

# ARTICLES

## Pregnancy, Work, and the Promise of Equal Citizenship

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*“Certain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman’s place among paid workers and active citizens.”<sup>1</sup>*

INTRODUCTION

In 1848, a group of feminists convened in Seneca Falls, New York and issued a document that signaled the birth of the women’s movement. The Declaration of Sentiments condemned a wide range of “injuries and usurpations on the part of man toward woman”—everything from withholding the right to vote to applying different codes of moral conduct—and demanded “immediate admission to all the rights and privileges which belong to them as citizens of the United States.”<sup>2</sup> Formal citizenship status was the basis for demanding the substantive rights that full citizens enjoy—a broad spectrum of political, personal, and civil rights from suffrage to child custody to property ownership.<sup>3</sup> The convention, and the document it produced, laid the groundwork for decades of advocacy undertaken in the name of women’s equal citizenship.

Pregnancy was not among the issues identified in the Declaration or discussed at the convention. Its absence is both surprising and curious, especially because most of the delegates surely had felt the effects of pregnancy in their

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1. AT&T Corp. v. Hulteen, 129 S. Ct. 1662, 1778 (2009) (Ginsburg, J., dissenting).  
2. DECLARATION OF SENTIMENTS (1848), reprinted in 1 HISTORY OF WOMAN SUFFRAGE 70–71 (Elizabeth Cady Stanton et al. eds., photo. reprint 1985) (1881).  
3. See id. (listing rights demanded).

own lives. Elizabeth Cady Stanton, a lead architect of the platform, gave birth to and raised seven children and readily acknowledged “the practical difficulties most women had to contend with in the isolated household, and the impossibility of woman’s best development if in contact, the chief part of her life, with servants and children.”<sup>4</sup> But Stanton was ahead of her time in trying to “have it all.” Most women of the era did not aspire to equal access to paid work but focused instead on fighting for civil and political rights that could in most cases be exercised without interfering with their primary roles as wives and mothers.

The civil and political rights these early advocates sought, like property ownership and suffrage, were essential components of equal citizenship, a substantive concept popularized in the 1950s by British social theorist T.H. Marshall. Marshallian “citizenship” is both a measure of and an aspiration to equal rights and duties for all members of a community. But Marshall’s framework also includes an important third dimension, social citizenship, which entails economic security and access to paid work. Pregnancy became a more substantial obstacle to equal citizenship when the women’s movement shifted its focus to this dimension during the second half of the twentieth century.

Pregnancy increasingly impeded women’s workplace equality and, by implication, their equal citizenship as they entered the paid workforce in large numbers after World War II and, eventually, sought access to jobs traditionally reserved for men. Conflicts between pregnancy and work escalated in number and degree, triggering an antidiscrimination movement that resulted in an important piece of federal legislation, the Pregnancy Discrimination Act of 1978 (PDA).<sup>5</sup> The PDA was part of a broad social movement designed to guarantee equal employment opportunities for women. This agenda drew on new notions of equal social citizenship for women rather than the political and civil aspects of citizenship underlying the earlier movement.

Without a doubt, the PDA successfully opened workplace doors for pregnant women. It brought an abrupt end to common employer policies that categorically excluded pregnant women or restricted the terms on which they could work.<sup>6</sup> Today, by contrast, a majority of pregnant women work in paid employment, and the vast majority of working women will become pregnant at some point.<sup>7</sup> The PDA also made sharp inroads against harmful pregnancy stereotyp-

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4. ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN’S RIGHTS MOVEMENT IN THE UNITED STATES* 73 (1975) (citing ELIZABETH CADY STANTON, *EIGHTY YEARS AND MORE* 147–48 (1898)). Stanton implored her friend and co-advocate, a childless Susan B. Anthony, to be patient: “Courage, Susan—this is my last baby, and she will be two years old in January. Two more years and—time will tell what!” *Id.* at 90 (citing ALMA LUTZ, *CREATED EQUAL: A BIOGRAPHY OF ELIZABETH CADY STANTON* 104 (1940)).

5. Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

6. *See infra* section III.A.

7. SHEILA B. KAMERMAN ET AL., *MATERNITY POLICIES AND WORKING WOMEN* 5 (1983) (“85 percent of working women are likely to become pregnant during their working lives.”); *see also* JEANETTE N. CLEVELAND ET AL., *WOMEN AND MEN IN ORGANIZATIONS: SEX AND GENDER ISSUES AT WORK* 208 (2000) (estimating that 75% of working women are likely to give birth at least once while working); Hal G. Gueutal & Elisabeth M. Taylor, *Employee Pregnancy: The Impact on Organizations, Pregnant*

ing and bias in the workplace, though evidence suggests that they still persist today.<sup>8</sup>

But women's equal participation in the workforce requires more than just open doors. The plight of pregnant workers today rests not primarily in false assumptions about their incapacity but in the failure of current law to account for the physical, medical, and social realities of pregnancy. Pregnancy discrimination law provides absolute protection for women only if they retain full work capacity during the period of pregnancy and childbirth. A pregnant woman who seeks to continue working through pregnancy, but experiences a temporary diminishment or alteration of capacity due to the physical effects of pregnancy, will encounter limited protection in the law. For her, the PDA only requires employers to provide necessary workplace accommodations if they have chosen to provide them for other temporarily disabled workers with similar levels of incapacity. Thus, a pregnant woman who cannot perform some or all of her duties because of the physical effects of pregnancy could be fired, or otherwise penalized, as long as the employer would treat a similarly situated non-pregnant employee the same way. This is true even when the employee could continue working if the employer were to provide minor or inexpensive workplace accommodations. The additional protection theoretically provided by disparate impact law has proven extremely limited in the pregnancy context.

