Survey of American Families, the Urban Institute found that while nearly 46% of families living at incomes of less than 100% of the federal poverty line reported that they had access to paid leave, 35% of those families only had one week or less for paid leave and another 36% received between one and three weeks of paid leave. By contrast, 83% of workers at 200% or more of the federal poverty line had access to paid leave and over half of those workers were able to take leave for more than three weeks. See KATHERINE ROSS PHILLIPS, THE URBAN INSTITUTE, GETTING TIME OFF: ACCESS TO LEAVE AMONG WORKING PARENTS 8 (2004).

leave is often premised on an employee working for the same employer for one year and working full time. However, low-income women are less likely to have worked for the same employer for one year, and less likely to work full-time.²⁵ In 2000, the U.S. Department of Labor found that nearly 45% of all businesses do not provide unpaid leave for individuals who have worked for the business for less than a year.²⁶ Additionally, 45% of businesses do not provide unpaid leave for part-time workers.²⁷

Workers who benefit most from the Pregnancy Discrimination Act, in terms of ability to take medical leave related to childbirth, are women who work for employers that offer paid temporary disability leave or a generous sick leave policy to all workers. Most often, such leave is available to women in higher-paying jobs. In March 2005, 54% of workers who made more than \$15 per hour had access to a short-term disability policy, while only 28% of workers earning less than \$15 per hour had access to a short-term disability policy.²⁸ Similarly, 46% of workers who made over \$15 per hour had access to long-term disability leave, while only 16% of workers making less than \$15 per hour had access to long-term disability leave.²⁹ There are similar disparities in access to paid sick leave and paid holidays. Eighty-eight percent of workers making more than \$15 per hour had access to paid holidays, and 75% of these workers had access to paid sick leave.³⁰ Meanwhile, 68% of workers earning less than \$15 per hour had access to paid holidays, and only 47% had access to paid sick leave.³¹

In sum, although working-class women and professional women had access to maternity or family leave at nearly the same rate in the early 1960s, professional women now have far more access than working-class women. Part III explores how this disparity came to be.

III.

HISTORY OF PREGNANCY AND FAMILY LEAVE BENEFITS

The disparity in benefits between higher and lower income workers is not an accident of history. At key points in the development of leave laws, policymakers made trade-offs that assisted more highly-educated and

25. See *infra* Part IV.C.2.

26. See U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: THE FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE, at 5-10 tbl.5.4 (2000) (hereinafter BALANCING THE NEEDS) (showing that 44.8% of all surveyed businesses did not provide unpaid leave to workers who had worked for less than one year).

27. *Id.* (defining part-time workers as those who have worked less than 1250 hours a year, which averages to twenty-five hours a week for fifty weeks).

28. See U.S. BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, MARCH 2005, at 9 tbl.5 (2005).

29. *Id.*

30. *Id.* at 22 tbl.18.

31. *Id.*

highly-paid workers at the expense of low-income working women. This Part focuses on three key historical moments in the early construction of leave policies: the development and subsequent rejection of women-only state protective labor laws, the passage of Title VII, and the interpretation of Title VII with respect to childbearing and childrearing.

This Part will challenge the conventional view that state protective labor laws were bad for women because they were “based on stereotypes about women’s transient and secondary role in the labor market and their weak physical condition as well as on the desire of male workers to reduce competition for higher paying jobs.”³² This narrative, developed in the late 1970s by equality feminists, advocating for equal access to work and its benefits on the same terms as men, has been widely accepted by the courts.³³ The Supreme Court has criticized protective labor legislation for “reflect[ing] archaic or stereotypical notions about pregnancy and the abilities of pregnant workers”³⁴ and for having “as their objective the protection of weaker workers, which the laws assumed meant females.”³⁵ The Court also has described these early laws as “rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”³⁶

Although there are important truths in this narrative, it is not the whole story. While the Court and equality feminists were focused on articulating a normative ideal of equality as strict equality between men and women, they failed to embrace the accommodation theory of equality, which suggests that equality must be reached by addressing both the real biological difference between men and women, based on the fact that only women can bear children, and the empirical reality that women are disproportionately responsible for caretaking. A more nuanced history has been uncovered by scholars such as Alice Kessler Harris, Theda Skocpol, and Dorothy Sue Cobble, who suggest that protective labor laws regulating the maximum hours women could work, while overbroad, were supported by a wide-range of women’s organizations and in fact helped low-wage working mothers balance paid work with family caretaking responsibilities.³⁷

32. BARBARA A. BROWN ET AL., *WOMEN’S RIGHTS AND THE LAW* 209-10 (1977).

33. See *Cal. Fed. Sav. & Loan Ass’n v. Guerra (Cal Fed)*, 479 U.S. 272, 290 n.28 (1987) (citing BROWN ET AL., *supra* note 32); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 n.10 (1982) (same); see also *Hibbs v. Nevada Dep’t of Human Res.*, 273 F.3d 844, 861-62 (9th Cir. 2001) (relying on the historical narratives of equality feminists Wendy Williams, Judith Baer, and Barbara Babcock).

34. *Cal Fed*, 479 U.S. at 290.

35. *Miss. Univ. for Women*, 458 U.S. at 725 n.10.

36. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

37. See ALICE KESSLER-HARRIS, *OUT TO WORK* 180-214 (20th Anniversary ed. 2003); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 373-423 (1992); DOROTHY SUE COBBLE, *THE OTHER WOMEN’S MOVEMENT* 145-205 (2004).

In the early 1900s, a broad array of women's organizations—from those representing elite society women to the labor-led coalition of working-class women—were united in support of labor laws that set maximum hours and minimum wages for women in paid work.³⁸ Equality feminists have argued that these organizations fighting for women-only protective labor laws were primarily interested in maintaining the status quo—a state of affairs in which women were solely responsible for homemaking and caring for children—and that the organizations did not support extending these laws to all workers.³⁹ But the historical evidence suggests otherwise. Some women's organizations saw women-only state protective labor laws as only the first step in an effort to protect all workers from the abuses of the paid labor market. They recognized that the cultural shift in caregiving responsibilities—from women-only to women and men—would not change immediately and that women should be protected through these state labor laws as the fight for equality continued. A shift away from the women-only labor laws, which offered protection in the form of fewer hours and greater pay, to an equality model would—and did—hurt low-income working mothers.

The passage and implementation of Title VII, a strict equality statute, ultimately led to the end of the women-only state protective labor laws. But Title VII also proved inadequate to accommodate women's roles as child-bearers and did not help either men or women in their roles as caregivers.

Without this alternative history, modern policymakers and legislators have overlooked the needs of low-wage working women for accommodations in their dual roles as workers and mothers. Moreover, policymakers tend to assume that the current state of the law embodies the proper conception of fairness. In fact, contemporary equality norms have produced wide disparities in access to leave. These disparities disfavor low-income mothers who are both the primary caretakers of their children and often sole wage earners. This important history should inform current efforts by Congress to promote equitable opportunities for low-wage working women, as I propose in Part V.

A. *Early History*

Throughout the twentieth century, as women entered the paid labor market in increasing numbers,⁴⁰ our society struggled with how to accom-

38. SKOCPOL, *supra* note 37, at 373-423; KESSLER-HARRIS, *supra* note 37, at 180-214.

39. See BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 257 (1975).

40. In 1900, approximately 20% of women participated in the paid labor force. This number jumped to 29% by 1950, over 41% by 1970, and almost 60% by 2000. For married women, the increase in workforce participation was even more drastic, jumping from approximately 6% in 1900 to 23% in 1950, 40% in 1970, and 61% in 2000. U.S. CENSUS BUREAU, *MINI-HISTORICAL STATISTICS, STATISTICAL ABSTRACT OF THE UNITED STATES* 52, 52-53 tbl.HS-30 (2003).

moderate parents' ability to bear and care for children while ensuring equal rights to participation in the labor market. This early history is critical to understanding the later policy and legal debates regarding how to reach equality for women in the workforce—whether through strict equality or through accommodations to women that resulted in substantive equality.

Well before the surge in women's workforce participation in the second half of the twentieth century and before passage of federal laws setting labor and workplace standards,⁴¹ state laws governed workplace protections. The early state laws provided protections for both men and women, but after the Supreme Court struck down such laws, the laws were targeted only at women and assumed that all women were mothers and the primary caregivers for their children. These women-only labor laws regulated the maximum hours that women could be required to work, with the aim of allowing women to balance responsibilities at home with paid work in the labor market, and set a minimum wage to ensure that the cut in hours would not diminish their pay. In addition, women in unions relied on collective bargaining agreements, which included hour limitations, wage requirements, and maternity benefits.⁴² These early state laws, although overbroad, were in fact based on a theory of accommodating women as childbearers and caregivers.

However, the development of the women-only state protective labor laws did not begin as an intentional policy to accommodate workers' family and work responsibilities. Instead, state maximum-hours laws were originally gender-neutral and were intended to allow all workers to fully participate in civic, religious, and family life outside of work.⁴³ Advocacy and development of these gender-neutral state labor laws came to a halt in 1905 when the Supreme Court in *Lochner v. New York* held unconstitutional a state statute that set maximum hours for bakery employees.⁴⁴

The response to *Lochner* differed by gender. Labor unions, whose membership was 92% men at the end of the 1920s,⁴⁵ responded to *Lochner*

41. The first comprehensive labor law providing protection for all workers was the Fair Labor Standards Act of 1938 (now codified at 29 U.S.C. §§ 201-219 (2000)). Laws providing equal rights for women in the workplace were not passed until the 1960s when the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000), were passed.

42. By the 1950s, labor unions were successfully negotiating maternity benefits in collectively bargained contracts. See COBBLE, *supra* note 37, at 129. However, as noted in *Hibbs*, these maternity policies covered women only for periods of leave of six months to a year, but did not cover gender-neutral family leave for caregiving after the child was born. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 n.5 (2003).

43. In 1840, President Van Buren issued an executive order instituting a ten-hour work day for all federal employees. In the 1850s, the first state laws were passed restricting hours for all workers. Two states instituted ten-hour days for their state employees and eight other states set a maximum of ten-hour days absent a private contract to the contrary. In 1871, the Knights of Labor continued the trend by calling for an eight-hour day. See KESSLER-HARRIS, *supra* note 37, at 182-84.

44. 198 U.S. 45 (1905).

45. COBBLE, *supra* note 37, at 16.

by seeking hours restrictions in collectively bargained agreements as an alternative to the now-unconstitutional state laws. The unions generally opposed women-only protective labor laws out of concern that such laws would undercut their ability to negotiate hours restrictions in collectively bargained agreements.⁴⁶ Women's organizations, on the other hand, intensified the fight for women-only state labor laws, which had begun before *Lochner*.

The historical evidence makes clear that women-only state protective laws, developed in the 1900s through 1920s, resulted from hard-fought advocacy and leadership by a broad coalition of women's organizations on behalf of low-wage working women.⁴⁷ Their political victories came in spite of opposition by business and labor.⁴⁸ The advocacy coalition included the National Consumer League, an organization of upper- and middle-class women who advocated on behalf of working women; the General Federation of Women's Clubs, also comprised of upper-class women; the Women's Trade Union League, made up of women trade union members; the Women's Christian Temperance Movement; the Women's Educational and Industrial Union;⁴⁹ and the League of Women Voters.⁵⁰ There is limited evidence that any organized women's group opposed women-only protective legislation in these early years.⁵¹ Collectively, in the early part of the twentieth century, organized women of all classes and backgrounds were largely unified in their support and advocacy for women-only state labor laws.⁵² At this stage, there was no rift between the equality and accommodation feminists. Instead, women's organizations agreed that women needed accommodation in order to fully participate in the paid labor market.

In 1908, the women's organizations advocating for these laws, led by the National Consumer League, won a victory when the Supreme Court in

46. SKOCPOL, *supra* note 37, at 379-80.

47. *Id.* at 402-03 tbl.8.

48. Although some unions and workers supported these laws in order to make women less competitive in the labor market than men, one of the two main umbrella labor organizations, the American Federation of Labor, took an official position opposing these laws in the wake of *Lochner* and the increasing push for women-only laws. *Id.* But see KESSLER-HARRIS, *supra* note 37, at 203 (suggesting that the advocacy of labor unions in promoting these laws was one of the central forces in passing these laws).

49. SKOCPOL, *supra* note 37, at 415.

50. KESSLER-HARRIS, *supra* note 37, at 205.

51. The National Congress of Mothers (which later became the Parent-Teachers Association or PTA) did advocate against protective labor laws for women in an editorial entitled "Legislating Women Out of a Livelihood." SKOCPOL, *supra* note 37, at 382. In addition, some trade union women opposed protective laws for women only, but their voices were not heard due to the overwhelming support by most women's organizations. See KESSLER-HARRIS, *supra* note 37, at 205.

52. In the early years, the women's organizations advocating for protective labor laws primarily consisted of white women. Later, the National Council of Negro Women, founded in 1935, became active in the fight against the Equal Rights Amendment and the fight to save women-only protective laws. See COBBLE, *supra* note 37, at 50, 65, 193, 287 n.72.

*Muller v. Oregon*⁵³ held that protective labor laws for women were constitutional on the ground that maximum-hour laws came within the state's police power to legislate worker protections based on health. This victory led to a surge in the passage of state laws regulating the maximum hours that women could work.⁵⁴

Muller distinguished *Lochner* based on the physical health differences between men and women as well as the societal role of women as caregivers.⁵⁵ In its brief, the National Consumer League tried to highlight the uniqueness of women's role in the workplace. This strategy was used by the women's organizations both to protect low-wage working women in their roles as mothers and to try to save the state laws restricting hours for women so that such laws could later be extended to men.⁵⁶

The strategy was a dangerous one. The state protective labor laws were not tailored to "mothers." Instead, they applied to all women regardless of whether they were wives, mothers, or caregivers, and regardless of their economic situation or need for such protection. The statutes assumed that all women were physically weak and unable to perform certain jobs, locking women into a gender-stereotyped role and denying women access to some jobs. Nevertheless, such laws also allowed mothers and female caregivers some protection against long hours at the factory away from their families.⁵⁷

53. 208 U.S. 412 (1908).

54. Prior to 1905, when *Lochner* was handed down, only five states had laws restricting the hours women could work. In 1907 and 1908, six more states passed hours laws. From 1909 through 1919, twenty-two more states passed such laws. See SKOCPOL, *supra* note 37, at 387-89 tbl.7. By 1957, approximately forty-three states had laws regulating women's work hours. See COBBLE, *supra* note 37, at 142.

55. In upholding the constitutionality of Oregon's law, the Court relied on a series of reports and commissions submitted by the state. The Court quoted a labor inspector from one of the reports stating:

The reasons for the reduction of the working day to ten hours—(a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home—are all so important and so far reaching that the need for such reduction need hardly be discussed.

Muller, 208 U.S. at 419. The report that the Court cites was included in a brief submitted by Louis Brandeis on behalf of the National Consumer's League although the major work on the brief had been compiled by his sister-in-law, Josephine Goldmark. The famed "Brandeis brief" was the first brief ever submitted to the U.S. Supreme Court that relied so heavily on statistics to explain the social facts as a way of demonstrating the reasonableness of the law. See Philippa Strum, *Brandeis and the Living Constitution*, in *BRANDEIS AND AMERICA* 118, 120 (Nelson Dawson ed., 1989).

56. COBBLE, *supra* note 37, at 184.

57. See KESSLER-HARRIS, *supra* note 37, at 189 ("If protective legislation handicapped women who needed to engage fully in wage work, it enabled married women who were not entirely dependant on their own earnings to work more easily Interview schedules reveal a grateful relief at the additional time."); see also COBBLE, *supra* note 37, at 143 ("[Labor women] wanted mechanisms that allowed women to combine caregiving and breadwinning and that prevented the intolerable oppression of compulsory long hours. The ability to leave work at a time the worker could predict, even if it meant less pay or fewer opportunities for promotion, was a benefit they valued.").

The maximum hours laws for women only were also problematic because a restriction in hours meant lower wages. The National Consumer League and the Women's Trade Union League recognized this problem and, as early as 1908, began to advocate for a minimum wage for women.⁵⁸ The advocacy for such laws was not as successful as the hours restrictions, however, and in 1923 the Supreme Court held that the health and safety arguments that were dispositive in *Muller* could not be extended to minimum wage laws.⁵⁹ Even though the Supreme Court overturned this decision in 1937, the success in passing women's minimum wage laws was minimal in comparison to the hours restrictions.⁶⁰

Neither the Supreme Court nor the women's organizations advocating for protective labor laws effectively distinguished between state laws that barred women from certain professions and laws that protected working-class women from working long hours for low wages in factories. The Court broadly refused to interfere with the state prerogative to regulate women's work, regardless of whether it was for a purely discriminatory purpose or for the protection of women's health and community well-being. Two themes ran through the Court's early case law. First, states had the right to legislate for the purpose of protecting the health and morals of women as mothers to protect "the strength and vigor of the race."⁶¹ Second, there was no constitutional ground on which women could stand to fight such laws even if the laws were more discriminatory than protective.⁶²

The failure of women's organizations to articulate the difference between protective and discriminatory laws eventually led to a divergence in strategies among the women's organizations. In 1920, after women gained

58. KESSLER-HARRIS, *supra* note 37, at 195; *see also* SKOCPOL, *supra* note 37, at 408-09 (explaining the relationship between hours restrictions and minimum wages).

59. Between 1912 and 1914, ten states passed minimum wage laws for women only, although many of these laws had weak enforcement mechanisms. *See* KESSLER-HARRIS, *supra* note 37, at 195-98. In 1923, when fifteen states had enacted minimum wage laws for women, the Supreme Court struck down those laws. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

60. In 1937, the Supreme Court overturned *Adkins* and upheld a Washington state minimum wage law for women. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). In 1971, forty states had minimum wage laws, ten of which restricted the laws to women only. *See* Eliot A. Landau & Kermit L. Dunahoo, *Sex Discrimination in Employment: A Survey of State and Federal Remedies*, 20 DRAKE L. REV. 417, 449 n.188 (1971).

61. *Muller v. Oregon*, 208 U.S. 412, 421 (1908) ("[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."); *West Coast Hotel*, 300 U.S. at 398 ("What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?"); *Goeseart v. Cleary*, 335 U.S. 464, 466 (1948) ("[B]artending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures . . .").