This Article argues, ultimately, that the PDA's promise of equal social citizenship for pregnant workers has fallen short. The quest for full citizenship requires that women have the opportunity to utilize, and benefit from, their innate talents and capacities in multiple dimensions of society, including paid work. Equal citizenship requires not only legal protection from unjustified exclusion from the workforce, but also protection for a pregnant woman's right to continue working despite the potential temporary physical limitations of pregnancy. This protection, in turn, means that employers must be required to provide reasonable workplace accommodations to counter the physical effects of pregnancy. The PDA, however, is modeled on a basic formal equality framework, which provides no absolute right to accommodation necessitated by pregnancy. Women are thus deprived individually and as a group of the opportunity to capitalize fully on their abilities in the workplace because of a legal regime that fails to account for the predictable, and recurring, effects of pregnancy. By not insisting that employers provide such accommodations, regardless of whether they accommodate other forms of temporary disability, current law guarantees that women will face more involuntary exits from the workforce and fewer advancements and successes within it. This is particularly so for those who labor in traditionally male-dominated occupations that are physically strenuous or hazardous.

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*Employees and Co-workers*, 5 J. BUS. & PSYCHOL. 459, 459 (1991) (estimating that 90% of working women "will be pregnant at least once during employment"); *infra* text accompanying notes 10–28.

8. See *infra* text accompanying notes 41–47.

This Article will proceed in three parts. First, it will explore the realities of pregnant women at work. This exploration begins with data on labor force patterns of women generally and pregnant women in particular. It then considers the current levels of pregnancy discrimination and evidence of lingering bias against pregnant workers. Finally, it examines the effects of pregnancy on work and the effects of work on pregnancy. An examination of medical research and guidelines, scientific data, workforce pattern statistics, and case law reveals the range of challenges faced by pregnant working women and their potential consequences. Conflicts between the physical effects of pregnancy and the existing structure of jobs and the workplace vary greatly by individual and by job, but they are widespread and reinforce both obstacles to women's employment opportunities and long-entrenched patterns of gender-based occupational segregation.

Second, this Article will suggest a different theoretical framework for analyzing the problem of conflicts between pregnancy and work. Pregnancy discrimination law has conventionally been framed as a debate about gender equality. Certainly it is about gender, but "equality" is a contested term that led even feminists to divide over its definition in the pregnancy context. When the contours of pregnancy discrimination law were tested early on, feminists split over whether "equality" called for equal treatment or accommodation of pregnant workers, cementing a growing boundary between theories of formal and substantive equality.<sup>9</sup> This Article thus applies a new lens to the treatment of pregnant women in the workplace. This lens, rooted in T.H. Marshall's substantive notion of citizenship, helps reframe the debate and expose the limitations of the current legal framework. Using "equal citizenship" as a multi-dimensional concept that connotes inclusion, it reframes the equal treatment/accommodation debate about pregnancy as a question of social citizenship, which aspires, among other aims, to women's equal participation in the workforce.

Finally, this Article will evaluate modern pregnancy discrimination law against the goal of equal social citizenship. Against this measure, current law falls quite short. Though pregnancy discrimination law sharply reversed course in the 1970s, ending an era of exclusion and ushering in an era of access, it has failed to deliver on the broader promise of women's equal social citizenship. This failure, in a nutshell, flows from the PDA's structure, which grants rights based primarily on a pregnant woman's capacity. Pregnancy discrimination is legally defined to provide absolute rights only to the extent a pregnant woman is able to work at full capacity despite her physical condition. She is protected from employment decisions motivated by false assumptions or stereotypes about her abilities, but not necessarily entitled to accommodations that might be essential for her to continue to work. The PDA, with its focus on short-term (in)capacity and neglect of innate capacity, fails to account for the actual effects of pregnancy and thus neglects the needs of many pregnant working women today.

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9. See *infra* text accompanying notes 197–207.

## I. PREGNANT WOMEN IN THE WORKPLACE

## A. WORKFORCE PATTERNS FOR PREGNANT WOMEN

A number of long-term trends have converged to produce a dramatic increase in the number of pregnant women in the workplace such that “virtually everyone in the labor force will be affected directly or indirectly by employee pregnancy.”<sup>10</sup> The most fundamental shift that has led to this result is the sheer number of women who have joined the paid workforce. Following a sharp increase during World War II, the number of working women has been rising at a steady clip since the 1950s—from 29% in 1950 to 60% in 2000.<sup>11</sup> Alice Kessler-Harris, the leading historian on women’s wage earning in the United States, notes:

In contrast to earlier decades where, at any one time, wage-earning women were a relatively small, if significant, minority, in the fifties their proportion crept upward, to the point where in the sixties women who did not work for wages became the exception. . . . A third of all women worked in 1950—only half of them full time. By 1975, nearly half worked, more than 70 percent at full-time jobs.<sup>12</sup>

Today, 59.5% of women participate in the labor force with 75% of employed women working on a full-time basis.<sup>13</sup> Workforce participation has increased beyond simply the number of women who work—women now work for more years of their lives and for more hours at each job.<sup>14</sup> The percentage of married women in the labor force has also increased, along with the percentage of family income contributed by wives.<sup>15</sup>

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10. Gueutal & Taylor, *supra* note 7, at 459.

11. See TALLESE D. JOHNSON, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS, 1961–2003, at 4 n.18 (Feb. 2008) (“Overall labor force participation rates for women, regardless of pregnancy status, were as follows: 32 percent in 1960, 43 percent in 1970, 52 percent in 1980, 58 percent in 1990, and 60 percent in 2000.” (internal citation omitted)); ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 301 (1982).