62. *See* *Bradwell v. Illinois*, 83 U.S. 130 (1872) (Privileges and Immunities Clause does not require admission to certain professions); *Goeseart*, 335 U.S. 464 (Equal Protection Clause does not require women to be provided equal access to employment); *Muller*, 208 U.S. 412 (Due Process Clause does not protect women's "liberty" right to freedom of contract, but instead allows states to regulate contracts based on the state's police power); *West Coast Hotel*, 300 U.S. 379 (same).

the right to vote, the National Women's Party, headed by Alice Paul, began to promote an Equal Rights Amendment (ERA) to the Constitution.⁶³ At this stage, unionized women opposed the ERA,⁶⁴ as did civic and political leaders including Eleanor Roosevelt and Felix Frankfurter,⁶⁵ the American Civil Liberties Union,⁶⁶ the Women's Bureau at the U.S. Department of Labor,⁶⁷ and most major women's organizations (with the notable exception of the "National Federation of Business and Professional Women's Clubs and other organizations of well-educated career women").⁶⁸ These advocates worried that the ERA would make unconstitutional the very state labor laws that they had fought so hard to win on behalf of working mothers. The ERA proposal thus revealed a class division in the women's movement.⁶⁹

The ERA proposal spurred the original women's organizations to distinguish discriminatory from protective laws. An alternative to the Equal Rights Amendment, the Women's Status Bill, supported by labor women, called for an end to discriminatory laws and the retention of laws that were beneficial.⁷⁰ One group of labor union activists proposed a Labor ERA, which would have added a clause to the amendment extending protective labor laws to all workers.⁷¹ Other labor union activists remained skeptical that an equal rights amendment would help working women and instead focused their energies on opposing the ERA and fighting to maintain protective labor laws.⁷²

63. KESSLER-HARRIS, *supra* note 37, at 206; COBBLE, *supra* note 37, at 60.

64. COBBLE, *supra* note 37, at 60.

65. KESSLER-HARRIS, *supra* note 37, at 208 ("Frankfurter wrote to Ethel Smith [of the Women's Trade Union League] in 1921 of his 'shock' at learning of the amendment, which 'threatens the well-being, even the very life of these millions of wage-earning women.'"); William H. Chafe, *The American Woman, Her Changing Social, Economic and Political Roles, 1920-1970*, in BABCOCK, *supra* note 39, at 260 ("Eleanor Roosevelt and Mary Anderson [of the Women's Labor Bureau] insisted that protective legislation was more valuable than the establishment of an abstract principle of legal rights.").

66. Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 164 (2002) (The American Civil Liberties Union "[o]riginally opposed . . . the Equal Rights Amendment on the grounds that it would nullify protective labor legislation for women workers.").

67. The Women's Bureau at the Department of Labor consistently supported protective labor laws for women from the establishment of the bureau through the passage of Title VII. In 1928, the Women's Bureau released a report finding that the effects of such legislation had been overwhelmingly positive. See KESSLER-HARRIS, *supra* note 37, at 209-11.

68. *Id.* at 210.

69. Chafe, *supra* note 65, at 256 ("Indeed, the reformers believed that the entire feminist drive was motivated by the desire of a few business and professional women to advance their own interests at the expense of the rest of the sex The result, [Mary] Van Kleeck [formerly of the forerunner to the Women's Bureau] declared, was that in the name of freedom a small number of career women were undercutting the only protection which female factory workers had.").

70. See COBBLE, *supra* note 37, at 62-66.

71. See *id.* at 193.

72. See KESSLER-HARRIS, *supra* note 37, at 207 (noting that the National Women's Party in developing the language of the ERA reached out to the Women's Trade Union League suggesting that they would like to draft an amendment that would not harm the eight-hour laws and other social legislation; the WTUL, however, did not believe it was possible and thus remained in opposition).

After two and a half decades of lobbying, the women's organizations fighting to save the protective labor legislation succeeded in defeating the ERA in 1946.⁷³ Upon its defeat, the *New York Times* noted with approval that "motherhood cannot be amended."⁷⁴ The victory of saving the protective labor laws was short-lived, however, with the passage of Title VII in 1964.⁷⁵ Further, this initial dispute in the ranks of women's organizations set the stage for what would become the equality-versus-accommodation debate that permeated the later development of federal antidiscrimination and family leave laws.⁷⁶ Ultimately, formal equality would win over accommodation, and women's organizations would be decidedly more representative of the interests of professional women.

In sum, the early labor laws were a messy start in the effort to protect working women's ability to bear and care for children. These early laws were not tailored to mothers or parents, did not distinguish between women's needs related to childbearing versus caretaking, and did not recognize the different needs of mothers based on their socioeconomic status. Even with these weaknesses, the laws were recognized as critical to the protection of low-wage working mothers and were supported and developed by a broad base of women's organizations.

B. Congress's "Recognition" of Sex Discrimination in Employment

In 1964, the debate over how best to promote women's equity and accommodate their dual roles as workers and mothers was far from resolution. The ERA had never been considered for a vote by the full House, and although it had twice passed the Senate, the most recent votes approving the amendment had included a rider exempting protective labor legislation and any future statutes that conferred "rights, benefits, or exemptions" upon women.⁷⁷ Apart from this rider, there had never been any federal legislation addressing how best to accommodate women in their roles as workers and mothers.

The President's Commission on the Status of Women, established by President Kennedy in 1961, released a report in October 1963 calling for the continuation of women-only protective labor laws in a number of areas

73. The ERA was defeated in the Senate in 1946 by a vote of 38 to 35, which was short of the two-thirds majority needed for approval. See Chafe, *supra* note 65, at 260.

74. *Id.*

75. See *infra* Parts IV.B. & IV.C.

76. See *infra* Part IV.

77. The ERA had passed the Senate in 1950 and 1953, but both votes included a rider by Senator Carl Hayden (D-Ariz.) exempting current and future protective laws. See Amelia R. Fry, *Alice Paul and the ERA*, in *RIGHTS OF PASSAGE: THE PAST AND FUTURE OF THE ERA* 8, 13-16, 121-25 (Joan Hoff-Wilson ed., 1986).

with the gradual extension to men.⁷⁸ Regarding state maximum hours laws, the report noted: “For those women who fulfill the dual role of wives, mothers, and homemakers as well as wage earners, the reasonable schedules of work guaranteed by legal limitations on maximum hours of work are of particular value.”⁷⁹ However, to prevent barriers for women seeking or holding professional jobs, the report specifically exempted “women working in administrative, executive, or professional capacities . . . from limitation on hours of work.”⁸⁰ This recommendation indicates the Commission’s awareness of the differing needs of low-wage workers and professional salaried employees. The former needed the ability to control the hours they spent away from their families and protection from exploitation; the latter might need to work long hours to advance in their professions.

In addition, the report recommended that the federal government take the lead in creating legislation to establish cash maternity benefits for women when they were pregnant.⁸¹ Further, the report recommended that federal, state, and local governments partner to provide childcare services with a priority for children of employed women.⁸²

With the disagreement over how best to help women in their roles as workers and caregivers, and with little national consensus that federal legislation should be enacted, the political environment hardly seemed ripe to amend the Civil Rights Act of 1964 to prohibit sex discrimination. Yet just four months after the President’s Commission released its report, Congressman Howard Smith, a Democratic Representative from Virginia, stood on the floor of the United States House of Representatives, two days prior to final passage of the bill, and introduced an ultimately successful amendment to add “sex” as a basis on which private employers would be prohibited from discriminating under Title VII of the Civil Rights Act.⁸³ The

78. PRESIDENT’S COMM’N ON THE STATUS OF WOMEN, AMERICAN WOMEN: REPORT OF THE COMM. ON LABOR LEGISLATION (1963) (recommending that states adopt minimum wage laws to cover both men and women; that state laws be enacted to ensure “premium” pay for men and women who worked over forty hours a week; and that maximum hours laws be established for women and gradually extended to men).

79. *Id.* at 10.

80. *Id.*

81. PRESIDENT’S COMM’N ON THE STATUS OF WOMEN, AMERICAN WOMEN: REPORT OF THE COMM. ON SOCIAL INSURANCE AND TAXES 8 (1963) (noting that “[f]or low-income families especially, loss of income can threaten the welfare of both the mother and the newborn child”).

82. PRESIDENT’S COMM’N ON THE STATUS OF WOMEN, AMERICAN WOMEN: REPORT OF THE COMM. ON HOME AND COMMUNITY 13 (1963).

83. When Congressman Smith offered the amendment, he provided little substantive reasoning in support of his amendment. Instead, he stated that he was “very serious” about the amendment and noted, “I do not think it can do any harm to this legislation, maybe it can do some good.” 110 CONG. REC. 2577 (1964). There are at least two theories on why this amendment was introduced and ultimately passed. The first is that Congressman Smith, a Southern congressman and a well-known opponent of the Act, believed that adding sex would be a poison pill that would accomplish the defeat of the entire bill. See Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 310-312 (1968). This version of

move codified an equality-based antidiscrimination model to oppose sex discrimination rather than the accommodation model advocated by labor unions and other organizations representing low-wage women workers.

The Civil Rights Act of 1964 was signed into law with no congressional hearings and only limited substantive debate regarding the impact of adding “sex” to the list of protected categories.⁸⁴ Congress did not investigate the consequences Congressman Smith’s amendment would have on the ability of women to receive workplace protections with regard to pregnancy and childbirth,⁸⁵ nor the effect the bill would have on existing state protective labor laws.⁸⁶ There was no debate regarding the impact the bill would have on women who chose to continue to meet societal expectations of being the primary caregiver for their children while working. Nor was there

history was recognized by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989) (noting that the addition of “sex” to Title VII was intended to block the bill’s passage). The EEOC has recognized an alternative theory of history suggesting that Smith was a supporter of equal rights for women and that the amendment was a result of careful planning by the National Women’s Party and its supporters to add “sex” to the bill. See EEOC, Celebrating the 40th Anniversary of Title VII, Expanding the Reach—Making Title VII Work for Women and National Origin Minorities: Pregnancy, Harassment, and Language Discrimination (2004), <http://www.eeoc.gov/abouteeoc/40th/panel/expanding.html>.

84. See 110 CONG. REC. 2577 (1964). Congressman Emanuel Celler (D-N.Y.), the House floor manager of the bill and Judiciary Committee chairman, opposed the bill and read a letter from the U.S. Secretary of Labor citing the recent report from the President’s Commission on the Status of Women which noted that “discrimination based on sex . . . involves problems sufficiently different from discrimination based on other factors listed to make separate treatment preferable.” The letter concluded that based on this recommendation to “attack discriminations based on sex separately,” the amendment to this bill would not “be to the best advantage of women at this time.” On the other side, Congresswoman Martha Griffiths (D-Mich.) supported the amendment and primarily argued that women of color would be protected under the legislation, but white women would not if the bill was not amended. *Id.* at 2578-80.

85. Congressman Celler noted, “You know the biological differences between the sexes. In many States we have laws favorable to women. Are you going to strike those laws down? This is the entering wedge, an amendment of this sort. The list of foreseeable consequences, I will say to this committee, is unlimited.” *Id.* at 2577. Congresswoman Edith Green (D-Or.), a member of the President’s Commission on the Status of Women and the primary sponsor of the Equal Rights Act, opposed the bill, emphasizing that “[b]ecause of biological differences between men and women, there are different problems which will arise in regard to employment There will be new problems for business, for managers, for industrial concerns. These should be taken into consideration before any vote is made in favor of the amendment without any hearings at all on the legislation.” *Id.* at 2584.

86. Congresswoman Griffiths noted that black women would be able to challenge the discriminatory basis of protective labor legislation, which excluded women from certain jobs, and argued that white women should have the same basis on which to challenge the legislation. *Id.* at 2578-80. Congresswoman Katharine St. George (R-N.Y.) raised the problems of protective labor legislation prohibiting women from accessing higher paying jobs as a reason to support the amendment. She also noted the inequity in the protective labor laws in which some women were “protected” from working at lucrative night jobs, while there was little attention paid to the women who cleaned offices in the middle of the night in Washington, D.C. and New York City. *Id.* Congresswoman Edna Kelly (D-N.Y.) supported the bill but stated, “I believe in equality for women, and am sure the acceptance of the amendment will not repeal the protective laws of the several States.” *Id.*

any discussion of the various effects the bill might have on women of differing economic circumstances.⁸⁷

C. *Early Interpretation of Title VII in Relation to Childbearing and Childrearing*

Early Title VII cases heard by the Equal Employment Opportunity Commission (EEOC) did not address issues directly related to childbearing or childrearing. Instead, the majority of cases involved sex segregation,⁸⁸ unequal pay for equal work,⁸⁹ and discrimination based on the state protective labor laws restricting heavy lifting and the number of hours women could work.⁹⁰ These early cases show that Title VII addressed the broad issues of access to work and equal pay but was not equipped to deal with women's needs in relation to work and family. In particular, it did not address the recommendations laid out by the President's Commission on the Status of Women, such as protecting maximum hour laws, paid maternity leave, and childcare.

Two questions emerged in the immediate aftermath of the passage of Title VII that had a direct bearing on the equality/accommodation debate. First, would Title VII provide added protection for women against discrimination based on pregnancy and childbearing? Second, would Title VII override state protective labor legislation that afforded mothers some guaranteed limitations on work to allow for childrearing?

87. *Id.* at 2577-84 (entire record of debate).

88. There were at least fourteen published cases brought before the EEOC on charges of sex-segregation, all of which held that the employer—in some cases jointly with the labor union—violated Title VII by segregating females into certain jobs. *See* E.E.O.C. Dec. No. 70-9 (1969); E.E.O.C. Dec. No. 70-88 (1969); E.E.O.C. Dec. No. 70-375 (1969); E.E.O.C. Dec. No. 70-401 (1970); E.E.O.C. Dec. No. 70-445 (1970); E.E.O.C. Dec. No. 70-599 (1970); E.E.O.C. Dec. No. 70-661 (1970); E.E.O.C. Dec. No. 71-77 (1970); E.E.O.C. Dec. No. 71-77 (1970); E.E.O.C. Dec. No. 71-362 (1970) (finding joint liability with labor union); E.E.O.C. Dec. No. 71-796 (1970); E.E.O.C. Dec. No. 71-1062 (1970); E.E.O.C. Dec. No. 71-1100 (1970); and E.E.O.C. Dec. No. 71-49 (1970).

89. The Commission held that employers were in violation of Title VII when the employer offered a lower wage rate for females who were employed in a job equivalent to that of their male counterparts. *See* E.E.O.C. Dec. No. 70-36, (1969); E.E.O.C. Dec. No. 70-695 (1970). By contrast, the Commission did not find a violation where the employer offered differential pay for “performing substantially the same duties.” *See* E.E.O.C. Dec. No. 70-405 (1970).

90. *See* E.E.O.C. Dec. No. 70-3 (1969) (ruling that sex is not a bona fide qualification under Title VII for jobs requiring the lifting of weights and, thus, holding that the employer need not comply with the Oregon state law limiting employment to women if the job requires lifting more than 25 pounds); E.E.O.C. Dec. No. 70-424 (1970) (ruling that employer violated Title VII by excluding women from certain jobs and forbidding women to work overtime on Sundays due to state statute limiting the number of hours women could work); E.E.O.C. Dec. No. 70-675 (1970) (ruling that employer improperly dismissed women in violation of Title VII when it laid-off the women despite a seniority agreement due to state protective laws on hours and weight restrictions).

1. *Childbearing: The Early Debate over Pregnancy*

In its early years, the EEOC, established by the Civil Rights Act of 1964, examined whether discriminatory state laws forbidding pregnant women from working should be overturned⁹¹ and whether private employers violated Title VII if they offered medical benefits or disability leave without covering pregnancy and childbirth. In early opinion letters, the General Counsel of the EEOC informed private employers that Title VII did not require the coverage of pregnancy and pregnancy-related disabilities within employee benefits offered by an employer.⁹²

In the early 1970s, however, the EEOC began reversing course.⁹³ In its case rulings, the EEOC found that pregnancy leave should be granted whether or not a leave of absence is granted for illness;⁹⁴ that when insurance benefits are offered to employees, such benefits must be offered on an equal basis to men and women and must therefore include pregnancy benefits;⁹⁵ and that an employee's seniority must not be erased when the employee takes maternity leave.⁹⁶ In 1972, the EEOC filed an amicus brief arguing that an employer's policy of requiring mandatory leave for pregnant employees a specified number of months before their due dates violated Title VII unless the employer could show that "all or substantially all women" could not safely perform the duties of the job.⁹⁷

91. See Elizabeth Koontz, *Childbirth and Childrearing Leave: Job-Related Benefits*, 17 N.Y.L. F. 480, 482-87 (1971) (noting that four states and Puerto Rico had statutes prohibiting women from working in certain industries and occupations for periods immediately before or after childbirth).

92. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142-43 (1976) (citing two opinion letters issued by the General Counsel of the EEOC in 1966 ruling that pregnancy could be excluded from an employer's long-term salary continuation plan and that "an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory").

93. See LISA VOGEL, *MOTHERS ON THE JOB* 65 (1993) (suggesting that the EEOC reversed course because it was "pressured by women's groups and perhaps influenced by the tumultuous social movements of the period"); see also GERALDINE LESHIN, *EEO LAW: IMPACT ON FRINGE BENEFITS* 20 (1979) (relying on S. REP. NO. 95-311 (1977) to suggest that the EEOC was finally interpreting the true intent of Congress in enacting Title VII).

94. E.E.O.C. Dec. No. 70-360 (1969) (holding that employer's policy of only offering maternity leave on a discretionary basis violated Title VII and finding that to promote equality of opportunity, employers must offer pregnancy leave to female employees regardless of whether the employer offers sick leave).

95. E.E.O.C. Dec. No. 70-495 (1970) (maternity insurance coverage offered to the wives of male employees also needed to be offered to female employees); E.E.O.C. Dec. No. 71-1474 (1971) (insurance coverage which covered all disabilities except for pregnancy violates Title VII).

96. E.E.O.C. Dec. No. 71-413 (1970) (holding that employer must reinstate employees' seniority upon return from maternity leave in same manner that it reinstates employees' seniority upon return from disability leave).

97. See *Schattman v. Tex. Employment Comm'n*, 330 F. Supp. 328, 329 (W.D. Tex. 1971) (holding that employer was in violation of Title VII for terminating plaintiff, employed as a labor analyst, two months prior to the employee's due date for giving birth to her child), *rev'd*, 459 F.2d 32 (5th Cir. 1972) (holding that Texas Employment Commission is not an "employer" for purposes of Title VII and, further, that the regulation did not violate the Equal Protection Clause). Subsequently, Congress passed the Equal Employment Opportunity Act of 1972, which amended Title VII to apply to state agencies and educational institutions. Further, the Supreme Court held that mandatory pregnancy leave before and

The EEOC issued regulations the same year based on these rulings. It clarified that discrimination on the basis of pregnancy could violate Title VII in three ways: (1) if an employer denied women access to work because of pregnancy; (2) if an employer fired or refused to hire a woman because of pregnancy; or (3) if an employer prohibited women from taking leave or provided inadequate leave that resulted in her being fired.⁹⁸ In the early 1970s, the states that had prohibited women from working for certain periods before and after pregnancy repealed or modified their laws.⁹⁹

For low-income workers, the most important theory developed at this time was that an employer who offered no pregnancy leave or inadequate leave violated Title VII due to the disparate impact such a policy had on women. This theory was first articulated in EEOC decisions¹⁰⁰ and later formalized in the regulations. The disparate impact doctrine¹⁰¹ allowed women to take pregnancy leave even when their employers offered no leave at all. Although this policy benefited all women workers, today it largely benefits low-wage women workers because they are most likely to be working for an employer offering no leave.¹⁰²

The disparate impact theory was tested as a matter of constitutional and statutory interpretation in the Supreme Court in the 1970s. Just two years after the EEOC published its final guidelines on pregnancy, the Supreme Court held in *Geduldig v. Aiello* that excluding pregnancy from a temporary

after child birth violated the Due Process Clause finding that arbitrary cut-offs had no relationship to valid state interests. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

98. 29 C.F.R. § 1604.10 (1972).