12. KESSLER-HARRIS, *supra* note 11, at 300–01.

13. See U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 8 tbl.2, 70 tbl.20 (2009), <http://www.bls.gov/cps/wlf-databook-2009.pdf>. More educated women are more likely to work in the paid labor force. See *id.* at 21 tbl.8. (reporting that among women age 25 and older with a college degree, 80% were labor force participants compared with only 68% of those with only a high school diploma and 48% of those with less than a high school diploma).

14. See, e.g., KESSLER-HARRIS, *supra* note 11, at 301 (observing that “where earlier wage work had been merely a short phase of many women’s lives, in the fifties it began to assume a more central position”).

15. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CHARTING THE U.S. LABOR MARKET IN 2006, at 66 chart 6-5 (2007), <http://www.bls.gov/cps/labor2006/chartbook.pdf> (indicating an increase in the percentage of family income contributed by working wives from approximately 25% in 1974 to 35% in 2005). For a comprehensive analysis of women’s current role in the workforce, see THE SHRIVER REPORT, A WOMAN’S NATION CHANGES EVERYTHING (Heather Boushey & Ann O’Leary, eds.) (2009), available at [http://www.americanprogress.org/issues/2009/10/pdf/awn/a\\_womans\\_nation.pdf](http://www.americanprogress.org/issues/2009/10/pdf/awn/a_womans_nation.pdf).



The dramatic increase in women workers has, of course, changed the composition of the overall labor force. Women have occupied an increasing proportion of the labor force since the 1970s, accounting today for nearly half.<sup>16</sup> The composition is continuing to change given that a majority of new entrants to the labor force are women<sup>17</sup> and that men have been disproportionately on the receiving end of layoffs in the current economic downturn.<sup>18</sup> Women, in fact, may be “poised to surpass men on the nation’s payrolls, taking the majority for the first time in American history.”<sup>19</sup>

The influx of women into the labor force set the stage for more pregnant women and mothers to work, but that shift began later as attitudes about the proper role of women began to change. Kessler-Harris notes that “[t]he bulk of the increase in labor force participation in the fifties occurred among women over forty-five—past the years when they would normally have young children at home.”<sup>20</sup> But by the 1960s, pregnant women and mothers began to demonstrate greater labor force entry and commitment.<sup>21</sup> Women began to work more and longer while pregnant and return sooner after childbirth. For example, among women who had a first birth between 1961 and 1965, 44% worked during pregnancy, compared with 67% of women whose first birth occurred between 2001 and 2003.<sup>22</sup> For the earlier cohort, only 40% of women worked full-time during pregnancy, while 57% of the later cohort did.<sup>23</sup>

Women who work during pregnancy are much more likely today to work into the third trimester than in decades past, often times until the day of delivery. Only 35% of working women with a first birth between 1961 and 1965 were still at work within a month of giving birth, and 13% left before the end of the first trimester. Among those with a first birth between 2001 and 2003, only 4% left within the first three months, and 80% were still at work a month before

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16. See U.S. Dep’t of Labor, *Women in the Labor Force in 2008*, <http://www.dol.gov/wb/factsheets/Qf-laborforce-08.htm> (last visited Jan. 30, 2010) (reporting that women accounted for 46.5% of the total labor force in 2008).

17. See, e.g., Gueutal & Taylor, *supra* note 7, at 475 (predicting that 65% of new entrants to the labor force during the 1990s would be women).

18. See, e.g., Catherine Rampell, *As Layoffs Surge, Women May Pass Men in Job Force*, N.Y. TIMES, Feb. 6, 2009, at A1 (reporting that “a full 82 percent of the job losses [since the recession started] have befallen men, who are heavily represented in distressed industries like manufacturing and construction”).

19. *Id.*

20. KESSLER-HARRIS, *supra* note 11, at 302.

21. See, e.g., WILLIAM B. JOHNSTON ET AL., HUDSON INST., *WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY* 85 (1987) (“Much of the increase in the numbers of women in the labor force has come from increased participation by women with children. Of the 14.6 million married women who joined the labor force between 1960 and 1984, 8 million came from families with children.”).

22. JOHNSON, *supra* note 11, at 4 tbl.1 (reporting data from the U.S. Census Bureau’s Survey of Income and Program Participation (SIPP), a nationally representative survey that has been administered periodically since 1984).

23. *Id.*

delivery.<sup>24</sup> Working through pregnancy has thus become the norm.

Women are also returning to work much sooner after childbirth than in earlier eras. For the earlier cohort, only 16% of women who worked during pregnancy were back at work by three months after delivery, and only 26% were back at work twelve months later. For the later cohort, 58% were back at work within three months and 79% within twelve.<sup>25</sup> All of these figures are even higher for single mothers.<sup>26</sup>

The current work patterns for pregnant women vary significantly by age and educational level. Older mothers are more likely to have worked prior to a first pregnancy and significantly more likely to still be working within one month of childbirth.<sup>27</sup> More educated mothers are also more likely to work longer into pregnancy: 67% of women with a college degree worked within one month of childbirth, compared with only 57% for women with less than a high school degree.<sup>28</sup>

In addition to the greater labor force participation of women in general and pregnant women in particular, there has also been an expansion of women into non-traditional occupations—those historically predominated by male workers. Though a high degree of occupational segregation still persists today, women have made steady, if small, inroads into occupations ranging from bartending to construction to mining.<sup>29</sup> The relatively higher pay and benefits that accompany non-traditional occupations is a significant draw to women, who otherwise find their economic opportunities to be less than ideal. As one mother of four

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24. *Id.* at 7 tbl.3.

25. *Id.* at 14 tbl.8. Other studies show similar work patterns for pregnant women. *See, e.g.*, U.S. CENSUS BUREAU, U.S. DEP'T OF LABOR, CURRENT POPULATION SURVEY, JUNE 1976–2006 tbl.5 (2008), <http://www.census.gov/population/socdemo/fertility/cps2006/SupFertTab5.xls> (noting the increase in the percentage of women in the labor force among those who had a birth in the last 12 months from 31% in 1976 to 56% in 2006); Sonalde Desai & Linda J. Waite, *Women's Employment During Pregnancy and After the First Birth: Occupational Characteristics and Work Commitment*, 56 AM. SOC. REV. 551, 558 (1991) (finding that 43% of mothers returned to work within three months of childbirth and 69% returned within 12 months). These workforce patterns are not confined to the United States. *See, e.g.*, Geoffrey Chamberlain, *Work in Pregnancy*, 302 BRITISH MED. J. 1070, 1070 (1991) (noting greater workforce participation among women and greater workforce commitment among pregnant women in Britain).

26. *See* JOHNSON, *supra* note 11, at 15 tbl.9.

27. *Id.* at 3–4. For mothers who gave birth the first time at age 30 or older, 68% worked within one month of childbirth, while only 56% of mothers under age 18 worked that far into pregnancy. *Id.* at 5 tbl.2.

28. *Id.*

29. *See* KESSLER-HARRIS, *supra* note 11, at 312 (noting that by 1970 “[t]he number of women in skilled, predominantly male, trades rose to almost half a million: an increase of nearly 80 percent over 1960, twice that for women in all occupations, and eight times that for men in the skilled trades”); *see also* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CURRENT POPULATION SURVEY, HOUSEHOLD DATA: ANNUAL AVERAGES tbl.11 (2009), <http://www.bls.gov/cps/cpsa2008.pdf> (reporting that 22% of workers in “[p]roduction, transportation, and material moving occupations” were women). *See generally* JERRY A. JACOBS, *REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS* 64–87 (1989) (analyzing trends in women's occupational choices); SUSAN EHRLICH MARTIN & NANCY C. JURIK, *DOING JUSTICE, DOING GENDER* (1996) (examining women in judicial occupations).



explained of her decision to enter the field of mining: “I like workin’ in the mines. The pay’s good. That’s the reason I work.”<sup>30</sup> Non-traditional occupations for women are more likely to include a physical component and thus, as discussed below, more likely to trigger pregnancy-based conflicts.<sup>31</sup>

There are a variety of explanations for these convergent workforce trends. They coincide with economic changes that increased the number of households needing a second income in order to survive rising housing prices and inflation.<sup>32</sup> They also coincide with an increase in older mothers, who are more likely to be in the workforce before a first birth.<sup>33</sup> These developments also bear some relationship to legal and policy changes that opened workplace doors to women, including pregnant women and mothers. The enactment of laws to prohibit sex and pregnancy discrimination reduced the number of barriers to entry into the workforce for all women.<sup>34</sup> Other laws, such as a federal tax credit for dependent care adopted in 1976, also made conditions more favorable for working mothers.<sup>35</sup> Regardless of the explanation, the increasing number of women working through pregnancy without concomitant reconfigurations of job descriptions heightens the possibility for conflict between pregnant women and employers. Section I.C takes up the nature of these conflicts, and section IV.B considers the consequences of failing to accommodate them.

#### B. THE PERSISTENCE OF PREGNANCY DISCRIMINATION

Pregnant women in the workplace are now commonplace,<sup>36</sup> yet discrimination against them clearly persists. Pregnancy discrimination charges were among the fastest growing category of claims filed with the Equal Employment Opportunity Commission (EEOC) during a modern period despite a decline in the birth rate.<sup>37</sup> The EEOC itself is pursuing pregnancy discrimination claims more

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30. *Women in Blue-Collar Labor: The Numbers Grow*, OCCUPATIONAL HEALTH & SAFETY, Feb. 1983, at 23, 23.

31. See *infra* text accompanying notes 283–97.

32. See JULIA OVERTURF JOHNSON & BARBARA DOWNS, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961–2000, at 2 (2005), <http://www.census.gov/prod/2005pubs/p70-103.pdf> (noting background changes that contributed to the rise in pregnant women’s labor force participation); KRISTIN SMITH ET AL., U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, MATERNITY LEAVE AND EMPLOYMENT PATTERNS: 1961–1995, at 3 (2001), <http://www.census.gov/prod/2001pubs/p70-79.pdf> (same).

33. See JOHNSON, *supra* note 11, at 3 (“For women 30 years and older, 9 out of 10 women who had a first birth in 2001–2003 had worked for at least 6 consecutive months, compared with 55 percent of women under 22 years of age.”).

34. See *infra* text accompanying notes 122–25.

35. JOHNSON & DOWNS, *supra* note 32, at 2–3.

36. See, e.g., Sara J. Corse, *Pregnant Managers and Their Subordinates: The Effects of Gender Expectations on Hierarchical Relationships*, 26 J. APPLIED BEHAV. SCI. 25, 26 (1990) (noting, based on a variety of studies, that “[i]t is no longer unusual to see women in the workplace in the advanced stages of pregnancy”).