99. For states that repealed their statutes restricting women's employment before and after child birth, see CONN. GEN. STAT. ANN. § 31-26 (repealed 1972); MO. ANN. STAT. § 290.060 (repealed 1973) (prohibiting employers from employing women three weeks before or after childbirth); MASS. GEN. LAW ANN. ch. 149 § 55 (repealed 1974); and VT. STAT. ANN. tit. 21 § 444 (repealed 1970). For states that amended their statutes to allow women to come back to work if they choose to do so, see N.Y. LABOR LAW § 206-b, (2006) (prohibiting employers from requiring women to work for four weeks after child birth was amended to allow women to return to work with a written statement of their desire to work and a written doctor's statement of their physical and mental ability to work); P.R. LAWS ANN. tit. 29 § 467 (2004) (requiring employers to provide women with leave four weeks before and four weeks after child birth was amended in 1975 to make it permissible for the working mother to opt for taking only one week of prenatal rest and extending up to seven weeks the postpartum rest).

100. E.E.O.C. Dec. No. 71-308 (1970) (finding that "[r]espondent maintained a policy of refusing to grant leaves of absence for maternity Such a policy has a foreseeable adverse effect upon the terms and conditions of females' employment, without an equivalent effect upon males. ").

101. The disparate impact doctrine was first recognized in the context of race discrimination in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that disparate impact discrimination is found to exist where a facially neutral employment policy has a disparate impact on a Title VII protected group and the employer-defendant can demonstrate no "business necessity" for such a policy). The Supreme Court first recognized the issue of disparate impact theory for sex-based discrimination because of pregnancy in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (holding that an employer's leave policy (which allowed male and female employees to retain seniority if leave was for any disease or disability apart from pregnancy, but denied seniority if the employee took a leave for any other reason, including pregnancy), while neutral on its face in its treatment of male and female employees, nevertheless violated Title VII because its effect was discriminatory against women).

102. See *supra* Part II.

disability insurance plan did not violate the equal protection clause of the Fourteenth Amendment.¹⁰³ The Court ruled that the denial of sickness and accident benefits to pregnant women did not violate Title VII, holding that such a denial was based not on sex but on a facially-neutral distinction between pregnant and non-pregnant persons.¹⁰⁴ In 1976, the Supreme Court, relying on *Geduldig*, overturned the EEOC regulations interpreting Title VII in *General Electric Co. v. Gilbert*.¹⁰⁵ Congress passed the Pregnancy Discrimination Act of 1978 to explicitly overrule *Gilbert* and to codify the EEOC regulations making discrimination based on pregnancy a violation of Title VII.¹⁰⁶ The Pregnancy Discrimination Act could not, however, overturn *Geduldig*'s constitutional holding.¹⁰⁷

2. *Childrearing: Title VII and State Protective Labor Laws*

Apart from Title VII's impact on pregnancy in the workplace, it was unclear whether Title VII would override the state laws restricting women's hours, which provided some women with protection against unwanted overtime work that conflicted with their caretaking responsibilities at home. Upon passage of Title VII, over forty states had laws limiting the number of hours that women could work per day or per week.¹⁰⁸

The EEOC faced the task of determining whether Title VII should be interpreted to override state women-only protective labor laws.¹⁰⁹ In its first

103. 417 U.S. 484 (1974).

104. *Id.* at 496-97, n.20.

105. 429 U.S. 125 (1976).

106. See S. REP. NO. 95-331 (1977) (amending Title VII of the Civil Rights Act of 1964); H.R. REP. NO. 95-948 (1978) (prohibiting sex discrimination based on pregnancy). See also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679 n.17 (1983) (providing full legislative history of the Pregnancy Discrimination Act and Congress' clear intent to overrule *Gilbert*).

107. Public employees, who are not covered by the Pregnancy Discrimination Act or the Family and Medical Leave Act, thus are left without protection. At least one scholar has argued that *Geduldig* should be re-challenged in order to ensure that women have equal access to state disability programs for pregnancy leave. See Shannon 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, 94 (1997). For the most part, however, employees of federal, state, and local governments are covered by Title VII and the FMLA. See 42 U.S.C. § 2000e (2000); 29 U.S.C. § 2611 (2000). Further, it is important to note that employment in the public sector is less common for low-income mothers than for other working mothers. One study reports that only 14% of low-wage working mothers are employed in the public sector compared with 22% of working mothers who are above 200% of the poverty line. See LEE, *supra* note 20, at 2.

108. See *Vogel v. Trans World Airlines*, 346 F. Supp. 805, 813-14 (W.D. Mo. 1970) (citing EEOC Policy Statement of August 19, 1966).

109. The EEOC noted in the introduction to its first set of "Guidelines on Discrimination Because of Sex":

Probably the most difficult area considered in these guidelines is the relation of Title VII to state legislation designed originally to protect women workers. The Commission cannot assume that Congress intended to strike down such legislation. Yet our study demonstrates that some of this legislation is irrelevant to present day needs of women, and much of this legislation is capable, in particular applications, of denying effective equality of opportunity to women. Title VII, which makes suspect any sex distinction in employment, and state protec-

guidelines on sex discrimination under Title VII, the EEOC considered whether some protective laws could be upheld as part of the bona fide occupational qualification defense.¹¹⁰ The EEOC made clear that such a defense was available to uphold state laws so long as the state law had the effect of protecting rather than discriminating against women workers:

The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception. However, in cases where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination.¹¹¹

While the guidance had strong support from a coalition of women's organizations representing working women, it met powerful resistance from the National Organization for Women and other equality feminists who urged the EEOC to interpret all state women-only protective labor laws as violating Title VII. They argued that such laws locked women into sex stereotypes and had the effect of discriminating against women who did not fit the stereotype (for example, women who were not mothers or caregivers would be unnecessarily restricted from working long hours).¹¹² On August 19, 1969, the EEOC overturned its previous guidelines and issued final administrative guidelines concluding that state laws that "prohibit[ed] or limit[ed]" opportunities for women conflicted with Title VII. The EEOC concluded that such state protective labor laws would not constitute a bona

... tive legislation, which requires special treatment for women, represent competing value judgments which cannot easily be harmonized. Clarifications and improvements can however be achieved. We believed it desirable—even essential—that Congress and the state legislatures address themselves to this problem.

30 Fed. Reg. 14,926-27 (Dec. 2, 1965).

110. *Id.* at 14,927. The defense of bona fide occupational qualification is found at 42 U.S.C. § 2000-e2(e) (2000), which reads, "Notwithstanding any other provision of this title . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"

111. *Id.* (establishing 29 C.F.R. § 1604.1 (sex as a bona fide occupational qualification)). Section 1640.1(c) is the provision allowing state statutes to be considered a defense to Title VII.

112. *See* COBBLE, *supra* note 37, at 184 ("Writing to the EEOC chair in July 1966 on behalf of a coalition comprised of the IUE [International Union of Electrical Workers], the ACWA [Amalgamated Clothing Workers of America], the NCL [National Consumers League], the YWCA [Young Women's Christian Association], the AAUW [American Association of University Women], and others, NCNW's [National Coalition of Negro Women's] Dorothy Height urged retention of the state labor standards until the laws could be improved and extended to all workers"); *see also id.* at 190 ("On August 19, 1969, after numerous NOW-led demonstrations and lawsuits, and much media scrutiny, the EEOC finally issued an administrative guideline holding that state laws which 'prohibit or limit' opportunity for women conflict with Title VII.").

bona fide occupational qualification defense to a Title VII violation.¹¹³ The EEOC left it up to the courts to determine which of the state protective labor laws prohibited or limited opportunities for women.

The courts were quick to rule that maximum hour laws prohibited women from accessing jobs that required overtime and thus limited women's opportunities in violation of Title VII.¹¹⁴ Only one federal court recognized the possible disadvantage of eliminating maximum hour laws for workers who may not want to work overtime, a situation faced predominantly by working mothers:

It has also been pointed out that the abandonment of limitations on working hours for women would place women on an equal basis with men in the matter of overtime pay, but at the same time would also make them subject to the obligation to perform as much overtime work as required of men. This is a mixed blessing. It is not a matter of letting women earn overtime when they want to, but an obligation to work overtime whether they want to or not on pain of being discharged.¹¹⁵

No court chose to extend maximum hours limitations to men instead of invalidating the state laws.¹¹⁶ Only one court chose to extend a state protective law to men that required women to be paid a daily overtime rate rather than the weekly overtime rate required by the Fair Labor Standards Act

113. Guidelines on Discrimination Because of Sex, 34 Fed. Reg. 13,367 (Aug. 19, 1969) (repealing 29 C.F.R. § 1604.1(a)(3), (c) and replacing 29 C.F.R. § 1604.1(b)).

114. *Rosenfeld v. S. Pacific Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968), *aff'd*, 444 F.2d 219 (9th Cir. 1971). *Rosenfeld* was the first case to hold that a state maximum hour law for women-only violated Title VII and that reliance on a state statute alone was not enough to demonstrate a bona fide occupational qualification to exempt an employer from Title VII. The court invalidated a California statute which limited the maximum number of hours women could work both per day and per week. *See also* *Ridinger v. Gen. Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971) (holding Ohio statute invalid in violation of Title VII as it related to maximum hours and weight-lifting requirements); *Kober v. Westinghouse Elec. Corp.*, 325 F. Supp. 467 (D.C. Pa. 1971) (holding that Pennsylvania statute regulating the hours of women's work was in conflict with Title VII and, thus, invalid); *Graneau v. Raytheon Co.*, 323 F. Supp. 391 (D. Mass 1971) (holding that Massachusetts statute prohibiting women from working more than nine hours in any one day and not more than forty-eight hours in any one week violated Title VII and, thus, was invalid); *LeBlanc v. S. Bell Tel. & Tel. Co.*, 333 F. Supp. 602 (E.D. La. 1971) (holding invalid a Louisiana statute prohibiting women from working in a telegraph or telephone company for more than eight hours a day or forty-eight hours a week); *Vogel v. Trans World Airlines*, 346 F. Supp. 805 (W.D. Mo. 1970) (holding that employer violated Title VII in not allowing a woman airline mechanic to work over 54 hours per week and that its reliance on the Missouri state statute limiting women's hours was misplaced and, further, the court declared the Missouri statute invalid under Title VII).

115. *Mengelkoch v. Indus. Welfare Comm'n*, 284 F. Supp. 950, 954 (C.D. Cal. 1968), *vacated*, 393 U.S. 83 (1968).

116. *Homemakers, Inc. of Los Angeles v. Div. of Indus. Welfare*, 356 F. Supp. 1111 (N.D. Cal. 1973) (holding that a California statute regulating maximum hours and overtime pay for female employees violated Title VII and refusing to extend the statute to cover men concluding that it would usurp the role of the state legislature particularly because the legislature had passed a bill that would have extended the protective labor laws to cover men, but that it was vetoed by the Governor); *Burns v. Rohr Corp.*, 346 F. Supp. 994 (S.D. Cal. 1972) (holding that state regulation requiring rest breaks for women violated Title VII and refused to extend such breaks to men concluding that to do so would usurp the power of the state legislature).

(FLSA).¹¹⁷ There is no evidence that the women's organizations that had fought for the protective labor laws lobbied state legislatures or filed amicus briefs in courts urging the extension of such laws to men.

By eliminating state women-only maximum hour laws, women gained access to jobs requiring overtime and could take advantage of the overtime pay protections afforded by the FLSA.¹¹⁸ But the Act included no prohibition on the number of hours that an employer could require an employee to work. Thus, by 1970, women workers were assured that they would not be discriminated against in the workplace in the areas of hiring, promotion, retention, or overtime pay but Title VII offered limited protection for women as childbearers and caregivers.¹¹⁹ At the time, one commentator explained,

Women are going to work, and they deserve to do so. Yet, we keep the old male work rules, 9 to 5, 40 hours a week, and if there's overtime, you do it or you don't keep your job. Neither men nor women can combine working with parenting under these rules. We need new ways of working.¹²⁰

Eliminating limits on maximum hours for women rather than extending such protections to men has had a continuing negative impact on the ability of employees to combine work with parenting.¹²¹ Neither federal nor state courts have offered legal protection against dismissal if the employer requires an employee to work overtime as long as other employees are treated similarly.¹²² The impact of eliminating a cap on mandatory hours has been

117. *Potlatch Forests, Inc. v. Hays*, 318 F. Supp. 1368 (E.D. Ark. 1970), *aff'd*, 465 F.2d 1081 (8th Cir. 1972).

118. The maximum hours provision of the Fair Labor Standards Act provides that "[n]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207 (2000).

119. Early in the life of Title VII, the Court did hold that Title VII protected against gender-based stereotypes that discriminated against women based on their role as caregivers of their children. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

120. Steven Roberts, *The Family Fascinates a Host of Students*, N.Y. TIMES, Apr. 23, 1978, at E20 (quoting from a *Psychology Today* interview with Professor Urie Bronfenbrenner of Cornell University).

121. *See* LONNIE GOLDEN & HELENE JORGENSEN, ECON. POL'Y INST., TIME AFTER TIME: MANDATORY OVERTIME IN THE U.S. ECONOMY (2000) (demonstrating that the workforce is putting in 25% more overtime than a decade ago and that the cumulative rise in overtime is higher for families).

122. *See, e.g., Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124 (4th Cir. 2002) (holding that African-American employee, a single parent with custody of his children, failed to establish prima facie case of race discrimination under Title VII based on his termination for failing to work mandatory overtime due to childcare conflicts because he could not demonstrate that Caucasian employees were treated differently); *Upton v. JWP Businessland*, 682 N.E.2d 1357 (Mass. 1997) (holding that employer did not violate public policy in dismissing an at-will employee, a single mother, who could not work extended hours and Saturdays); *cf. Intercraft Indus. Corp. v. Morrison* 289 S.E.2d 357 (N.C. 1982) (holding that an employee fired due to failure to work mandatory overtime on Saturdays due to lack of ability to find childcare could not be considered as being fired for misconduct and, thus, while firing was valid, employee was able to collect unemployment insurance).

felt most acutely by low-income workers¹²³ and particularly by single working parents who are the primary caregivers for their children.¹²⁴

The strong economy of the late 1990s had the effect of increasing mandatory overtime hours. In response, several state legislatures introduced gender-neutral bills limiting the maximum hours that employers could require each week,¹²⁵ but only one state enacted such a law for all employees.¹²⁶ In recent years, Congress has also introduced bills limiting mandatory overtime hours,¹²⁷ but only in the area of nursing, a field that has been particularly hard hit with shortages and requirements of mandatory overtime,¹²⁸ and in the area of international child labor.¹²⁹ None of these bills were considered by the full House or Senate.

123. See GOLDEN & JORGENSEN, *supra* note 121, at 5-6 (“Workers in blue-collar positions had a greater likelihood of facing mandatory overtime . . . while unionized workers had a lower likelihood.”) (citing Todd L. Idson & Philip K. Robbins, *Determinants of Voluntary Overtime Decisions*, 29 ECON. INQUIRY 1, 79 (1991)).

124. *Id.* at 4 (“Overtime, and in particular forced overtime without advanced notice, is a challenge to working families. Being told at the end of the workday to stay and finish a work assignment or work a second shift can leave working parents—especially single parents—scrambling to make arrangement for child care at the last minute.”); see also Sarah Schafer, *Many Workers Say Timeout to Overtime*, WASH. POST, Sept. 4, 2000, at A1 (“[B]ecause women still are the primary caregivers in many families, they are among the most vocal opponents of mandatory overtime . . .”).

125. GOLDEN & JORGENSEN, *supra* note 121, at 11-14. In the 1990s, thirteen state legislatures introduced legislation that would have required a limitation on mandatory overtime hours. Of these state bills, eight states focused their effort on curtailing mandatory overtime hours in nursing or the broader health care field. The five states that would have limited mandatory overtime to all hourly workers in the state included: California (legislation would have “prohibit[ed] mandatory overtime beyond eight hours a day or 40 hours in a work week,” *id.* at 11), Pennsylvania (bill “would give employees who have worked a 40-hour work week the right to refuse overtime work in excess of eight hours without fear of” discharge, *id.* at 13), Washington (legislation would have prohibited employers from “require[ing] an employee to work more than 8 hours in a workday or 40 hours in a work week, *id.* at 14); Wisconsin (would prohibit employers from forcing overtime on hourly wage workers and contains a provision for employees to decline overtime work, *id.* at 14); and Maine (“[t]he enacted law limits the total amount of mandatory overtime that employees can be required to work to no more than 80 hours of overtime in any consecutive two-week period,” *id.* at 12).

126. Maine enacted a law limiting the total number of mandatory overtime hours to no more than eighty hours of overtime in any consecutive two-week period for all employees and limited the number of hours nurses could be required to work to twelve hours per day. 26 ME. REV. STAT. ANN. tit. 26 § 603 (2005). It appears that this law was enacted to address concerns with safety on the job, rather than to address the issue of work-family balance. See Mary Williams Walsh, *As Hot Economy Pushes Up Overtime, Fatigue Becomes a Labor Issue*, N.Y. TIMES, Sept. 17, 2004, at A32 (describing the momentum for the passage of the Maine law as resulting from the death of a worker for Central Maine Power who had worked continuously over a two and one half day period with only five hours of sleep due to mandatory overtime requirements).

127. See Safe Nursing and Patient Care Act of 2003, S. 373, 108th Cong. (2003); Registered Nurse Safe Staffing Act of 2003, S. 991, 108th Cong. (2003); Department of Veterans Affairs Health Care Programs Enhancement Act of 2001, H.R. 3447, 107th Cong. (2001) (enacted) (requiring a report on mandatory overtime for nurses and nursing assistants in Department of Veterans Affairs facilities).

128. See GENERAL ACCOUNTING OFFICE, NURSING WORKFORCE: EMERGING NURSE SHORTAGES DUE TO MULTIPLE FACTORS (2001) (finding that ten states had introduced legislation to address mandatory overtime in the field of nursing and finding further that job dissatisfaction and overtime work are contributing to the departure of nurses from their profession).

D. Summary of Early Years

The early debate over women-only state labor laws revealed the tension in the women's movement over whether policies should be promoted to accommodate women in their roles as mothers and caregivers or whether a strict equality model should be followed. The accommodationists started from a stronger political base with most women's organizations supporting protective labor laws. But with the addition of "sex" to the protected categories under Title VII, the equality theory became federal policy for women of all classes and backgrounds. In the early implementation of Title VII, this theory proved inadequate to cover the needs of working women who were mothers and caregivers.

During this period, women were divided by more than competing theories of equality. For the first time, professional women were joining the workforce in unprecedented levels. Working-class women, who had been in the paid labor force for decades, were now joined by women entering the professional sector due to the increased opportunities for educated women resulting in part from the passage of Title VII. From 1963 to 1968, more than four million women entered the paid labor force, and the numbers of women in teaching, the health professions, and other professional technical work dramatically increased.¹³⁰ At the time, maternity and caregiving policies were slightly more generous for working-class women due to union contracts and state protective labor laws. But they were inadequate to protect professional women and often inadequate to provide full protection to the working-class women for whom these policies were originally developed.

The changes during this time—the growing number of professional women combined with the growing political power of women's organizations representing them—led to the rejection of early protective laws in favor of equality-based policies. This rejection of early protective labor laws has had an enduring impact on the ability of low-income women to gain access to pregnancy leave and workplace protections for childbearing and childrearing.

129. See Corporate Code of Conduct Act, H.R. 2782, 107th Cong. (2001); H.R. 4596, 106th Cong. (2000).

130. See REPORT OF THE INTERDEPARTMENTAL COMM. ON THE STATUS OF WOMEN, *supra* note 17, at 11. ("During the five-year period, the number of women employed in teaching, the health professions, or other professional or technical work increased by more than a million, and in clerical jobs by more than two million. At the same time, women's employment at private-household workers and farmworkers declined. Nonwhite women have shared in the better paying jobs. Over the five-year period the number of non-white women holding clerical positions more than doubled and the number of professional or technical work increased by nearly two-thirds.").

IV.

DEVELOPMENT OF TODAY'S PREGNANCY AND FAMILY LEAVE LAWS

The inadequacies of Title VII's protections against pregnancy discrimination led to the passage of the Pregnancy Discrimination Act of 1978 (PDA). Although Title VII is a strict equality statute and the Pregnancy Discrimination Act amended Title VII, some feminists believed that Title VII with the addition of the PDA could be interpreted to "accommodate the real physical sex-based differences during the limited period of time that women and men are affected differently."¹³¹ While this theory of accommodation initially prevailed in the Supreme Court's interpretation of the law,¹³² I argue that the courts have subsequently stripped Title VII down to a bare-bones equality statute, disproportionately impacting low-income workers.

This section will also shed light on the development of the Family and Medical Leave Act (FMLA), rightly hailed as an important step in creating a federal role in assisting and parents in their dual roles as workers and caregivers. The FMLA incorporates both equality and accommodation theories of feminism by being gender-neutral yet allowing accommodation for pregnancy and caregiving needs. At the same time, however, because of the many exemptions in the law, it fails to protect low-income workers.

A. The Pregnancy Discrimination Act of 1978

The Pregnancy Discrimination Act clarifies the definition of "because of sex" to include discrimination "on the basis of pregnancy, childbirth or related medical conditions" and further states that "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."¹³³

1. Legislative History

The PDA clarifies that Title VII guarantees women equal access to employee benefits provided to men. The PDA, however, does not serve as comprehensive legislation to ensure that women receive leave for pregnancy-related purposes.¹³⁴ Instead, it merely ensures that if an employer

131. Brief for Equal Rights Advocates et al. as Amici Curiae Supporting Respondents, 1986 WL 728374, Cal. Fed. Sav. & Loan Ass'n v. Guerra (*Cal Fed*), 479 U.S. 272 (1987).

132. *Cal Fed*, 479 U.S. 272.

133. 42 U.S.C. § 2000-e(k) (2006).

134. The Pregnancy Discrimination Act applies to all aspects of employment—hiring, reinstatement, termination, disability benefits, sick leave, medical benefits, seniority, and other conditions of employment covered by Title VII—and requires equal treatment between men and women, including

chooses to offer temporary disability leave for injury or illness, such leave must be made available to pregnant women. Congress made clear that the PDA “will reflect no new legislative mandate of the Congress, nor effect changes in practices, costs or benefits beyond those intended by Title VII of the Civil Rights Act.”¹³⁵ In fact, the House noted:

[T]he legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. [The bill] in no way requires the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.¹³⁶

Further, Congress made clear that with regard to medical benefits, employers were only expected to extend medically necessary benefits to women. The House Report gave this example: “[I]f an employer has a temporary disability program which pays up to 15 weeks . . . that does not mean a pregnant worker can receive benefits for all 15 weeks. She may only receive benefits for those weeks during which she is medically unable to work.”¹³⁷ The Senate echoed this sentiment, noting that “an employer will not have to allow pregnant women to use paid sick leave or receive disability benefits simply because they are pregnant; benefits need to be paid only on the same terms applicable to other employees—that is, generally, only when the employee is medically unable to work.”¹³⁸

With this legislative history, it was not clear whether the second clause of the PDA, requiring that pregnant workers “shall be treated the same for all employment-related purposes,” would overrule or negate the early disparate impact theory adopted by the EEOC. Under that theory, facially neutral policies providing no leave or inadequate leave, which had a disparate impact on women workers, violated Title VII.¹³⁹ EEOC guidelines continued to provide that “where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.”¹⁴⁰ In the early years, several federal courts interpreted the PDA

women who are affected by pregnancy, childbirth, and related medical conditions. See H.R. REP. NO. 95-948, at 4, 13 (1977). This Article focuses only on employee leave benefits.

135. *Id.* at 3-4.

136. *Id.* at 4.

137. *Id.* at 5.

138. See S. REP. NO. 95-331, at 4 (1977).

139. 29 C.F.R. § 1604.10 (1972).

140. See 44 Fed. Reg. 23,805 (Apr. 20, 1979) (publishing amendments to 29 C.F.R. § 1604.10 resulting from the passage of the Pregnancy Discrimination Act). The language regarding disparate impact remains identical today. See 29 C.F.R. § 1604.10(c).

broadly to incorporate the disparate impact theory, invalidating facially neutral policies that provided no leave or inadequate leave to pregnant employees.¹⁴¹

2. PDA: Equality or Accommodation Statute?

Legal scholars and advocates, however, were sharply divided over whether the PDA should be interpreted to require strict equality or accommodation based on women's biological differences. While many feminist scholars endorsed the disparate impact theory, there was much debate about how a policy of no leave or inadequate leave should be remedied.¹⁴²

The debate centered on whether the PDA conflicted with state statutes that required minimum pregnancy leave policies after birth, even when an employer had no disability policy or had a lesser disability policy. Generally, equality feminists believed that such state laws should only be upheld if disability leave was extended to all disabled workers, while accommodation feminists believed that the statutes alone helped women gain equal footing with men.¹⁴³

In *California Federal Savings & Loan Ass'n v. Guerra*, the Court held that a California statute requiring employers to provide up to four months of

141. *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (concluding that "a ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age an impact no male would ever encounter" and, thus, holding that the policy violated Title VII under disparate impact theory); *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 515 F. Supp. 1264 (D. Mont. 1981) (holding that an employer policy which allowed no sick leave or disability leave for employees who had been with the company for less than one year created a disparate impact on female employees and thus violated Title VII), *vacated and dismissed*, 655 F.2d 1088 (9th Cir. 1982) (holding that no federal question existed because it was a state claim under the Montana Maternity Leave Law), *remanded to Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 692 P.2d 1243, 1251-52 (Mont. 1984) (holding that the no-leave policy violated the Montana maternity statute and had a disparate impact on women in violation of Title VII and the Pregnancy Discrimination Act).

142. See *Williams*, *supra* note 10 (concluding that any law or policy found to have a disparate impact on women should lead to leave policies available for all affected workers); *Krieger & Cooney*, *supra* note 11 (arguing that the availability of disparate impact theory is clear from legislative history and previous case law and that disparate impact theory provides support for state laws that allow for accommodation of pregnant workers to ensure that women have equal access to employment); *Herma Hill Kay*, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985) (arguing that pregnancy is temporary and episodic and that not all women experience it and thus workplace policies should be crafted based on sex difference only to account for the specific time period in which women are experiencing the biological and medical results of pregnancy); *Reva Siegel*, *Employment Equality under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985) (arguing that the disparate impact claim should be fully embraced under the Pregnancy Discrimination Act); *Andrew Weissman*, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690 (1983) (arguing that the PDA should recognize both difference and equality in women and men and suggesting that the PDA affords room to recognize disparate impact theory in order to stimulate employers and the government to mitigate the effects of pregnancy on women's employment).

143. The two primary cases litigated during this time were *Cal Fed* and *Miller-Wohl*. See *Cal. Fed. Sav. & Loan Ass'n v. Guerra (Cal Fed)*, 479 U.S. 272 (1987) (discussed *infra* Part IV.A.3); *Miller-Wohl*, 515 F. Supp. at 1264 (case history outlined *supra* note 141).

unpaid pregnancy disability leave did not violate Title VII.¹⁴⁴ The Court concluded that Congress had intended the PDA to be a floor of minimum protection rather than a ceiling.¹⁴⁵ Further, the Court said the legislative history of the PDA made clear that such preferential treatment, while not required, was also not prohibited.¹⁴⁶ The Court thus allowed the state accommodation statute to stand as a benefit available solely to pregnant workers, rejecting both the employer's argument that the statute should be overturned as a violation of Title VII and the equality feminists' argument that Title VII should be interpreted to extend leave to all workers unable to work due to a temporary physical disability.¹⁴⁷

Though a victory for accommodationists, *Cal Fed* had a limited impact on low-income women workers, who disproportionately lacked access to disability leave, because it left unanswered whether disparate impact theory requires employers, absent state action, to offer reasonable leave accommodation for pregnant workers under the PDA. While *Cal Fed* clearly held that states were *allowed* to enact laws that required employers to provide minimal accommodation for pregnant workers, even if more generous than the leave employers must offer non-pregnant workers, the holding has had little impact on employers in states without such laws. Ultimately, it has proved inadequate to motivate employers to offer leave where no state laws exist.

3. Impact of *Cal Fed* on Pregnancy Leave Policies

In 1987, when *Cal Fed* was decided, three states—California, Montana, and Connecticut—had statutes that required employers to provide reasonable leave for pregnant employees even where the employer had no disability leave policy.¹⁴⁸ Four other states not affected by the *Cal Fed* decision, as well as California, offered protection to low-income workers in the form of access to partial wage replacement through the state disability insurance system.¹⁴⁹ Workers in the other forty-three states and the District of Columbia, however, either had no supplemental state statute or had laws similar to the Pregnancy Discrimination Act whereby workers whose employer offered no disability leave policy had no clear access to leave for the purposes of pregnancy.

144. 479 U.S. 272.

145. *Id.* at 285.

146. *Id.* at 287.

147. Brief of Nat'l Org. for Women et al. as Amici Curiae in Support of Neither Party, 1986 WL 728368, *Cal. Fed.*, 479 U.S. 272 (1987).

148. See Brief of Equal Rights Advocates et al. as Amici Curiae, 1986 WL 728374, *Cal. Fed. Sav. & Loan Ass'n v. Guerra (Cal Fed)*, 479 U.S. 272 (1987) (citing CAL. GOV'T CODE § 12945(b)(2) (West 1980), CONN. GEN. STAT. § 46a-60 (1985), and MONT. CODE ANN. § 49-2-310 (1985)).

149. See H.R. REP. NO. 95-948, at 11 (1978) (describing the partial wage replacement programs available in California, Hawaii, New Jersey, New York, and Rhode Island).

From 1987 to the present, only three additional states enacted statutes prohibiting termination of employment based on pregnancy where an employer offers no leave or inadequate leave.¹⁵⁰ Three more states have adopted similar rules by regulation.¹⁵¹ This dearth of state action can be explained partly by the passage of the Family and Medical Leave Act. States have either relied on the FMLA to cover the field of family leave or mirrored the FMLA in their own state law. However, as discussed below, the exclusion of large classes of workers under the FMLA has meant that low-wage workers in states without pregnancy leave provisions have limited protection if their employer offers no leave or inadequate leave.¹⁵²

Since *Cal Fed*, lower courts have grappled with whether the PDA requires businesses to make reasonable accommodations for pregnancy leave under a disparate impact theory. In recent scholarship, Christine Jolls and Joan Williams have argued that it does.¹⁵³ In addition to *Cal Fed*, Jolls cites general pregnancy discrimination cases that adopt the disparate impact theory as examples of how Title VII can be read to impose accommodation requirements on employers rather than strictly neutral antidiscrimination edicts.¹⁵⁴ In addition, Jolls relies on the EEOC guidelines recognizing the availability of disparate impact theory under the PDA to challenge no-leave or inadequate leave policies¹⁵⁵ as well as the few early cases that found such policies in violation of Title VII.¹⁵⁶

Writing in 2001, prior to the Court's consideration of *Hibbs*, Jolls sought to establish that if disparate impact theory exists under the PDA, as

150. See generally NAT'L P'SHIP FOR WOMEN & FAMILIES, STATE-BY-STATE GUIDE TO UNPAID, JOB-PROTECTED FAMILY AND MEDICAL LEAVE LAWS (2003); see also IOWA CODE ANN. § 216.6(2)(e) (2006) (prohibiting employers with four or more employees from refusing to grant a pregnant employee a leave of absence for pregnancy disability or eight weeks, whichever is less, where leave is insufficient or unavailable); LA. REV. STAT. § 23:341-42 (2006) (prohibiting employers with 25 or more employees to refuse to grant leave on account of pregnancy for "a reasonable time, not to exceed 4 months"); N.H. STAT. § 354-A:7(VI)(b) (2006) (prohibiting employers with six or more employees to refuse to allow female employees to take leave for the period of her disability).

151. See HAW. ADMIN. RULES § 12-46-108 (1993) (disability due to pregnancy or related condition shall be justification for leave for a "reasonable period of time"); OHIO ADMIN. CODE § 4112-5-05(G)(2) (2006) (prohibiting the termination of an employee who is temporarily disabled due to pregnancy where there is insufficient or no maternity leave available); WASH. ADMIN. CODE § 162-30-020(4)(b) (2006) (stating that an employer policy which offers no leave or inadequate leave has a disparate impact on women and is thus an unfair business practice unless justified by business necessity).

152. See *infra* Part IV.C.

153. See Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief from Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003). While Title VII disparate impact theory has been upheld, disparate impact is not a viable theory under the Equal Protection Clause. See *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976).

154. Jolls, *supra* note 153, at 663.

155. *Id.* (citing 29 C.F.R. § 1604.10(c) (2000)).

156. *Id.* at 661 (citing *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811, 818-20 (D.C. Cir. 1981); *EEOC v. Warsharsky*, 768 F. Supp. 647, 651-55 (N.D. Ill. 1991); and *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 692 P.2d 1243, 1251-52 (Mont. 1984)).

Cal Fed appeared to suggest, then the Court must acknowledge that the PDA is an accommodation statute and thus accept Congress' Section 5 power under the Fourteenth Amendment to enact accommodation statutes such as the Family and Medical Leave Act.¹⁵⁷ As it turned out, the Court in *Hibbs* held that Section 5 authorizes a gender-neutral accommodation statute to remedy past gender discrimination but did not read the PDA broadly as an accommodation statute in reaching this conclusion.¹⁵⁸ Instead, the Court noted that Title VII and the PDA had failed to adequately address gender discrimination with respect to pregnancy and family leave needs of women.¹⁵⁹ The Court further noted that a Title VII-type statute, requiring strict equality in leave policies, would not adequately remedy gender discrimination in family leave because "[s]uch a law would allow States to provide for no family leave at all."¹⁶⁰

While Jolls is correct that courts have recognized disparate impact theory in pregnancy discrimination suits generally,¹⁶¹ the most recent appellate decisions on facially neutral no-leave or inadequate leave policies have held, consistent with *Hibbs*, that such policies do not violate Title VII. In *Troupe v. May Department Stores*, the Seventh Circuit reached this conclusion on the basis of the PDA's second clause requiring that "women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."¹⁶² Judge Posner noted that the PDA "overturned *Gilbert*, but, as the text we have quoted makes clear, goes further."¹⁶³ Citing *Cal Fed*, the court in *Troupe* explained that the PDA requires pregnant workers to be treated the same as other similarly situated workers, but does not require that employers provide preferential treatment to pregnant

157. *Id.* at 672-73.

158. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003).

159. *Id.*

160. *Id.* at 738.

161. *See Garcia v. Woman's Hosp.*, 143 F.3d 227 (5th Cir. 1998) (recognizing the availability of disparate impact theory under PDA, but holding that employee failed to demonstrate that employer's 150-pound lifting requirement had a disparate impact on pregnant women); *Scherr v. Woodland Sch. Cmty. Consol. Dist. No. 50*, 867 F.2d 974 (7th Cir. 1988) (concluding Congress intended the disparate impact theory to be available in PDA suits and holding that a policy that did not allow employees to combine paid sick leave and unpaid leave should be evaluated under disparate impact theory); *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987) (recognizing disparate impact of employer's "negative role model" policy prohibiting continued employment of unmarried staff members who either became pregnant or caused pregnancy, but holding that the policy was justified by business necessity); *Hayes v. Shelby Mem'l Hosp.*, 726 F.2d 1543 (11th Cir. 1984) (holding that an employment policy requiring a pregnant employee to be dismissed from the radiology department out of concern for fetal safety had a disparate impact on women and, in the absence of a business necessity justification or an alternative placement, violated Title VII).

162. 20 F.3d 734, 735 (7th Cir. 1994) (Posner, J.) (citing 42 U.S.C. § 2000(e)).

163. *Id.* (citing *Int'l Union, United Auto Workers v. Johnson Controls, Inc.* 499 U.S. 187, 198-99 (1991)).

employees.¹⁶⁴ While *Troupe*'s discussion of disparate impact theory is dicta,¹⁶⁵ this interpretation breathed new life into a strict equality reading of the second clause of the PDA, a reading that *Cal Fed* had rejected.¹⁶⁶

In *Dormeyer v. Comercia Bank-Illinois*, the Seventh Circuit relied on *Troupe*'s argument—that under the PDA employers are not required to treat pregnant workers “better” than other workers—to conclude that any such treatment would lead to “an argument for subsidizing a class of workers, and the concept of disparate impact does not stretch that far.”¹⁶⁷ Similarly, the Fifth Circuit relied on *Troupe*'s plain language analysis of the PDA to conclude that an employer may deny a benefit to pregnant workers so long as it treats non-pregnant workers the same.¹⁶⁸ The Fifth Circuit in *Stout v. Baxter Healthcare Corp.* later relied on these precedents and the plain language of the PDA to reject a disparate impact claim that all or substantially all pregnant women would be negatively impacted by a probationary period that allowed for only three days of leave within the first ninety days of employment.¹⁶⁹

It is not surprising that these cases—*Troupe*, *Dormeyer*, and *Stout*—have gone this way. Despite *Cal Fed*'s interpretation of the PDA, it is difficult to overcome the statute's plain language requiring that employees disabled by pregnancy should be treated “the same” as other employees similarly situated in their inability to work. Moreover, as explained above, nothing in the legislative history suggests that Congress intended to require businesses to offer pregnant women leave not available to other workers.¹⁷⁰ This modern interpretation squares with early predictions that the plain language of the PDA does not allow for a disparate impact theory,¹⁷¹ the early court decisions rejecting disparate impact theory as applied to leave poli-

164. *Id.* at 738 (citing *Cal. Fed. Sav. & Loan Ass'n v. Guerra (Cal Fed)*, 479 U.S. 272, 286-87 (1987)).

165. *Id.* at 736 (noting that “the only kind of discrimination alleged in this case” is intentional discrimination).