37. Pregnancy discrimination charges with the EEOC, which are a prerequisite to filing a lawsuit under Title VII, increased 58% between 1997 and 2008, on top of a 10% increase between 1992 and 1996. See EEOC, PREGNANCY DISCRIMINATION CHARGES: EEOC & FEPAs COMBINED: FY 1997–FY 2008

aggressively and collecting far more in settlements than a decade ago.<sup>38</sup> This surge in pregnancy discrimination charges, which includes high-profile cases against companies like Bloomberg, Verizon, and Google,<sup>39</sup> serves as an important reminder that the unfair treatment of pregnant workers is still a ripe issue, one that has garnered substantial media attention in the last few years.<sup>40</sup>

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(2009), <http://eeoc.gov/stats/pregnanc.html> [hereinafter, EEOC, FY 1997–FY 2008]; EEOC, PREGNANCY DISCRIMINATION CHARGES: EEOC & FEPAs COMBINED: FY 1992–FY 1997 (2007), <http://eeoc.gov/stats/pregnanc-a.html>; see also Press Release, Nat'l Ctr. for Health Statistics, U.S. Birth Rate Reaches Record Low (June 25, 2003), available at <http://www.cdc.gov/nchs/PRESSROOM/03news/low-birth.htm>. For an analysis of the rise in claims, see NAT'L P'SHIP FOR WOMEN & FAMILIES, THE PREGNANCY DISCRIMINATION ACT: WHERE WE STAND 30 YEARS LATER 12 (2008) (noting, among other trends, a dramatic increase in claims filed by women of color).

38. See NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 37, at 11 (noting an increase in the percentage of EEOC-instigated lawsuits that include a pregnancy discrimination claim from 1.3% in 1997 to 8.6% in 2006). Monetary benefits paid out annually through EEOC conciliations (not including subsequent litigation) more than doubled in the last decade, rising from \$5.6 million in 1997 to \$12.2 million in 2008, with an all-time high of \$30 million collected in 2007 alone. EEOC, FY 1997–FY 2008, *supra* note 37.

39. See *Elwell v. Google*, No. 05 Civ. 6487 (DLC), 2007 WL 217978, at \*5 (S.D.N.Y. Jan. 30, 2006) (requiring employee to submit pregnancy discrimination claims to binding arbitration); Alan Feuer, *54 More Claim Bloomberg Firm Discriminated*, N.Y. TIMES, May 2, 2008, at B1 (reporting on the EEOC's class-action pregnancy discrimination suit against a company founded by New York City Mayor Michael Bloomberg, which alleges that women who were pregnant or took maternity leave suffered undeserved demotions and pay cuts); Press Release, EEOC, Maternity Store Giant to Pay \$375,000 to Settle EEOC Pregnancy Discrimination and Retaliation Lawsuit (Jan. 8, 2007), available at <http://www.eeoc.gov/press/1-8-07.html>; Press Release, EEOC, EEOC and Verizon Settle Pregnancy Bias Suit; Thousands of Women to Receive Benefits (Feb. 26, 2002), available at <http://www.eeoc.gov/press/2-26-02.html> (reporting that Verizon agreed to pay millions to settle pregnancy discrimination claim involving thousands of employees).

40. See, e.g., Lesley Alderman, *When the Stork Carries a Pink Slip*, N.Y. TIMES, Mar. 28, 2009, at B6 (reporting suspicion among lawyers that “some employers are now using the law’s laxity and the dismal economy to tacitly discriminate against new or expectant mothers”); Stephanie Armour, *Pregnant Workers Report Growing Discrimination*, USA TODAY, Feb. 17, 2005, at B1 (noting “soaring” number of pregnancy discrimination claims); Tresa Baldas, *Pregnancy Discrimination Suits Are Steadily Rising*, NAT'L L.J., April 14, 2006, at 4 (noting increase in pregnancy discrimination lawsuits, “particularly among high-level female executives who claim that they are being knocked off the corporate ladder because of maternity issues”); Mike Drummond, *Pregnant and Fired: A Rising Trend?*, CHARLOTTE OBSERVER, Jan. 7, 2007, at 1D (noting increase in number of pregnancy discrimination cases won by plaintiffs); Alison Grant, *EEOC Reports Jump in Claims of Pregnancy-Related Job Bias*, CLEVELAND PLAIN DEALER, Nov. 4, 2007, at G3 (reporting that “[p]regnancy discrimination cases are increasing at the same time that race and gender cases are declining”); Chrissy Kadleck, *Baby Bias: Pregnancy Discrimination Cases More Prevalent as Women, Employers Struggle to Find Common Ground in Changing Work Force*, CRAIN'S CLEVELAND BUS., Mar. 3, 2008, at 29 (noting that women are more willing to fight pregnancy discrimination); Lisa Marsh, *EEOC: Pregnancy Discrimination Complaints Up Sharply*, N.Y. POST, June 11, 2006, at 35 (reporting that pregnancy discrimination had “leaped into the news” after Verizon’s \$49 million settlement with the EEOC); David Mitchell, *Prevalence of Pregnancy Discrimination Surprises Advocates*, CHI. DAILY LAW BULL., May 4, 2006 (describing pregnancy discrimination as “all too common”); Sue Shellenbarger, *More Women Pursue Claims of Pregnancy Discrimination*, WALL ST. J., Mar. 27, 2008, at D1 (noting that a new EEOC call center received over 20,000 telephone inquiries about pregnancy discrimination during 2007 and that the EEOC reported a surge in formal charges filed); Carmel Sileo, *Executive Women Drive Rise in Pregnancy Bias Lawsuits*, TRIAL MAG., July 1, 2006, at 18 (noting increase in number of EEOC claimants that went on to file lawsuits); Anne Thompson, *When Becoming a Mom Means Losing Your Job*, MSNBC.com, Mar. 31, 2006, <http://www.msnbc.msn.com/id/12100070/> (noting increase in preg-