166. *Cal Fed*, 479 U.S. at 284 (“Petitioners . . . contend that the second clause of the PDA forbids an employer to treat pregnant employees any differently than other disabled employees . . . however, we must examine the PDA's language against the background of its legislative history and historical context. As to the language of the PDA, “[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” (quoting *Steelworkers v. Weber*, 443 U.S. 193, 201 (1979) (internal quotation marks and citation omitted))).

167. 223 F.3d 579, 584 (7th Cir. 2000).

168. *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998) (holding that airline's policy of granting light-duty assignments only to workers who suffered occupational injuries did not violate PDA as long as pregnant women were not treated any differently from any other worker who was injured off duty) (citing *Troupe*, 20 F.3d at 738).

169. 282 F.3d 856, 861-62 (5th Cir. 2002).

170. *See supra* Part IV.A.1.

171. *See Krieger & Cooney, supra* note 11, at 529 (“To read the PDA literally would require a *de facto* abrogation of the adverse impact doctrine as it applies to sex discrimination cases involving pregnancy.”).

cies,¹⁷² and the evidence of widespread acceptance of policies that have gone unchallenged under the PDA.¹⁷³

In sum, the limited availability of the disparate impact theory means that women with little or no access to leave—that is, most low-wage working women—remain without protection under the PDA.¹⁷⁴

B. Use of Title VII to Protect Women's Role as Caregivers

While Congress amended Title VII to clarify that it protects women against discrimination resulting from pregnancy, no such clarification has ever been added to Title VII to protect workers on the basis of their role as parents or caregivers.¹⁷⁵ Instead, the circumstances in which caregivers are afforded protection under Title VII have been left to the courts.

Under an interpretation of the PDA, courts have distinguished between pregnancy-related medical disabilities and caregiving upon the birth of a child. Courts have held that Title VII-protected leave is available only for actual incapacitation due to pregnancy (generally six to eight weeks after a

172. Noting that only two courts (citing *Abraham* and *Miller-Wohl*) had accepted the disparate impact theory, Siegel observed that “courts have repeatedly dismissed challenges to leave policies inadequate for childbearing on the grounds that they afford employees comparable treatment.” Siegel, *supra* note 142, at 940. Siegel cites numerous district and circuit court cases rejecting disparate impact claims, including *Connors v. University of Tennessee Press*, 558 F. Supp. 38 (E. D. Tenn. 1982) (denying pregnancy discrimination claim in case where employer refused to grant additional leave to employee suffering from nausea associated with pregnancy finding that the employer would have treated her the same even if her disability had resulted from an illness other than pregnancy). See also Lucinda M. Finley, *Transcending Equality Theory: A Way Out of The Maternity and Workplace Debate*, 86 COLUM. L. REV. 1118, 1164 n.196 (1986) (“[I]n the context of sex discrimination courts are adopting narrower views of the definition of discrimination to the point of virtually abandoning the disparate impact theory as a viable tool for ferreting out the discriminatory impact of subjective criteria that may be male-biased in their underlying value structures.”) (citing *Spaulding v. Univ. of Wash.*, 740 F.2d 686 (9th Cir. 1984) (disparate impact not available for comparable worth claim) and *EEOC v. Sears Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986) (rejecting use of disparate impact theory to prove that subjective hiring practices were discriminatory)).

173. See Finley, *supra* note 172, at 1125-27. Finley acknowledges that disparate impact was recognized in *Abraham* and *Miller-Wohl*, but highlights the fact that many facially-neutral employment policies are tolerated despite the Pregnancy Discrimination Act, including abbreviated leave policies, seniority policies that restrict access to leave, lack of pay during leave time, employers that deny health benefits during leave, and policies that require women to take sick leave during pregnancy and mark their record with excessive use of sick leave.

174. Jolls notes that the FMLA now makes “the failure to provide an appropriate leave period . . . independently unlawful.” Jolls, *supra* note 153, at 661. But because the FMLA has crucial gaps in coverage, as discussed below, the invalidity of disparate impact theory under the PDA continues to disadvantage low-wage working women.

175. In 1999, President Clinton put forward a proposal to include “parental status” as a protected class under Title VII. Subsequently, Senators Dodd and Kennedy introduced the Ending Discrimination Against Parents Act, S. 1907, 106th Congress (1st Sess. 1999). However, no action was taken on the bill. In addition, President Clinton issued Executive Order No. 13,152, 65 Fed. Reg. 26,115 (May 2, 2002), adding parental status as a protected class under the federal government’s equal employment opportunity policy. For a full analysis of these proposals, see Peggie R. Smith, *Parental Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569 (1999).

normal childbirth), not for caregiving after birth.¹⁷⁶ The Supreme Court has ruled that under Title VII an employer may not limit a caregiver's employment opportunities if the same limitation is not placed on a person of the opposite sex.¹⁷⁷ And courts have held under Title VII disparate treatment theory that if an employer offers caregiving leave to one sex, it must also offer equivalent leave to the other sex.¹⁷⁸

For low-income workers, as in the case of pregnancy discrimination, when an employer offers no leave policy, the only possible theory of protection available under Title VII is disparate impact theory. The availability of disparate impact as a strategy to combat discrimination against caregivers has received limited recognition by courts,¹⁷⁹ and with the narrowing of the availability of disparate impact in pregnancy leave suits, it is difficult to imagine that disparate impact will be available as a tool to combat caregiving discrimination in the future.

Professor Joan Williams argues, however, that the disparate impact theory in caregiving suits has been underutilized.¹⁸⁰ Williams agrees with Jolls that disparate impact theory is available in pregnancy discrimination suits involving inadequate pregnancy leave policies.¹⁸¹ Williams further argues that disparate impact cases should be pursued more vigorously to pro-

176. See *Piantanida v. Wyman Ctr., Inc.*, 927 F. Supp. 1226, 1238 (E.D. Mo. 1996) (denying relief to mother seeking leave to take care of newly adopted child by reason that "new mother" is not a protected class under the PDA); *Barnes v. Hewlett-Packard Co.*, 846 F. Supp. 442, 443-45 (D. Md. 1994) (holding that employer's failure to provide parental leave to female employee does not violate Title VII as amended by the PDA); *Record v. Mill Neck Manor Lutheran Sch.*, 611 F. Supp. 905, 907 (E.D.N.Y. 1985) (holding that female employee is not protected under Title VII as amended by the PDA when wishing to take childrearing leave).

177. *Phillips v. Martin Marietta Corp.*, 400 U.S. 452 (1971) (finding a genuine issue of material fact as to whether requirement that female job applicants not have preschool age children was a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business or enterprise).

178. *Shafer v. Bd. of Pub. Educ.*, 903 F.2d 243 (3d Cir. 1990) (finding that denying a one-year unpaid leave of absence to Shafer, a male teacher, to care for his son violated Title VII where the controlling collective bargaining agreement provided a one-year leave for "female teachers and other female personnel" for "personal reasons relating to childbearing or childrearing").

179. *Roberts v. U.S. Postmaster Gen.*, 947 F. Supp. 282, 288-89 (E.D. Tex. 1996) (holding that disparate impact theory was available under Title VII in evaluating whether a policy denying employees sick leave to care for ill family members had a disparate impact on women in violation of Title VII). *But see Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1157 (7th Cir. 1997) (holding that disparate impact claim was not available to combat policy of laying off part-time workers when plaintiff used "decades-old" studies to try to demonstrate that the majority of part-time workers were women with child-care responsibilities); *Maganuco v. Leyden Cmty. High Sch. Dist.* 212, 939 F.2d 440 (7th Cir. 1991) (recognizing that disparate impact theory could be available in a no-leave or inadequate leave policy affecting pregnancy, but that no such theory is available related to the period of caregiving after the medically necessary recovery period immediately following child birth); *O'Hara v. Mt. Vernon Bd. of Educ.* 16 F. Supp. 2d 868, 887 (S.D. Ohio 1998) (rejecting disparate impact claim because of insufficient statistical analysis regarding the impact on women of a policy requiring employees to seek approval to return from parental leave, but no requirement to seek approval to return from disability leave).

180. Williams & Segal, *supra* note 153; see also JOAN WILLIAMS, UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT (2000).

181. Williams & Segal, *supra* note 153, at 85-87.

tect women facing discrimination based on caregiving. Williams, like Jolls, relies on *Abraham*¹⁸² and *Warshawsky*¹⁸³ as the basis for her argument that disparate impact is a live theory available in caregiving leave suits.¹⁸⁴ Williams also relies on one district court opinion finding disparate impact theory available in the caregiving context—*Roberts v. U.S. Postmaster General*¹⁸⁵—but *Roberts* likely has limited force given the Fifth Circuit’s later holding in *Stout v. Baxter*.¹⁸⁶ In *Stout*, the Fifth Circuit clarified that disparate impact theory is not available under Title VII pregnancy discrimination leave claims if women are treated the same as other workers, even if such leave policies have a disparate impact on women workers. According to the court, Title VII does not create an affirmative right to pregnancy leave. It is likely that such reasoning would be extended to caregiving leave if a *Roberts*-like case were to reach the Fifth Circuit today.

In considering the availability of disparate impact in caregiving discrimination suits, Williams also does not adequately address the negative case law from the Seventh and Fifth Circuits, holding that a plain language reading of the Pregnancy Discrimination Act excludes a disparate impact theory of discrimination.¹⁸⁷ Instead, Williams dismisses *Troupe* by suggesting that the case is an aberration involving weak facts: The plaintiff was late for work due to morning sickness but also had a problem with absenteeism prior to her pregnancy.¹⁸⁸ Further, Williams suggests that *Troupe* can be isolated insofar as “cutting-edge employment discrimination cases” should not be brought in the Seventh Circuit.¹⁸⁹ This dismissal, however, ignores the reasoning of *Troupe* and the impact the case has had in the Fifth Circuit.¹⁹⁰

In sum, there is little reason to believe that a theory already limited in the case of pregnancy can be extended to cover caregivers. Further, Professor Laura Kessler points to other weaknesses in the use of disparate impact theory, noting that such a theory can only be used when a neutral employment policy is identified.¹⁹¹ She contends that work practices such as the expectation of long work hours, rigid work schedules, limited personal leave, and strict limits on absenteeism, while not considered policies for the

182. 660 F.2d 811 (D.C. Cir. 1981).

183. 768 F. Supp. 647 (N.D. Ill. 1991).

184. Williams & Segal, *supra* note 153, at 134.

185. 947 F. Supp. 282, 288-89 (E.D. Tex. 1996).

186. 282 F.3d 856 (5th Cir. 2002).

187. *See supra* Part III.A.3.

188. Williams & Segal, *supra* note 153, at 106.

189. *Id.* at 78, n.10.

190. *Stout*, 282 F.3d at 860 (relying on *Dormeyer*).

191. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 412-18 (2001).

purposes of disparate impact theory, often have a disparate impact on disadvantaged women.¹⁹² Yet they remain unchallenged under Title VII.¹⁹³

C. *The Family and Medical Leave Act of 1993*

With recognition of the limits of Title VII and the Pregnancy Discrimination Act, Congress passed the Family and Medical Leave Act (FMLA) to guarantee unpaid leave for workers, regardless of gender, to care for family or medical needs. The FMLA provides qualified employees with the right to take up to twelve weeks each year of job-protected unpaid leave for the birth or care of the employee's child, care of an immediate family member with a serious health condition, or for an employee's own serious health condition.¹⁹⁴ This statute was the first of its kind—a gender-neutral law providing accommodation to all workers based on the real needs of workers as caregivers. The weakness of the law is not its framework, but rather that it does not fully close the gap left by the Pregnancy Discrimination Act and does not go far enough to cover low-wage workers.

To be sure, the FMLA affords important protections to all workers and has helped numerous low-income workers. In fact, Title VII and the FMLA have contributed significantly to changing the culture of work.¹⁹⁵ Millions of workers now have legal protections ensuring they no longer have to fear losing their job and employer-provided health insurance if they become pregnant or take leave to care for a newborn, newly adopted child, or an ill family member.¹⁹⁶ A low-wage pregnant woman who is covered by the FMLA but cannot afford to take twelve weeks of leave can at least be assured that if she needs to take leave from work to give birth, she will still have her job when she is able to return.¹⁹⁷ Furthermore, while only applicable to employers with fifty or more employees, the FMLA has influenced employer norms more broadly. Since the passage of the FMLA, an increasing number of employers not covered by the act have changed their practices to provide leave for family and maternity leave.¹⁹⁸ Finally, the FMLA provides guaranteed unpaid leave to men who wish to take paternity

192. *Id.*

193. *Id.* at 413-15.

194. 29 U.S.C. §§ 2601-2654 (2000).

195. See generally Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000) (recognizing this cultural shift, but also exploring what more needs to be done for American culture to fully accept women in the paid labor market).

196. For a full analysis of the benefits of family leave and the ability of women to take maternity leave, see BALANCING THE NEEDS, *supra* note 26.

197. *Id.* at tbls.A2-2.6, A2-2.15. In fact, a significantly greater percentage of women (17.7%) with a family income of less than \$20,000 reported that maternity leave was the primary reason they used the FMLA than did women in the higher income categories.

198. *Id.* at 5-5 ("The proportion of all establishments reporting policies consistent with the FMLA's leave provisions has increased from 27.9% in the 1995 survey to 39.1% in the 2000 survey").

leave,¹⁹⁹ a job benefit often not provided to men prior to the passage of the FMLA.²⁰⁰

Despite these positive changes, the benefits of the FMLA have disproportionately favored higher-educated and higher-income women. In contrast to the Pregnancy Discrimination Act, which initially left room for the courts to cover low-income workers through the disparate impact theory, the FMLA explicitly exempts certain workers from coverage.²⁰¹ These workers are disproportionately in the low-income bracket. The FMLA leaves no room for courts to interpret the law to extend coverage to exempted workers.²⁰²

1. Pre-Legislative History: Equality and Accommodation Approaches Merged

The impetus for the development of what ultimately became the Family and Medical Leave Act was the 1984 district court decision in *Cal Fed*.²⁰³ The author of the California statute, Howard Berman, then a California Assemblymember, believed that the district court decision in *Cal Fed* demanded a federal response.²⁰⁴ Shortly after the district court decision, Berman, now a Congressman, called for federal legislation modeled on the California statute to guarantee pregnant women the right to take temporary disability leave without losing their jobs.²⁰⁵ Such a bill would have extended pregnancy-related job protection to women who work for employers that provide no leave or inadequate leave for other disabilities.²⁰⁶

199. *Id.* at 4-16 (approximately 34% of men with young children took leave under the FMLA and of these male leave takers 75% took leave to care for a newborn or newly adopted child).

200. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (documenting the gender gap in the provision of family leave prior to the passage of the FMLA).

201. *See infra* Part IV.C.2.

202. Courts have construed the statute narrowly to ensure that only eligible employees under the statutory definition of employee are covered. Several circuit courts have held invalid a Department of Labor regulation, 29 C.F.R. § 825.110 (1995), which deemed eligible any employee who was not advised of his or her eligibility prior to the date of requested leave regardless of whether the employee was in fact eligible under the month and hour requirements. *See Woodford v. Cmty. Action of Greene County, Inc.*, 238 F.3d 51, 54-45 (2d Cir. 2001); *Brungart v. Bellsouth Telecomms., Inc.*, 231 F.3d 791, 795-97 (11th Cir. 2000); *Dormeyer v. Comercia Bank-Ill.*, 223 F.3d 579, 582-83 (7th Cir. 2000).

203. *Cal Fed Sav. & Loan Ass'n v. Guerra*, No. 83-4927R, 1984 WL 943 (C.D. Cal. Mar. 21, 1984).

204. Tamar Lewin, *Maternity Leave: Is it Leave, Indeed?*, N.Y. TIMES, July 22, 1984, at A1.

205. *Id.*; accord RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 18-19 (1995).

206. The California statute on which the federal bill would have been modeled does not require that employees work for an employer for a certain period of time before being covered. The statute covers all employers with five or more employees. *See CAL. GOV'T CODE* § 12945 (2005) (prohibiting employers from denying a female employee disabled by pregnancy, childbirth, or related medical conditions leave for a reasonable period of time not to exceed four months); *CAL. GOV'T CODE* § 12926 (2005) (defining employer as any person regularly employing five or more employees and defining employee as any individual who is not employed by a family member or under a special license in a non-profit sheltered workshop or rehabilitation center).

However, Representative Berman's mere mention of a federal statute accommodating pregnancy leave for women in the workplace reignited the dispute over whether a leave statute should be based on equality or accommodation.²⁰⁷ The proponents of the California model saw it as offering women an equal opportunity to participate in the labor market, especially women who worked in small businesses, such as restaurants and laundries, with no job protection or disability leave.²⁰⁸ Equality feminists, by contrast, continued to believe that special accommodation statutes made women of childbearing age more expensive to hire and thus less desirable, creating an environment in which women would experience discrimination regardless of their interest in having children.²⁰⁹ In addition, equality feminists argued that special accommodation statutes shifted the focus away from the inadequate leave policies employers offered for all workers.²¹⁰

With the major women's organizations in Washington aligned in favor of an equality model,²¹¹ and Representative Berman in agreement that such a model was the better policy in the long run,²¹² he decided not to offer his job-protected maternity leave bill, but rather to support a gender-neutral unpaid leave policy providing for broad family and medical leave. The policy endorsed by Berman included leave for childbearing, childrearing immediately after the birth or adoption of a child, and medical leave for one's own illness or to care for an ill family member.²¹³ This gender-neutral law was based on a model of strict equality, but it implicitly recognized the need for women to be accommodated in their caregiving responsibilities, given the disproportionate role of women as caregivers.

207. ELVING, *supra* note 205, at 18-19; *accord* Lewin, *supra* note 204.

208. At the time, Linda Krieger, then a lawyer at San Francisco's Employment Law Center, stated:

I don't see why it should be illegal sex discrimination to fire a woman because she gets pregnant, but acceptable to tell her she loses her job if she takes off a few weeks for childbirth. In the real world, it's the same thing. The point isn't that men and women must be treated alike, it's that they must have equal opportunities. When it comes to pregnancy, equal treatment means inequality for women. . . . I get calls all the time from women who work in restaurants, laundries and small companies with no formal policies, who lost their jobs when they took time off for pregnancy or childbirth. They are completely shocked when I tell them they have no affirmative legal right to take disability leave and keep their job. I don't tell them that many feminists think they shouldn't have any such right—they'd die.

Lewin, *supra* note 204.

209. *Id.* (citing Professor Wendy Williams for these arguments).

210. *Id.*

211. The Women's Legal Defense Fund, led by Judith Lichtman and Donna Lenhoff, spearheaded the push for an equality model. Joining them were the National Women's Law Center, the League of Women Voters, the National Organization for Women, the National Women's Political Caucus, and the American Civil Liberties Union. *See* ELVING, *supra* note 205, at 32.

212. *Id.* at 30 (describing Berman as believing that the broader bill, while ultimately ideal, was reaching too far for the mid-1980s and that it would be more politically palatable and quicker to pass a maternity leave bill covering only women).

213. The initial bill introduced to cover family and medial leave was the Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. (1985), sponsored by Representative Patricia Schroeder (D-Colo.). Congressman Berman co-sponsored H.R. 2020 but never introduced a separate bill to cover only maternity leave.

2. Legislative History: Bargaining Away Protection for Low-Wage Workers

The bill as first drafted did not remain intact. As a result, the FMLA left many low-wage workers without protection. The top priority for the women's organizations supporting the bill was to enact a gender-neutral statute that provided a right to leave for all caregivers. The organizations that had fought for protection of low-wage working mothers in the early part of the twentieth century were no longer in existence and no organization with equal prominence had stepped to the forefront to primarily advocate for low-wage workers.

Given the reality that more single women were raising children alone and women were more often the caregivers in two-parent homes, from the FMLA's earliest legislative history,²¹⁴ Congress recognized that low-wage women workers needed protection to balance family and work responsibilities. The first House Report noted:

Women represent the sole parent in 16 percent of all families. At the same time, a majority of women workers remain in female intensive, relatively low paid jobs and are less likely than men to have adequate job protections and fringe benefits. Each of these phenomena, which affect women of all races, are [sic] most pronounced for Black and other minority women. Single women heads of households, who work full-time in the labor force, often cannot keep their families above the poverty line.²¹⁵

Similarly, the first Senate Report described the economic and family situation of low-income working women:

Women are in the workforce out of economic necessity. Two out of every three women working outside the home today are either the sole providers for their children or have husbands who earn less than \$15,000 a year . . . For too many American families, family crises such as the urgent need to care for an ill child or elderly parent present an untenable choice; millions of workers are denied the temporary leave necessary to meet their family obligations without losing their jobs in the process.²¹⁶

Further, the House recognized that the limited protections afforded by the Pregnancy Discrimination Act and Title VII were inadequate for workers whose employers did not offer leave or disability benefit policies. The

214. The first bill on parental and medical leave, H.R. 2020, was introduced in the first session of the 99th Congress but never received a committee mark-up. The second iteration of the bill was introduced in the second session of the 99th Congress both in the House, as H.R. 4300, 99th Cong. (1985), by Representative William Clay (D-Mo.), and in the Senate, as S. 2278, 99th Cong. (1985), by Senator Christopher Dodd (D-Conn.). The full committees of jurisdiction in the House reported out the House version of the bill with an accompanying report. See H.R. REP. NO. 99-699 (1986). The Senate did not fully consider the bill and no Senate report exists.

215. H.R. REP. NO. 99-699, pt. 2, at 15.

216. S. REP. NO. 101-77, at 23 (1989).

first House Report noted that the parental and medical leave bill was designed to fill the gaps left by the Pregnancy Discrimination Act.²¹⁷

Despite this early recognition, the bill's journey through Congress involved no recognition that exempting certain classes of workers would disproportionately impact low-wage women workers, leaving them with the same lack of protection discussed in the initial congressional reports.²¹⁸ The business community advocated for various exemptions, including an exemption for small businesses, a probationary period before employees were eligible to take leave, and an exemption for part-time workers.²¹⁹

Small Business Exemption. When first introduced, the parental and medical leave bill included no exemption for small businesses.²²⁰ All employees would have been covered regardless of the size of the business for which they worked. However, an exemption for small businesses was added to every subsequent bill and grew larger with each iteration.²²¹ The FMLA in its final form covers only workers employed by companies with fifty or more employees.²²² While recognizing valid concerns that many small businesses would be unable to absorb the costs of mandatory leave,²²³

217. H.R. REP. NO. 99-699, pt. 1, at 3 (“If the employer provides no such benefits [sick leave or disability and health insurance coverage] to anyone in its workforce, it is in full compliance with the antidiscrimination laws because it treats employees equally. Similarly, the employer is free to fire employees who take leave to care for seriously ill or dying children or to bond with newly born or adopted children provided it does so evenhandedly without regard to sex. Thus, while Title VII, as amended by the PDA, has required that benefits and protections be provided to millions of previously unprotected women wage earners in this country, it leaves gaps which an antidiscrimination law, by its nature, cannot fill. This bill, H.R. 4300, is designed to fill those gaps.”).

218. Ironically, while working to carve out more and more classes of individuals from coverage under the FMLA, Republican lawmakers were also arguing that this bill was a “yuppie” bill that would not provide protection to workers most in need. See ELVING, *supra* note 205, at 108-09 (describing the July 14, 1988, mark-up of S. 249 in which Republicans on the Senate Labor Committee raised distinctions between the parental and medical leave bill and historic labor laws, such as the Fair Labor Standards Act, which were designed to help entire classes of workers).

219. H.R. REP. NO. 99-699, pt. 2, at 49-52 (dissenting views) (“One of the foremost problems with H.R. 4300 is that the small employer exemption is grossly inadequate. . . . A second major problem . . . is that the required leave periods are too long. . . . [A] step in the right direction is the addition of a length of service requirement. We strongly feel, however, that the bill’s three-month service requirement before an employee is entitled to leave should be increased to one year . . .”).

220. See H.R. 2020, 99th Cong. (1985).

221. See H.R. 4300, 99th Cong. (1985) (excluding employers with fewer than fifteen employees); S. 249, 100th Cong. (1987) (same); H.R. 925, 100th Cong. (1987) (same); S. 345, 101st Cong. (1989) (fewer than twenty employees); H.R. 770, 101st Cong. (1989) (fewer than fifty employees in the first two years after enactment and fewer than thirty-five employees thereafter); S. 2973, 101st Cong. (1990) (fewer than fifty employees); S. 5, 102d Cong. (1991) (same); H.R. 2, 102d Cong. (1991) (same); S. 5, 103d Cong. (1993) (same); H.R. 1, 103d Cong. (1993), which became the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (same).

222. 29 U.S.C. § 2611(4) (2000).

223. See S. REP. NO. 101-77, pt. 10, at 61 (1989) (minority views) (“For small business the total costs of mandated leave would be incalculable. . . . [M]any of these small businesses struggle to survive and remain competitive. Without some incentive or relief, they would be forced to bear the brunt of the costs of mandated leave . . .”).

Congress did not analyze how such an exemption would impact low-income workers.

Although Congress was aware that larger swaths of workers would not be covered as the small business exemption expanded,²²⁴ it did not examine the characteristics of the excluded workers. Had it made such an inquiry, Congress would have discovered that the exemption has a disproportionate impact on low-wage workers. More than half of all low-wage workers are employed by small businesses.²²⁵ In addition, small businesses are more likely to employ workers with a high school education or less,²²⁶ and small businesses are more likely to employ individuals receiving public assistance.²²⁷ Moreover, because only women can become pregnant and women disproportionately provide caregiving, low-wage women workers were most severely impacted by this exemption.

Probationary Period Exemption. The FMLA is also limited to employees who have worked for twelve months for the same employer.²²⁸ This excludes many new low-wage entrants to the labor market.²²⁹ Like the exemption for small businesses, the first family and medical leave bills included no exclusion based on time of service. Each subsequent version of the bill, however, increased the required period of employment before eligi-

224. In the 99th Congress, the House noted that the “exemption of small employers with less than 15 employees excludes more than one fifth of the private sector workforce.” H.R. REP. NO. 99-699, pt. 2, at 26. In expanding the exemption to fifty employees, the House recognized that it would be excluding 95% of all employers and 44% of all employees in the national workforce. *Id.* When ratcheted down to thirty-five employees, the bill would have still excluded 92% of all employers and 40% of all employees. *Id.*

225. See CAROLYN LOOF, DISTRIBUTION OF LOW-WAGE WORKERS BY FIRM SIZE IN THE UNITED STATES (1999), <http://www.sba.gov/advo/research/rs196tot.pdf> (finding that smaller firms had a greater percentage of low-wage workers than larger firms). The report evaluates Current Population Study data indicating that 54% of minimum wage workers were employed in firms with one hundred employees or less. In addition, the report cites a study by David Card and Alan Krueger finding that nearly 60% of all minimum wage workers were employed in firms with twenty-five employees or less. See DAVID CARD & ALAN KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF MINIMUM WAGE 314-18 (1995); see also PHILLIPS, *supra* note 24, at 1 (observing that low-income workers are more likely to work in smaller firms than higher-income workers).

226. See OFFICE OF ADVOCACY, SMALL BUS. ADMIN., CHARACTERISTICS OF SMALL BUSINESS EMPLOYEES AND OWNERS 3 (1997) (noting that in small firms 54.5% of the workforce had a high school education or less compared with 44.6 % of the large-firm workforce and that 20% of the workforce in small firms had less than high school education compared to only 12% in large firms).

227. *Id.* (finding that the smallest firms—those with under ten employees and those with ten to twenty-four employees—had higher rates of employing individuals on financial assistance and public assistance than firms with more workers).

228. 29 U.S.C. § 2611(2)(A)(i) (2000).

229. See Harry J. Holzer & Robert J. LaLonde, *Job Change and Job Stability Among Less Skilled Young Workers*, in FINDING JOBS: WORK AND WELFARE REFORM 125 (David E. Card & Rebecca M. Blank eds., 2000) (finding that “employment and job instability appears to be higher among women, minorities, and those with less education than their counterparts”); see also SHARON HAYS, FLAT BROKE WITH CHILDREN 222 (2003).

bility.²³⁰ Again, these changes were made at the behest of the business community, which had concerns that employers should not have to pay for benefits when an employee had limited attachment to the employer.²³¹

This exemption likewise has a disparate impact on low-wage workers, particularly employed current and former welfare recipients. Since the 1996 welfare reforms, nearly one-third of employed low-income single parents have reported that they were in their primary job for less than a year.²³² Among employed welfare recipients, their median job tenure was nine months.²³³ Further, more than half of all employed welfare recipients spend less than one year on the job.²³⁴ Thus, the probationary period under the FMLA excludes most employed welfare recipients from coverage and excludes approximately one-third of all low-income single parents. In considering the probationary period, Congress never examined the possible effects of the legislation on the most vulnerable workers.

Lack of Coverage of Part-Time Workers. With the addition of a probationary period also came an exclusion of part-time workers through an hours requirement. The FMLA requires that an employee work 1,250 hours of service for the employer in the previous twelve months, which translates to approximately twenty-five hours per week.²³⁵ This excludes most part-time employees from coverage.

This exemption also disproportionately affects low-wage working women. First, one-fourth of employed women work part-time as compared to one-tenth of employed men.²³⁶ In fact, women comprise two-thirds of the part-time workforce.²³⁷ Second, women who are employed part-time are

230. H.R. 2020, 99th Cong. (1985) (no requirement of time of service); H.R. 4300, 99th Cong. (1985) (employee eligible only after three months of continuous service for the same employer or not less than five hundred hours, whichever occurs earlier); S. 345, 101st Cong. (1989) (requiring individuals to work for twelve months and perform nine hundred hours of service within that twelve months before becoming eligible for coverage); H.R. 770, 101st Cong. (1989) (requiring individuals to work for twelve months and perform one thousand hours of service); S. 5, 103rd Cong. (1993) (requiring individuals to work for twelve months and perform 1,250 hours of service); H.R. 1, 103rd Cong. (1993) (same) (enacted into Pub. L. No. 103-3, 107 Stat. 6 (1993)).

231. See H. REP. NO. 99-699, pt. 2, at 26 (“Representatives of the business community have said that there is a need . . . for a reasonable ‘probationary period’ before new employees become eligible for leave”); H.R. REP. NO. 101-28, pt. 1, at 24-25 (1989) (“Several other changes have been made An employee is eligible for leave only after having worked for at least 1,000 hours and having been on the job 12 months It is the Committee’s belief that the bill properly accommodates the legitimate concerns of the business community while providing America’s employees basic leave and job securing rights when facing a period of great concern to their family.”).

232. AVIS JONES-DEWEEVER ET AL., INST. FOR WOMEN’S POL’Y RESEARCH, BEFORE AND AFTER WELFARE REFORM: THE WORK AND WELL-BEING OF LOW-INCOME SINGLE PARENT FAMILIES 14 (2003).

233. *Id.*

234. *Id.*

235. 29 U.S.C. § 2611(2)(A)(ii) (2000).

236. See U.S. DEP’T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 48 tbl.16 (2004).

237. See Rebecca M. Blank, *Labor Market Dynamics and Part-Time Work*, in 17 RESEARCH IN LABOR ECONOMICS 57 (Solomon W. Polachek ed., 1998). Evaluating longitudinal labor market data,

more likely to be low-income. According to one study, low-income mothers are more likely to be engaged in part-time work than are higher-income mothers, 36% as compared to 25%.²³⁸ And women who are trying to leave welfare for work are more likely to be employed part-time than full-time.²³⁹ Further, women are more likely to be involuntarily working part-time than are men.²⁴⁰ These women remain excluded from FMLA coverage.

3. *Low-Income Workers: Covered Yet Economically Precluded*

While the restrictions on employer and employee coverage disproportionately fall on the low-wage workforce, those low-wage workers who are covered often cannot afford to take advantage of unpaid leave policies. In 2000, three out of four workers who reported that they needed leave but did not take it cited lost wages as one of the main reasons.²⁴¹

Before introducing the first piece of legislation on family and medical leave, the Women's Legal Defense Fund and its coalition considered whether and how to provide paid leave to aid low-income workers. In its initial draft outline of a leave bill, the women's groups included a provision requiring employers to offer a minimum number of ten paid sick days per year for an employee's own illness or to care for dependents.²⁴² However, this provision was never included in any bill introduced in Congress because the coalition and the legislators sponsoring the bills feared that any proposal that included paid leave would be a political non-starter.²⁴³ From the legislative history, the women's organizations predictions appear accurate. Opponents of the FMLA rejected even the development of a commis-

Blank finds that "[a]mong the 19 percent of the workforce that worked part-time in 1992, over two-thirds were women." *Id.* at 3.

238. LEE, *supra* note 20, at 2.

239. Blank, *supra* note 237, at 45-46. In discussing the policy implications of trying to move women from welfare into full-time work, Blank concludes that women with low-levels of education and young children who have been out of the labor market are much more likely to leave the labor market or to stay in part-time work.

240. Joel F. Handler, *Women, Families, Work, and Poverty: A Cloudy Future*, 6 UCLA WOMEN'S L.J. 375, 387-88 (1996).

241. See BALANCING THE NEEDS, *supra* note 26, at 2-16.

242. See ELVING, *supra* note 205, at 29. While the proposal for providing paid sick leave was never included during consideration of the FMLA or any of its predecessor bills, the National Partnership for Women and Families (previously the Women's Legal Defense Fund) is now leading an effort to pass a paid sick leave bill in Congress. In the 108th and 109th Congresses, Senator Kennedy and Congresswoman Rosa De Lauro have introduced companion bills, called the Healthy Families Act, which would require employers to offer seven days of paid sick leave to any employee who works thirty hours per week and a prorated number of sick days for employees who work less than thirty hours per week, but at least twenty hours per week. See H.R. 1902, 109th Cong. (2005); H.R. 4575, 108th Cong. (2004); S. 1085, 109th Cong. (2005); S. 2520, 108th Cong. (2004).

243. See ELVING, *supra* note 205, at 30.

sion to study paid leave²⁴⁴ and made clear in their dissenting reports that the FMLA was not intended to evolve into a program of national paid leave.²⁴⁵

4. *What Could Have Been*

In upholding the constitutionality of the Family and Medical Leave Act's application to states, the Supreme Court favorably discussed the importance of the FMLA's coverage exemptions in evaluating whether the FMLA withstood the test of heightened scrutiny:

Unlike the statutes at issue in *City of Boerne*, *Kimel*, and *Garrett*, which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship We also find significant the many other limitations that Congress placed on the scope of this measure The FMLA requires only unpaid leave, and applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of services within the last 12 months.²⁴⁶

Could Congress have crafted a bill that more fully protects low-wage workers while remaining “narrowly targeted at the faultline between work and family”?²⁴⁷ I believe it would have been possible for Congress to pass a bill providing all pregnant women with job-protected leave that would have passed muster under Section 5. After all, *Hibbs* recognized that Congress had failed to fully address the problem of family leave when it enacted Title VII and the Pregnancy Discrimination Act.²⁴⁸ Further, it recognized that if Congress had chosen as its remedy to simply mirror Title VII through another antidiscrimination law, such a law “would allow States to provide no family leave at all,” which “would exclude far more women than men from the workplace.”²⁴⁹ If Congress had provided pregnancy leave as a guarantee for all workers, regardless of employer size or probationary period, the Court similarly would have recognized that such a guarantee was necessary to protect women who work for employers with no-leave policies.

Politically, Congress could have still authored the FMLA as a gender-neutral equality statute. But as the negotiations whittled away the number

244. The first several bills proposing family and medical leave included an establishment of a commission to study and make recommendations within two years for the provision of paid leave, or partial wage replacement, for employees taking family and medical leave. See H.R. 2020, tit. II, 99th Cong. (1985); H.R. 4300, tit. III, 99th Cong. (1985); S. 345, tit. III, 101st Cong. (1989); H.R. 770, 101st Cong. (1989).

245. See H. REP. NO. 99-699, pt. 2, at 51 (1986) (dissenting views) (arguing that “it is premature to look toward implementing a system of paid leave before we have sufficient knowledge of the costs of unpaid leave”); see also H.R. REP. NO. 101-28, at 73 (1989).

246. *Hibbs*, 538 U.S. at 738-39.

247. *Id.* at 738.

248. *Id.* at 737.

249. *Id.* at 738.

of covered workers, the congressional authors and advocates could have taken the position that, while they would accept limitations on caregiving coverage, they would not compromise on pregnancy leave. This position would have been politically palatable because Congress recognized that one of the primary goals of the FMLA was to fill the gap left by the Pregnancy Discrimination Act so that all women would have access to leave when giving birth or recovering. Providing leave for caregiving was a newer concept, one that took a tremendous amount of education as the authors and advocates pushed for such leave. This compromise—agreeing to exclude certain workers from caregiving coverage, but guaranteeing pregnancy leave for all—would have incorporated the theories of both accommodation and equality. It would have promoted greater workplace benefits for many workers through caregiver protection on a gender-neutral basis, while recognizing that no woman should be fired because she gave birth and needed time to physically recover afterwards. Additionally, such a policy would have been narrowly tailored to address sex-based biological differences between pregnant women and other employees, while providing for gender-neutral caregiving policies.

Yet, even if job-protected pregnancy leave had been included as a guarantee under the FMLA for all workers, many low-wage workers would have remained exempt from the caregiving protections. Recent scholarship has focused on two reasons why the FMLA failed to adequately address the needs of low-income workers with regard to caregiving: the misperceptions about the costs and benefits of providing paid leave²⁵⁰ and the failure of society and our political and economic infrastructure to value caregiving when provided by poor or low-wage workers for their own children.²⁵¹ The failure of the FMLA to cover all workers must be understood within its political context; the bill had twice been vetoed before it passed,²⁵² implying that the advocates had pushed the issue of caregiving as far as politically possible.

Even beyond the restrictions on coverage, the FMLA fails to fully protect low-wage workers for an additional reason. As I explain in the next Part, federal leave policy was developed on the assumption that low-wage women could opt-out of the paid labor market by relying on welfare to care for their families. After welfare reform, this assumption is no longer valid.