The rise in pregnancy discrimination claims, many of them successful, also suggests the persistence of unlawful bias against pregnant workers. Thirty years after enactment of the PDA, a report analyzing recent pregnancy discrimination cases noted the “striking” pattern of cases that “involve straightforward violations of the PDA that seem to be fueled by a fundamental resistance to having pregnant women in the workplace, or having to accommodate the needs of pregnant women.”<sup>41</sup>

Social science studies also show the persistence of stereotyped perceptions and decisionmaking with respect to pregnant workers. For example, one recent study concluded that “negative stereotypes and beliefs associated with pregnant working women do exist, and that men are more likely than women to hold these beliefs,” while another by the same researchers found that subjects assigned consistently lower performance ratings to a pregnant worker viewed on video than an identical, non-pregnant worker.<sup>42</sup> “Pregnant women,” these researchers found, “were viewed as overly emotional, often irrational, physically limited, and less than committed to their jobs. They were not seen as valued or dependable employees.”<sup>43</sup> Another study found that “pregnant women evoke hostile reactions in situations in which they stray from the traditional feminine gender role. As a result, pregnant women may face significant obstacles to successful employment.”<sup>44</sup> A third found that “subordinates studied tended to have more negative impressions of the pregnant manager and of their interactions with her than they did of the manager who was not pregnant.”<sup>45</sup>

As discussed in section IV.A below, the current legal framework directly targets pregnancy bias and the discriminatory employment decisions it might

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nancy discrimination claims and employers’ “mis-fears and stereotypes” that can lead them to engage in unlawful actions).

41. NAT’L P’SHIP FOR WOMEN & FAMILIES, *supra* note 37, at 10 (concluding that recent cases reveal “biases about both the abilities of pregnant women and their proper roles in the workplace and in the home”); *see also* William M. Slonaker & Ann C. Wendt, *Pregnancy Discrimination: An Empirical Analysis of a Continuing Problem*, 1991 LABOR L.J. 343 (analyzing pregnancy discrimination claims filed with the Ohio Civil Rights Commission between 1985 and 1989).

42. Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORGANIZATIONAL BEHAV. 649, 652, 654–55 (1993).

43. *Id.* at 655.

44. Michelle Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards That Maintain Traditional Roles*, 92 J. APPLIED PSYCHOL. 1499, 1509 (2007); *see also* Amy J. C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn’t Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004) (reporting on study finding that “women lost perceived competence [at work] and gained perceived warmth when they became mothers, looking significantly less competent than warm”). On social attitudes towards pregnant women, *see* Shelley E. Taylor & Ellen J. Langer, *Pregnancy: A Social Stigma?*, 3 SEX ROLES 27, 35 (1977) (noting, prior to passage of the PDA, that “until the unacknowledged social rejection of pregnancy is also eliminated, changes in law and policy may be insufficient to bring the pregnant woman back into the active commerce of daily life”); *see also* Dianne Horgan, *The Pregnant Woman’s Place and Where to Find It*, 9 SEX ROLES 333 (1983) (noting class-based differences in attitudes toward pregnant women).

45. Corse, *supra* note 36, at 38; *see also* Blythe Hamer, *When the Boss Becomes Pregnant*, PSYCHOL. TODAY, Jan. 1989, at 14 (“When a woman is pregnant her coworkers expect her to behave more like a mom and less like a boss.” (citing Sara Corse)).

produce. Pregnant workers face the same, often significant, obstacles to enforcing antidiscrimination rights as any other plaintiff,<sup>46</sup> but the legal analytic framework is at least designed to combat this type of discrimination. More robust enforcement of existing law could help eliminate the persistent bias. Toward that end, the EEOC recently issued a “best practices” document that makes specific recommendations to employers for purging their decisionmaking of stereotypes about pregnant and caregiving workers.<sup>47</sup>

### C. RISKS AND CHALLENGES FOR PREGNANT WOMEN AT WORK

The recent surge in pregnancy discrimination claims and the resulting renewal of public awareness provide the occasion to reconsider the predicament of pregnant women at work more generally. An important, yet under-examined, aspect of pregnant women in the modern workplace is the potential for conflict between the physical effects of pregnancy and paid work. Pregnancy is not incompatible with physical exertion. To the contrary, the pregnant woman’s potential to do almost anything is borne out by stories of marathon runners and others who achieve impressive goals during pregnancy and soon after childbirth. Paula Radcliffe won the New York City Marathon less than nine months after giving birth (and again twelve months later), having run competitively throughout her pregnancy.<sup>48</sup> Fantasia Goodwin, a Division I collegiate basketball player, not only played competitively through her seventh month of pregnancy but did so without revealing her condition at all.<sup>49</sup> Elite athletes are not generally a good barometer for the rest of us, but their stories challenge us to reconsider the conventional wisdom about the limits of the pregnant body.

The workplace has been long marked by assumptions about the pregnant woman’s ability with little attention to either relevant scientific data or the advice of individual doctors. Historically, women “with child” were presumed incapable of work, particularly in the later stages of pregnancy. Doctors routinely told working women that they had to leave work three months before an expected delivery (if their employers had not already excluded them from the workplace at that point). Today, the opposite presumption is often applied—uncomplicated pregnancy has no meaningful physical effects that bear on a woman’s ability to work. The presumption of incapacity and the presumption of uninterrupted capacity are, however, both flawed. Although some attention was

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46. See generally Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008) (arguing that procedural doctrines make enforcement of substantive Title VII rights unduly difficult); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001) (noting that employment discrimination claims are harder for plaintiffs to win than virtually any other kind).

47. See EEOC, EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES (2009), <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>.

48. See Gina Kolata, *Training Through Pregnancy To Be Marathon’s Fastest Mom*, N.Y. TIMES, Nov. 3, 2007, at A1.

49. See Deborah L. Brake, *The Invisible Pregnant Athlete and the Promise of Title IX*, 31 HARV. J.L. & GENDER 323, 324 (2008).

paid to the effects of work on pregnancy earlier in the twentieth century,<sup>50</sup> only in the past few decades have scientists started studying the issue in a systematic and rigorous way.

Medical experts now agree that there is no inherent conflict between pregnancy and paid work.<sup>51</sup> Indeed, most pregnant women work, and most working women will become pregnant.<sup>52</sup> As discussed above, many of these women will work throughout their pregnancies and return to work soon after giving birth. Yet, despite the ability of many or even most pregnant women to engage in paid labor, pregnancy does sometimes impose real, if temporary, limitations on a woman's working capacity.

In 1977, the American College of Obstetrics and Gynecology (ACOG), in conjunction with the National Institute for Occupational Safety and Health (NIOSH), published *Guidelines on Pregnancy and Work*, its first attempt at providing science-based recommendations to guide obstetricians.<sup>53</sup> The bottom line embraced the ability of most pregnant women to engage in paid work:

The normal woman with an uncomplicated pregnancy and a normal fetus in a job that presents no greater potential hazards than those encountered in normal daily life in the community may continue to work without interruption until the onset of labor and may resume working several weeks after an uncomplicated delivery.<sup>54</sup>

Seven years later, in 1984, the Council on Scientific Affairs (CSA) also issued a formal report, which noted that “[t]he impact of pregnancy on a worker's ability to perform her job has only recently become an area considered suitable for scientific inquiry.”<sup>55</sup> It thus cautioned “against accepting the traditional standard assumptions about pregnancy as fact.”<sup>56</sup> The Council expressly

50. Alice Kessler-Harris notes, for example, that “Dr. Alice Hamilton, who became the first female faculty member of the Harvard Medical School in 1911, began her career by looking into the effect of industrial poisons such as lead on pregnant women.” KESSLER-HARRIS, *supra* note 11, at 107.

51. See L. Remez, *Both Paid and Unpaid Work During Pregnancy Have Little Independent Effect on Birth Weight*, 2 FAM. PLAN. PERSP. 278, 279 (1990) (summarizing a study concluding that “in the absence of known environmental hazards, there is no evidence that ‘work per se during pregnancy interferes with fetal growth’”); see also M. J. Saurel-Cubizolles & M. Kaminski, *Work in Pregnancy: Its Evolving Relationship with Perinatal Outcome (A Review)*, 2 SOC. SCI. MED. 431, 438 (1986) (surveying studies on pregnancy and work and noting that “most recent surveys have found pregnancy outcome more favorable for working women”).

52. See *supra* text accompanying notes 10–31.

53. AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *GUIDELINES ON PREGNANCY AND WORK*, PUB. NO. 78-118 (1977) (written by contract for and with the National Institute for Occupational Safety and Health).

54. *Id.* at 12 (stating that the “goal of medical management is to counteract or minimize risks to the mother or fetus, enabling her to remain on the job without concern for as much of the period of pregnancy as possible”).

55. Council on Scientific Affairs, *Effects of Pregnancy on Work Performance*, 251 J. AM. MED. ASS'N 1995, 1995 (1984).

56. *Id.*



derided traditional recommendations regarding work during pregnancy as evidence that “few of our standard medical beliefs about the physical and emotional characteristics of pregnancy have any scientific basis.”<sup>57</sup> CSA then issued recommendations based on “fledgling” but “scientific” data about the impact of pregnancy on work. It concluded, ultimately, that women without unusual complications “should be able . . . to continue productive work until the onset of labor.”<sup>58</sup> But CSA cautioned that the determination of a pregnant woman’s ability to work “should be made on a case-by-case basis” considering “the types of activities and tasks the job requires, the general physical condition of the employee, and the length of gestation.”<sup>59</sup> In addition to the general recommendation on work, the report provided guidelines about which work-related activities could continue throughout pregnancy and which should cease at some specified prior point. For example, the guidelines state that secretarial and professional jobs can generally be continued to the end of pregnancy, while prolonged standing should be curtailed after the twenty-fourth week of pregnancy and repetitive lifting of more than fifty pounds should be stopped after the twentieth week.<sup>60</sup>

These agencies were prodded to adopt formal guidelines in order to aid doctors in formulating science-based clinical recommendations for their pregnant working patients. As one author noted in 1979, “It is primarily the obstetrician to whom the worker poses the questions pertinent to this relationship between work and health during pregnancy, but because of his limited knowledge and, until recently, lack of concern, he often does not provide her with satisfactory answers to assist her in decision-making as to her continued employment.”<sup>61</sup> Wendy Chavkin cites a study from the late 1970s of family medicine doctors in an industrialized area of New York that revealed limited knowledge or interest in the interaction between their patients’ pregnancies and their jobs: “Only 25 percent of these physicians obtained occupational histories from their pregnant patients; 65 percent offered no information to their patients about the reproductive risks associated with work conditions; 25 percent were not aware themselves that certain substances commonly used in industrial settings can be hazardous to reproduction.”<sup>62</sup>

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57. *Id.*

58. *Id.* at 1995, 1997. The types of complications that may be “disabling for further work” include “preeclampsia, premature rupture of the membranes, vaginal bleeding, or threatened abortion.” *Id.* at 1997.

59. *Id.* at 1996–97.

60. *Id.* at 1996.

61. Jacqueline Messite, *Guidelines on Pregnancy and Work Developed by the American College of Obstetrics and Gynecology*, 2 J. ENVTL. PATHOLOGY & TOXICOLOGY 319, 320 (1979).