250. See Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005).

251. See generally Kessler, *supra* note 191; Schultz, *supra* note 195.

252. See 138 Cong. Rec. S14,841 (daily ed. Sept. 22, 1992) (veto of FMLA by President George H.W. Bush); 136 CONG. REC. H5484 (daily ed. July 25, 1990) (same).

V.

IMPACT OF FAMILY LEAVE LAWS ON
WOMEN LEAVING WELFARE FOR WORK

Although the policy discussion leading up to the FMLA occurred without meaningful investigation of its impact on low-wage workers, the debate did include an explicit assumption that women who lose their jobs due to their responsibilities as mothers or caretakers can rely on welfare.²⁵³ But just months after passage of the FMLA, Congress began considering the end of welfare as an entitlement program for poor women to care for their children. The debate over the protections women needed to move from welfare to work centered on the need for childcare. It did not recognize the additional legal protections that women needed to keep their jobs even if they could obtain childcare.²⁵⁴ In the context of welfare reform, there were no analyses or policies put forward to address the limitations that antidiscrimination and family leave laws would place on welfare recipients. Furthermore, no such analyses occurred in the reauthorization of welfare reform in 2006.

In this Part, I analyze the relationship between family leave and welfare in legislative debates. I argue that without joint consideration of these policies, low-wage women are left both without welfare and without workplace accommodations for childbearing and childrearing.

A. The Relationship Between Welfare and Work

As societal attitudes changed about women and work, and as welfare was increasingly perceived as a program assisting African-American women, pressure began to build toward requiring women receiving welfare to work.²⁵⁵ From the late 1960s through the welfare reform of 1996, Aid to Families with Dependent Children (AFDC) was continually amended to increase the incentive for recipients of welfare to work for their benefits.²⁵⁶ In 1996, Congress made work an absolute requirement for state receipt of federal aid. Parents have to work in order to receive benefits after two years of receiving aid and have to permanently leave the welfare system after five

253. See *supra* Part IV.C.

254. See Lester, *supra* note 250 (arguing that paid family leave is important in addition to childcare because parents may want to provide their own care to their children).

255. See Roberts, *supra* note 5, at 1033 (“But as welfare became increasingly associated with Black mothers, it became increasingly burdened with behavior modification rules, work requirements, and reduced effective benefit levels.”).

256. In 1968, Aid to Families with Dependent Children was amended to include the Work Incentive Program (WIN), which required welfare agencies to refer to the Department of Labor “each appropriate child and relative who has attained age sixteen and is receiving AFDC.” Pub. L. No. 90-248, 81 Stat. 821, 884-90 (1968).

years of aid, regardless of the availability of jobs, childcare, or job protection for pregnancy and family leave.²⁵⁷

From the first state statute requiring work in exchange for welfare benefits through each federal amendment of AFDC until 1996, welfare laws have included a mandatory exemption for women caring for children of a certain age. In 1943, prior to federal action on work requirements, Louisiana became the first state to require work in return for welfare; it exempted mothers with children younger than school age.²⁵⁸ Georgia, the second state to implement such a law, exempted mothers of children under the age of three.²⁵⁹ Under the 1968 federal amendments to AFDC, Congress left the statute vague, requiring that “appropriate” individuals be referred for work.²⁶⁰ As time passed, work requirements were conditioned on the age of a mother’s child. The 1971 amendment required that AFDC recipients be referred to work unless a single mother had a child below the age of six.²⁶¹ Married mothers were not required to work. In 1981, the program was amended to exempt a parent from work requirements if the parent personally provided care for the child, age six or under, with “only very brief and infrequent absences from the child.”²⁶² In 1988, the program was amended again to exempt parents from work participation only if their children were under age three (unless the state opted to lower this age, but it could not be lower than one year of age) or under age six if the state could not guarantee childcare.²⁶³

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 created state block grants for Temporary Assistance for Needy Families (TANF). TANF provided the most radical shift away from protecting poor women in their role as caregivers. The federal statute included no exemption, accommodation, or protection for mothers or fathers caring for young children. Parents were not exempted from work requirements regardless of their children’s ages. Instead, TANF set an age ceiling: After a custodial parent’s child reached twelve months, the parent was required to work. Before that time, a state might exempt the mother, but was not required to do so.²⁶⁴ Since 1996, three states have chosen to provide no exemption for women with young children, requiring women to find work

257. See 42 U.S.C. § 607 (2000) (mandatory work requirements); *id.* § 608(a)(7) (five-year limit).

258. See Frances Fox Piven, *The Culture of Work Enforcement*, in *WOMEN AND THE UNITED STATES CONSTITUTION* 93, 96 (2003).

259. *Id.*

260. See Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1262 (1983).

261. *Id.* at 1264.

262. *Id.* at 1274 n.101.

263. See WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 376 (6th ed. 1999); see also Comm. on Finance, Report on the Family Self-Sufficiency Act of 1995, S. REP. NO. 104-96 (1995).

264. 42 U.S.C. § 607(b)(5) (1997).

immediately after birth or face sanctions that could reduce or eliminate their cash aid.²⁶⁵ Ten states provide exemptions for mothers with children less than three months old.²⁶⁶ Six more states allow mothers to be exempt from four to six months.²⁶⁷ Twenty-six states exempt mothers for an entire year, but all except one of these states counts this time on aid as part of a recipients' five-year lifetime limit.²⁶⁸ Only six states, through federal waivers or by providing aid with supplementary state funds, provide exemptions for mothers with children over twelve months of age.²⁶⁹

Many commentators have suggested that the push to require welfare recipients to work is a result of the increasing percentage of working-class women who have entered the labor market in the past several decades.²⁷⁰ This suggestion, while valid as political analysis,²⁷¹ ignores the reality that women are forced to go on and off welfare because of the instability of the low-wage labor market and lack of job protections.²⁷² In fact, labor market studies and welfare statistics demonstrate the fluidity of women entering and leaving welfare. These studies suggest that welfare recipients are not a separate class of individuals from low-wage workers.²⁷³

265. The three states providing no exemption are Idaho, Iowa, and Utah. See JANE KNITZER & STEPHEN PAGE, NAT'L CTR. FOR CHILDREN IN POVERTY, MAP AND TRACK: STATE INITIATIVES FOR YOUNG CHILDREN AND FAMILIES 65 (1998), http://www.nccp.org/pub_mat98.html.

266. *Id.* (Arkansas, Colorado, Florida, Michigan, Nebraska, New Jersey, Oklahoma, Oregon, South Dakota and Wisconsin).

267. *Id.* (California, Delaware, Hawaii, North Dakota, Tennessee and Wyoming).

268. Indiana does not count the time against time limits; the other twenty five states do. These states are Alabama, Alaska, Arizona, Connecticut, the District of Columbia, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Washington, and West Virginia. *Id.*

269. *Id.* (Massachusetts, New Hampshire, North Carolina, Texas, Vermont, and Virginia).

270. See WILLIAMS, *supra* note 180, at 53 (“[I]t is hard to defend poor women’s right to stay home in a society where a much higher percentage of poor women than of working class women are homemakers: about 33% of poor women are at home, but only about 20% of working-class ones. This situation is bound to generate working class anger.”); see also JOEL J. HANDLER & YEHESEKEL HASENFELD, WE THE POOR PEOPLE: WORK, POVERTY, & WELFARE 8 (1997) (“The resentment [of welfare as a way of life] may also be fueled by the large numbers of middle- and working-class mothers who are now in the paid labor force, working hard, and paying for their own child care and health care.”).

271. See WILLIAMS, *supra* note 180, at 197 (noting the success of conservatives in “stirring up working-class anger against poor single mothers” reflecting not only racism but also envy of the ability to stay at home with children); KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 4 (1997) (“[T]axpayers have generally viewed welfare recipients as wastrels who were willing to spend their adult years living off the hard work of others while raising children who were likely to do the same.”).

272. See Holzer & LaLonde, *supra* note 229.

273. See HANDLER & HASENFELD, *supra* note 270, at 46 (“Not only do people go on and off welfare, a significant fraction (about one-third) have more than one spell. It is estimated that during the first year of welfare, half the recipients exit AFDC within one year and three-quarters within two years [T]he most common route out of AFDC is through work. Many attempt to exit via work, but for a variety of reasons—lack of health care, a breakdown in child care, low wages, and jobs that do not last—return to welfare. . . . The picture that emerges . . . is that for most recipients, welfare is a safety net rather than a way of life.”); see also EDIN & LEIN, *supra* note 271, at 4 (“Even before welfare was time-

B. *The Role of Welfare in the Debate over the FMLA*

Despite increasing political pressure for work requirements, the Family and Medical Leave Act passed with an explicit assumption that women who lack guaranteed leave in the paid labor market would rely on welfare to care for their children. Proponents argued that Congress should pass the FMLA because it would reduce working women's reliance on welfare when faced with caregiving and medical needs.²⁷⁴ Proponents of the FMLA repeatedly voiced this assumption during the debates:

[A]s long as there is a welfare system in our country, *and there always will be*, and thank goodness we have a safety net, as long as that exists, then someone on a very low income who is working who has to leave that job and be fired because they want to take care of the first few weeks of their child's new life, that person may not get back to work for quite a while So . . . the employer may have the lack of a mandate, so-called, but society picks up an extra welfare bill. It is expensive to put people on welfare. That balance [is] very close for some people at the low income level. So we should do everything we can to make sure people for whom welfare is an alternative in fact have every incentive to stay on the job.²⁷⁵

[W]e have more single parents working today. These working parents and their families are often the most dependent on the consistent receipt of a paycheck and the fruits of an uninterrupted career. Humane leave policies enable single working parents on the margins of our economy to continue providing for their children and to advance in the workplace, ultimately benefiting the family's standard of living. In other words, they help people stay off welfare.²⁷⁶

From a fiscal standpoint, it is win-win. The taxpayers win, and business wins When a worker loses a job due to a family crisis, they experience a loss in earnings that is passed on to the taxpayer. Workers who cannot return to their jobs often must resort to receiving assistance from welfare or unemployment. In its 1989 cost estimate of the Family and Medical Leave Act, the General Accounting Office estimated that the cost to the public of

limited, a substantial majority of those who collected welfare got off the rolls within two years, and hardly any stayed on the rolls continuously for more than eight years. Just about all of those who received any welfare spent three times as many of their adult years off the rolls as on it, and only about one-fifth of the daughters of highly-dependent mothers became highly dependent themselves (two-thirds of these daughters never even used welfare).”)

274. See S. REP. NO. 103-3, at 18 (1993) (citing Institute for Women's Policy Research finding that “workers without leave increase the costs of public programs such as welfare, supplemental security income, and unemployment insurance” and estimating that the lack of parental leave cost taxpayers \$108 million annually and the lack of medical leave cost an additional \$4.3 billion annually); H.R. REP. NO. 103-8, pt. 1, at 31 (1993) (same).

275. 136 CONG. REC. H2199 (daily ed. May 10, 1990) (statement of Rep. Moody (D-Wis.)) (emphasis added).

276. 137 CONG. REC. H9750 (daily ed. Nov. 13, 1991) (statement of Rep. Berman (D-Cal.)).

not having family and medical leave amounts to about \$8 billion annually.²⁷⁷

The President talks about family values but fights a policy that values families. He supports welfare reform but rejects the bill that would enable low-income, single parents to raise their children and be productive working members of our society.²⁷⁸

Although Members of Congress recognized that providing family and medical leave would reduce the welfare rolls because it would offer job security for low-wage workers even though it was unpaid, they seemed not to recognize the converse: that exempting hundreds of thousands of low-wage workers from coverage would compel continued reliance on welfare when those workers needed leave and were unable to return to their jobs. At the same time, both sides of the debate acknowledged that increasing the availability of family and medical leave would provide greater protection for women leaving welfare for work. The opponents of the FMLA did not agree that family and medical leave should be mandated by the federal government and instead favored tax incentives to employers to encourage leave policies. But there was broad consensus that such leave would help women leave welfare for work.²⁷⁹

The possibility that traditional welfare would end was not considered during the FMLA debate. Policymakers and advocates assumed that women excluded from the FMLA—because they worked in small businesses, worked part-time, or worked for an employer for less than a year—would continue to rely on welfare when the labor market did not accommodate their pregnancy and caregiving needs.

277. 138 CONG. REC. S12,104 (daily ed. Aug. 11, 1992) (statement of Sen. Packwood (R-Or.)).

278. 138 CONG. REC. S12,094 (daily ed. Aug. 11, 1992) (statement of Sen. Dodd (D-Conn.)) (re-marking on President George H.W. Bush's veto of the FMLA).

279. See S. REP. NO. 103-3, at 49 (minority views) ("Family and medical leave will help to alleviate the concerns of working men and women with young children and aging parents. Such benefits will also ease the transition from welfare to work for low-income and disadvantaged families. In our view, every effort should be made—short of federal mandates—to encourage more and more employers to include family and medical leave among the benefits they provide their employees."); see also 136 CONG. REC. H2198 (daily ed. May 10, 1990) (statement of Rep. Miller) ("In a time when we want more families in America to be self-sufficient and to reduce welfare dependency, failing to provide for parental leave is counterproductive."); 137 CONG. REC. S14,125 (daily ed. Oct. 2, 1991) (statement of Sen. Coats) ("The other reality that we deal with is that, tragically, today many children are being raised in single-parent homes . . . those women have absolutely no choice, other than welfare or working to provide for their family. It is inconceivable to me that we should have policies that would bias that decision to welfare and not in support of providing for the family through the workplace.").

C. Welfare Reform of 1996 and the 2006 Reauthorization

Remarkably, the debate over welfare reform, which began just months after passage of the Family and Medical Leave Act,²⁸⁰ focused on the lack of available childcare for women leaving welfare for work,²⁸¹ but included no mention of the lack of legal protection for working women to ensure that they did not lose their jobs due to pregnancy or caregiving.²⁸² The most significant overhaul of federal welfare laws since the 1935 inception of Aid to Dependent Children²⁸³ passed with no acknowledgment that poor women rely on both welfare *and employer policies* for protection against pregnancy discrimination and to balance the demands of work and caregiving.

Arguably, welfare reform did more to change the relationship between work and caregiving for low-wage workers than any of the employment or labor laws developed during the twentieth century. While the rhetoric of welfare reform focused on individuals who were dependent on welfare payments as a substitute for work for long periods of time, the reality was that most women who received welfare before 1996 participated intermittently in the labor market.²⁸⁴ Welfare served as a form of paid leave between jobs. Moreover, many women were working while on welfare.²⁸⁵ Thus, welfare also served as a wage supplement to provide a living wage

280. The FMLA was signed into law on February 5, 1993. On November 15, 1993, the first welfare reform bill was introduced, and the final bill was signed into law on August 21, 1996. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

281. A major part of the debate over welfare reform was the consolidation of a number of different federal child care grants and a debate over whether adequate child care funding existed to support the large numbers of women who would be required to leave welfare for work. *See* H. REP. NO. 104-651 (1996).

282. None of the congressional reports leading up to the passage of welfare reform made any reference to legal protections for pregnancy or family leave through Title VII, the Pregnancy Discrimination Act, or the FMLA, nor did the reports include any broad discussion of the need for family leave policies. *See* H.R. REP. NO. 104-75 (1995); H.R. REP. NO. 104-81 (1995); S. REP. NO. 104-96 (1995); H.R. REP. NO. 104-651 (1996). Further, during the House and Senate floor debates, there was no mention of family leave laws or any discussion of the need that women entering the workforce would have for family leave protection. *See* 142 CONG. REC. H7745, H7784, H9403 (daily ed. July 17, 1996); 142 CONG. REC. S8070, S8379, S8395, S8493 (daily ed. July 18, 1996).

283. Aid to Dependent Children was first enacted in 1935. In 1961, Congress renamed the program Aid to Families with Dependent Children in recognition of amendments that provided funds to states to provide aid to families of children who were dependent because of the unemployment of the father's child. *See* Law, *supra* note 260, at 1259.

284. In fact, the House recognized that women were entering and exiting the labor market but attributed this pattern to a lack of personal discipline or responsibility rather than to a strategy employed by women who could not combine raising children with the structure and inflexibility of the paid labor market. *See* H.R. REP. NO. 104-81, at 7 ("Although roughly half the 5 million families on AFDC leave the rolls every year, most of them return . . . Welfare has become a narcotic.").

285. *See* HANDLER & HASENFELD, *supra* note 270, at 49 (citing GREG J. DUNCAN, INST. FOR SOC. RESEARCH, YEARS OF POVERTY, YEARS OF PLENTY: THE CHANGING ECONOMIC FORTUNES OF AMERICAN WORKERS AND FAMILIES (1984), and ROBERTA SPALTER-ROTH ET AL., INST. FOR WOMEN'S POL'Y RESEARCH, COMBINING WORK AND WELFARE: AN ALTERNATIVE ANTI-POVERTY STRATEGY (1992)).

for families. Welfare reform terminated the entitlement to welfare payments throughout the childrearing years. It ended the ability of low-wage working women to enter and exit the labor market for purposes of childbearing and childrearing by requiring individuals to work while on welfare and by permanently barring receipt of welfare benefits after five years.²⁸⁶

Throughout the period in which pregnancy and caregiving protections were developed, the availability of welfare had allowed policymakers to ignore the unique parenting needs of the most impoverished working women in crafting legal doctrine and legislative solutions. Yet when it became apparent that many of these women would soon leave welfare for work, there was little pressure, infrastructure, or political will to tackle the structural problems of providing workplace protections for low-income parents who faced the dual challenges of working and raising their children alone.

As a political matter, advocates for poor women and children found that they were fighting the most punitive welfare reform since the inception of Aid to Dependent Children in 1935. In Congress, there was little dialogue or room for discussion about the best way to encourage work for low-income parents while accommodating caregiving.²⁸⁷ The women's organizations fighting the reform were focused on preserving a safety net for women; guaranteeing adequate, affordable childcare; ensuring job training and transportation for women; providing adequate wages and health care; securing exemptions for battered women; and limiting the welfare-to-work requirements.²⁸⁸ There is some evidence that the women's organizations recognized the need to improve workplace protections for low-income women,²⁸⁹ but the fight to maintain a safety net and gain additional childcare funding took top priority. Furthermore, the law centered on welfare benefits and lacked any statement that existing antidiscrimination laws and

286. See 42 U.S.C. § 608(a)(7) (2000).

287. The dissenting views of House Committee on Economic and Educational Opportunities reflected the frustration with the lack of careful policy deliberation in reforming the welfare system:

Fifteen months ago, this committee first considered welfare within the legislative vise grip of the first hundred days of the new Republican Majority. . . . [T]he bill was considered by this committee with virtually no opportunity for careful deliberation or bipartisan agreement. . . . No matter how sensible and balanced Democratic amendments were, they were summarily rejected by the Republicans during markup . . . Policy judgment[s] about how best to improve welfare services are still not the driving force behind Republican welfare reform; the primary motive is to achieve more than \$50 billion in budget cuts.

H.R. REP. NO. 104-651, at 2025.

288. Leon Panetta, White House Chief of Staff, Talking Points for Meeting with Women Leaders in the Roosevelt Room (June 19, 1996) (original located at the Clinton Library, Little Rock, Ark.; duplicate on file with author).

289. Statement of Council of Presidents of National Women's Organizations, Pledge on Welfare Reform: Principles for Eliminating Poverty (1995) ("[A]chieving pay equity, increasing the minimum wage, creating incentives for employers to provide fringe benefits in contingent and other low-wage jobs, and encouraging collective bargaining should be integral parts of an effective and comprehensive welfare reform strategy.") (original located at the Clinton Library, Little Rock, Ark., duplicate on file with author).

other workplace protections available for low-wage workers would be available to individuals leaving welfare for work.²⁹⁰ When some members of Congress attempted to address the adequacy of wages for individuals leaving welfare for work, the amendment failed to receive support from the majority in Congress.²⁹¹

No amendment was proposed to extend the FMLA to unprotected caregivers, to provide paid leave for those who could not afford unpaid leave, or to codify disparate impact theory under the Pregnancy Discrimination Act to ensure that women in workplaces with no-leave policies would not be fired if they became pregnant. One possible reason is that Congress lacked knowledge that the FMLA disproportionately excluded low-wage workers. Another is that advocates were aware of the impact on low-wage workers but did not want to acknowledge—just three years after the many claims that the FMLA would reduce reliance on welfare programs—that the Act was inadequate in its coverage of such workers. Finally, it is possible that supporters of the FMLA did not want to re-open the debate over family leave laws for fear that Congress, which had switched from Democratic to Republican control, would amend the law unfavorably to exclude more workers or more activities from coverage. Whatever the reason, family leave and workplace protections for pregnant women and family caregivers were absent from the debate regarding welfare reform.

In February 2006, the federal government reaffirmed its commitment to the 1996 welfare reform law by granting a five-year reauthorization of the main component of the legislation, the Temporary Assistance for Needy Families.²⁹² This reauthorization, however, focused almost exclusively on requiring states to move more individuals off the welfare rolls into the paid labor market.²⁹³ The law accomplished this goal by requiring states to in-

290. See Jeffrey B. Fannell, *The National Labor Perspective of the AFL-CIO*, 73 ST. JOHN'S L. REV. 761, 762 (1999) ("Clearly, there is an emphasis on work and on creating workers, but amazingly, the statute that mandates this is silent on the issue of worker protections. It does not even address the Fair Labor Standards Act, Title VII protections against unlawful discrimination, or other workplace laws.").

291. In the House Committee on Economic and Educational Opportunities, the minority explained:

Any welfare reform plan worth its salt must address the connection between wages and work requirements. Our ranking Member, Representative Bill Clay, offered an amendment requiring that JOBS recipients [a work program for welfare recipients] receive a salary not less than the new minimum wage proposed recently by President Clinton Our Republican colleagues opposed the Clay amendment on the specious rationale that such a requirement would lead to greater reluctance by employers to hire those working their way off welfare. This time-worn argument—that minimum wage requirements constrict work opportunities—remains unconvincing. All workers, including welfare recipients, deserve to earn a living wage.

H.R. REP. NO. 104-75, at 407.

292. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 1932 (2006).

293. See MARK GREENBERG, CTR. FOR L. & SOC. POL'Y, CONFERENCE TANF AGREEMENT REQUIRES STATES TO INCREASE WORK PARTICIPATION BY 69 PERCENT, BUT NEW FUNDING MEETS ONLY A FRACTION OF THE COST (2006), http://www.clasp.org/publications/tanfagreement_update_jan12.pdf.

crease the percentage of individuals on welfare who must be working and by requiring parents receiving separate state aid, who were previously excluded, from being required to work if their children are receiving aid through the federal welfare program.²⁹⁴ Although Congress made a small concession in providing greater childcare funding,²⁹⁵ it again paid no attention to conditions in workplaces for women working while on welfare or women trying to transition off of welfare.

As part of the reauthorization, Congress required the U.S. Department of Health and Human Services to issue rules implementing the TANF reauthorization. These rules were promulgated in June 2006 to provide direction and specific requirements regarding how states are to count work participation. Combined with the increase in work participation requirements, the rules mean that more low-income parents will be in the paid labor market. Thus, the problems highlighted in this Article will touch more and more individuals who may find that they have little to no protection for pregnancy and family leave in the labor market and no safety net to fall back on.

D. *What Happened to Women Who Left Welfare for Work?*

Most individuals who received welfare assistance through AFDC and who currently receive such assistance through TANF are women. In 1996, when the welfare reform bill passed, 87% of the adults receiving welfare were women; five years later, 90% were women.²⁹⁶ Women who once relied on welfare are now providing for their families through the paid labor market. In three major studies of women leaving welfare, between 65% and 70% were working within two years after exiting welfare.²⁹⁷ From 1994 to 2000, labor market participation of single mothers climbed nearly 10%, while the increase of work participation among married women with children increased much more slightly and the work participation of women without children remained nearly flat.²⁹⁸ At the same time, the labor market participation of women with less than a high school education rose 6 percentage points in the 1990s after having remained unchanged from 1969 to

294. See Reauthorization of the Temporary Assistance for Needy Families Program: Interim Final Rule, 71 Fed. Reg. 37,454 (June 29, 2006) (to be codified at 45 C.F.R. § 261).

295. See GREENBERG, *supra* note 293, at 2-4 (noting that states will receive only \$200 million more each year in child care funding, which will not begin to cover the increase in need for childcare because of the increase in the number of welfare recipients who will be required to enter the paid labor market).

296. See U.S. Dep't of Health & Human Services Office of Family Assistance, Characteristics and Financial Circumstances of TANF Recipients, <http://www.acf.dhhs.gov/programs/ofa/character/indexchar.htm> (reporting statistics on welfare recipients from 1994 through 2001).

297. See Kristin S. Seefeldt, *After PWORA: Barriers to Employment, Work, and Well-Being Among Current and Former Welfare Recipients*, POVERTY RESEARCH INSIGHTS, Fall 2004 at 1 (summarizing studies).

298. See Rebecca M. Blank & Lucie Schmidt, *Work, Wages and Welfare*, in *THE NEW WORLD OF WELFARE* 70, 71 (Rebecca M. Blank & Ron Haskins eds., 2001).

1989, while work participation of skilled women and unskilled and skilled men remained constant.²⁹⁹ These numbers suggest that welfare reform did impact the labor market, sending more single women with limited education into the workforce.

Women who left welfare for work faced barriers in balancing work and family. They often received employment from companies with no paid sick leave or companies that did not allow employees to use sick leave to care for their children.³⁰⁰ In addition, such employers often do not provide health care.³⁰¹ If these working women have no employer-provided health care and do not qualify for Medicaid, they are most likely left to pay for the expenses of pregnancy on their own. Few women leaving welfare find employers that offer temporary disability insurance.³⁰² Many work long hours for little pay and must make extended childcare arrangements, find a relative to provide care, or allow their children to care for themselves.

Such women will have limited legal remedies, as this Article has explained. Where employers do not offer sick leave or disability leave, a mother leaving welfare for work will have no right to pregnancy leave and will face a difficult challenge in using disparate impact theory to take leave. For a woman leaving welfare to work for an employer exempted from the FMLA, she will have no legal right to sick leave, even unpaid sick leave, if her employer chooses not to offer it. And for a low-wage working woman who has an ordinary breakdown in childcare or a child at home with the flu, the hardship will be magnified by her low income and lack of control over her work schedule.

VI.

NEXT STEPS: PROMOTING EQUITY FOR LOW-WAGE WORKING WOMEN

In every major legislative action during the past forty years affecting the relationship between work and childbearing or childrearing, Congress has failed to recognize the impact its actions have on low-wage working women. It has failed to consider not only that low-wage working women are differently situated from higher-income working women, but also that they are differently situated from low-wage working men because of the

299. *Id.* at 73.

300. Only 20% of mothers who had received welfare have access to sick leave at work while 36% of working mothers who never received welfare have such access. See S. Jody Heymann & Alison Earle, *The Impact of Welfare Reform on Parents' Ability to Care for their Children's Health*, 89 AM. J. PUB. HEALTH 502 (1999); see also SHARON PARROTT, CTR. ON BUDGET & POL'Y PRIORITIES, WELFARE RECIPIENTS WHO FIND JOBS: WHAT DO WE KNOW ABOUT THEIR EMPLOYMENT AND EARNINGS? (1998); S. JODY HEYMAN, THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT 62 (2000).

301. See PARROTT, *supra* note 300 (evaluating numerous studies demonstrating that former welfare recipients are often without any form of health care).

302. See U.S. BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY, *supra* note 28.

biological fact that men do not face pregnancy and the empirical reality that women are more often primary caregivers in their families or single parents.

At times, there was a lack of debate or consideration by Congress of its actions, as when sex was added to Title VII and when welfare was “reformed” in 1996. At other times, Congress may not have recognized that low-wage working women would be adversely affected, for example, by lack of disability leave policies essential to statutory protection against pregnancy discrimination or by exclusions from coverage under the Family and Medical Leave Act. These Congressional failings do not add up to intentional discrimination against women. But for the reasons discussed in this Article, the current statutes do not exhaust Congress’s responsibility to give meaning to the constitutional guarantee of equality.³⁰³

In *Hibbs*, the Court made clear that Congress has the authority under Section 5 of the Fourteenth Amendment to address family leave needs that have historically precluded women from participating equally in the labor market:

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.³⁰⁴

Importantly, *Hibbs* upheld the FMLA as a valid enforcement measure to guarantee substantive equality between women and men in the workplace, rejecting a policy of mere non-discrimination as insufficient for creating real equality. The FMLA, to be sure, is an important step. But it is incomplete. To promote substantive equality for low-wage women workers, Congress should undertake several key reforms.

Guarantee pregnancy leave protection for all workers. There are at least two ways Congress could enact mandatory job-protected leave for all pregnant workers. First, Congress could amend the Pregnancy Discrimination Act to codify the disparate impact theory, making clear that the Pregnancy Discrimination Act protects women against firing or other forms of job discrimination, even when employers have a no-leave policy, when they must take time off due to the physical necessity of bearing a child and recovering from childbirth. Second, Congress could amend the Family and Medical Leave Act to require all employers, regardless of the current exemptions, to provide both part-time and full-time pregnant women employees with a reasonable amount of leave to bear a child and physically recover from childbirth, not to exceed the twelve weeks of unpaid leave allowed under the FMLA.

303. U.S. CONST. amend. XIV, § 5.

304. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 722-23 (2003).

As between these two options, amending the FMLA would benefit the greatest number of low-wage women workers. If Congress chose to amend the Pregnancy Discrimination Act, pregnant workers would be faced with the same problems that currently exist under the PDA—namely, a woman would have to demonstrate that she was disparately impacted by a policy in comparison to another group of workers with whom she worked. If a woman worked in a sector of the economy that was predominately female, the PDA would offer little protection because women are often unable to demonstrate a disparate impact in comparison to another group. The FMLA, on the other hand, is an affirmative leave policy that qualifying employers must follow. If all employers were required to provide FMLA leave to pregnant employees, then there would be no question that all pregnant women, including low-wage working women, would have access to leave for childbirth and recovery.

The proposal to cover all pregnant women under the FMLA is unlikely to rekindle the vigorous debate between accommodation and equality feminists that occurred during the initial debate over the FMLA. Given the stark evidence of inadequate maternity and family leave coverage for low-wage workers, even equality feminists would have to concede that pregnant women need protection or accommodation in order to achieve substantive equality. Furthermore, the PDA and the FMLA have contributed to creating greater cultural and societal acceptance of women working while pregnant and coming back to work shortly after giving birth. Expanding the laws to protect all pregnant women is unlikely to result in the workplace door being shut to women workers.

The greatest difficulty with this proposal is a political one. As discussed below, Congress may be reluctant to amend the FMLA for fear that doing so would lead to restrictions in coverage rather than expansions.

Expand coverage of the FMLA. In every Congress since the passage of the Family and Medical Leave Act in 1993, bills have been introduced to expand coverage by lowering the size of covered employers from those employing fifty workers to those employing twenty-five workers.³⁰⁵ For the most part, these bills have not included proposals to cover part-time workers or to lower the amount of time that an employee must work for an employer before being covered.³⁰⁶

To expand FMLA coverage for low-wage workers, Congress should amend the FMLA to require employees to be covered after a standard ninety-day probationary period rather than requiring employees to work for

305. See, e.g., S. 282, 109th Cong. (2005); H.R. 5625, 109th Cong. (2005); S. 304, 108th Cong. (2004); S. 3141, 107th Cong. (2002); S. 201, 106th Cong. (2001); S. 183, 105th Cong. (2000); S. 1896, 104th Cong. (1999); H.R. 3704, 104th Cong. (1999).

306. In the 106th Congress, a bill was introduced which proposed expanding FMLA to cover both part-time and full-time employees who had worked for an employer for twelve months. See H.R. 3297, 106th Cong. (1999).

one year for the same employer. This barrier proves particularly difficult for women leaving welfare for work. In addition, Congress should cover part-time workers and require employers with fifteen or more employees to provide leave, a threshold that would align the FMLA with employer coverage under Title VII.

The political difficulty with this proposal is that some in Congress would like to restrict the coverage of the FMLA. Policy suggestions to restrict the FMLA have included defining specific illnesses covered by the law and allowing employers to require employees to take intermittent leave rather than a consecutive twelve weeks of unpaid leave.³⁰⁷ Expanding coverage to a greater number of workers could come at the political cost of restricting the ways in which the FMLA can be used.

Pass paid leave laws. Congress should also ensure that pregnancy and family leave are accessible to those who live paycheck to paycheck. There are a number of proposals that Congress is currently considering to promote paid leave. These include a bill that would require employers to provide a minimum number of paid sick days³⁰⁸ as well as a bill that would provide states with grants to develop projects to provide paid leave directly, through a state disability insurance system, through a private disability insurance plan, or through any other mechanism.³⁰⁹ In addition, the Clinton Administration had promulgated a regulation (later overturned by the Bush Administration) that would have allowed states that administer the federal Unemployment Compensation program to provide paid leave to parents for the birth or adoption of a child.³¹⁰ If Congress undertakes reform of the unemployment compensation system, it should codify this regulation to make clear that the unemployment insurance system can be used to provide paid leave when an individual is temporarily unable to work due to the birth or adoption of a child.

Pass a law to allow parents to refuse overtime. To aid low-wage workers in their role as caregivers, Congress should enable workers to refuse to work overtime without fear of losing their job. This smaller-scale reform would protect parents against being fired when their family care needs conflict with their employer's need for overtime work.

Subsidize employers providing leave to former welfare recipients. While working toward the reforms suggested above, Congress should ensure that during the first two years of leaving welfare for work, women are protected from being fired due to pregnancy or family leave needs. Short of

307. See, e.g., Family and Medical Leave Clarification Act, H.R. 35, 108th Cong. (2003).

308. See H.R. 1902, 109th Cong. (2005); S. 1085, 109th Cong. (2005) (requiring all employers with fifteen or more employees to provide paid sick leave to part-time and full-time employees to care for oneself or a family member, and requiring no minimum time of service before accruing leave).

309. See S. 282, 109th Cong. (2005); H.R. 5625, 109th Cong. (2006).

310. Birth and Adoption Unemployment Compensation; Final Rule, 65 Fed. Reg. 37,210 (June 12, 2000), *superseded by* 68 Fed. Reg. 58,540-01 (Oct. 9, 2003).

full-scale reform of the nation's pregnancy and family leave laws, Congress could provide subsidies to former welfare recipients and employers when a recently-employed welfare recipient needs to take pregnancy or family leave. This proposal would allow women to more easily transition and become attached to the labor force. Disruptions due to pregnancy or family leave barriers can be insurmountable if a worker is fired and must begin a job search anew after each leave.

This proposal could be implemented by expanding the Welfare-to-Work Tax Credit. This credit provides a tax incentive to businesses that hire long-term welfare recipients in the first two years after the individual has left welfare.³¹¹ Employers could be provided with additional tax incentives if they have appropriate pregnancy and family leave policies. At the same time, former welfare recipients could be provided at least partial wage replacement for up to twelve weeks for pregnancy or family leave.

Critics may argue that this type of program is too costly or that it provides added benefits to welfare recipients over low-wage workers who have never had to rely on welfare. But such a program is likely to be less costly than the current practice of helping former welfare recipients with new job searches and providing them with additional cash aid each time they lose a job. And while the inequity in providing aid to former welfare recipients rather than to all low-wage workers is real, this program should be understood as an interim measure until full scale reforms are passed. Indeed, the efficacy of a temporary program may lead to greater pressure to pass full-scale reforms.

Meanwhile, states and localities do not have to wait for Congress to act. *Cal Fed* made clear that states have the authority to pass laws providing job-protected pregnancy leave to all workers. Only a handful of states have enacted such statutes since the Supreme Court's ruling nearly twenty years ago.³¹² Thirty-one states provide no legally guaranteed job protection for women who need to take pregnancy leave or for any worker who needs to take family leave. Only six states offer full protection against firing if a woman has to take a leave because of pregnancy and only five states offer any type of paid leave for pregnancy or family leave.³¹³ There is positive evidence of state efforts to pass paid leave laws,³¹⁴ but no evidence of advocates pushing states to provide guaranteed job-protected pregnancy leave for all women workers. Localities, too, can act to provide greater accom-

311. 26 U.S.C. § 51A (2000). Congress recently repealed this section and consolidated the Welfare-to-Work Credit with the Work Opportunity Credit. See Pub. L. No. 109-432, tit. I, § 105, 120 Stat. 2922 (2006) (codified at 26 U.S.C. § 51(d)).

312. See *supra* Part IV.A.3.

313. *Id.*

314. See NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, WHERE FAMILIES MATTER: STATE PROGRESS TOWARD VALUING AMERICA'S FAMILIES (2006), <http://www.nationalpartnership.org/portals/p3/library/PaidLeave/WhereFamiliesMatter2005Report.pdf>.

modations to working parents. In November 2006, San Francisco became the first city in the country to require employers to provide a minimum level of paid sick leave for all employees.³¹⁵ Other jurisdictions should follow suit.

The reforms proposed here are ambitious, but they flow logically from the gaps in our pregnancy and family leave laws. Today, there is hope for a return to the energy and organization that existed at an earlier stage in our history to make needed changes on behalf of low-wage working women. The equality versus accommodation debates have largely dissipated. The major women's organization that fought for the FMLA, the National Partnership for Women and Families, is advocating for coverage of the low-wage workers left behind under the FMLA at the federal and state levels. And more grassroots groups are sprouting up around the nation, comprised of low-wage working women speaking up for themselves and those around them.³¹⁶ Persistence in these efforts may yet produce the genuine equality of opportunity too long denied to our nation's low-wage workers.

315. See SAN FRANCISCO, CAL., ADMIN. CODE § 12W (2006); see also San Francisco Voter Information Pamphlet, Proposition F (Nov. 7, 2006), www.sfgov.org/site/uploadedfiles/election/SF_VIP_Nov2006-web.pdf.

316. See Editorial, *All Together Now . . .*, THE NATION, Jan. 17, 2002, <http://www.thenation.com/doc/20020218/editors20020204>.