62. Wendy Chavkin, *Walking a Tightrope: Pregnancy, Parenting, and Work*, in DOUBLE EXPOSURE: WOMEN’S HEALTH HAZARDS ON THE JOB AND AT HOME 196, 200 (Wendy Chavkin ed., 1984) (citing Susan Pincus, *Reproductive Hazards in the Workplace: The Possible Role of the Family Physician*, THE N.Y. FAMILY PHYSICIAN).



Despite the difficulties in conducting controlled studies of pregnant women,<sup>63</sup> there have been some significant advances in scientific knowledge related to the interrelationship between pregnancy and work since these initial science-based guidelines were issued. It is still not possible to generalize very effectively about the capacities of or risks to pregnant women at work, but we can better identify the types of conflicts most likely to surface when pregnant women work.

Conflicts between pregnancy and work run both ways—pregnancy can interfere with job performance and job performance can interfere with healthy pregnancy. The effects on job performance stem largely from the inevitable physical changes that accompany a woman's pregnancy, such as weight gain, a shifting center of gravity, a loss of balance, and unstable joints.<sup>64</sup> “[P]regnancy for many women restricts their ability to climb ladders, poles, scaffolding, and stairs; lift or move heavy objects; run or walk quickly; or stretch to reach things. During pregnancy, especially during the later stages, women may be unable, therefore, to perform job functions that require these physical abilities.”<sup>65</sup> In addition, many pregnant women experience back pain that makes certain tasks uncomfortable, even if not impossible.<sup>66</sup> These changes can affect a woman's ability to perform a wide variety of job-related tasks, either because she is physically unable to do them or is unwilling to risk the potential consequences to maternal or fetal health.<sup>67</sup> But these conflicts are obviously variable. The ACOG/NIOSH guidelines note:

Tolerance of strenuous exertion, such as lifting, pulling, pushing or climbing, will vary widely, depending on differences in the women's physical fitness and strength, the load handled, and the environment. The pregnant woman may be small, large, strong, or weak. Her strength, balance, agility and internal burdens change from month to month. Packages or loads also vary widely in size, shape, and consistency, from a bale of towels to a case of food,

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63. See, e.g., Lenore J. Launer et al., *The Effect of Maternal Work on Fetal Growth and Duration of Pregnancy: A Prospective Study*, 9 BRIT. J. OBSTETRICS & GYNECOLOGY 62, 62–63 (1990) (noting “important pitfalls” that “affect the interpretation of studies on the effect of maternal work on birth outcome”).

64. For a comprehensive description of pregnancy's physical effects, see Wendy Chavkin, *supra* note 62, at 196–202; see also Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 3–8 (1995) (discussing scientific research about the maternal and fetal hazards in the workplace); Jeannette A. Paul et al., *Work Load and Musculoskeletal Complaints During Pregnancy*, 20 SCANDINAVIAN J. WORK, ENV'T & HEALTH 153, 156–57 (1994) (noting the effect of the hormone relaxin on joint stability during pregnancy).

65. Calloway, *supra* note 64, at 5.

66. See, e.g., Paul et al., *supra* note 64, at 157 (noting that “[h]alf of pregnant women have low-back pain at some time during pregnancy”).

67. See, e.g., J. A. Nicholls & D. W. Grieve, *Performance of Physical Tasks in Pregnancy*, 35 ERGONOMICS 301, 301, 304 (1992) (finding that pregnant women had more difficulty performing thirty-two of forty-six ordinary tasks).

or a patient in a nursing home. The job may or may not permit modification of intensity, frequency, and pattern of its physical tasks.<sup>68</sup>

Certain workplace policies may also be more difficult for pregnant women to satisfy, even if they were to disregard potential hazards to themselves or their fetuses. A no-leave policy, for example, is virtually impossible for a pregnant woman to adhere to, given that childbirth necessitates time away from work.<sup>69</sup> But other policies may be burdensome as well, such as those restricting the number or timing of bathroom breaks, setting an inflexible start time for work, or prohibiting eating or drinking during non-break work time.<sup>70</sup>

In addition to the effects of pregnancy on job performance, work can have an adverse impact on pregnancy outcomes—both maternal and fetal—as well. Pregnant women, their fetuses, or both face three types of potential danger in the workplace: hazardous environmental conditions, contraindicated physical movements, and adverse working conditions.<sup>71</sup> First, certain environmental conditions may make work hazardous to pregnant women, including exposure to “hazardous chemicals, gas, dust, fumes, radiation, or infectious disease.”<sup>72</sup> Exposure to excessive heat in early pregnancy can increase the risk of neural tube defects in the fetus. A study of women working in hospital laboratories, for example, showed an association between exposure during early pregnancy to certain commonly used chemicals and both miscarriage and lower birth weight.<sup>73</sup> These exposures seem most likely to be dangerous during the early phases of

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68. AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *supra* note 53, at 34.

69. For discussion of the legal treatment of no-leave policies, see *infra* subsection IV.A.3.

70. See Calloway, *supra* note 64, at 6–7; Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 5 OME. L. REV. 225, 250 (1998) (noting that even uncomplicated “pregnancies involve a certain level of discomfort that will interrupt the workplace’s daily routines” and generate the need for “frequent breaks to walk around, use the rest room, or eat snacks”); see also, e.g., *Maldonado v. U.S. Bank*, 186 F.3d 759, 767 (7th Cir. 1999) (noting pregnant workers’ “need to take more frequent snack and restroom breaks and the need to take some time off, at the very least, to give birth” (citing Greenberg, *supra*, at 250)); *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994) (involving retail salesperson who needed to start her shift later because of morning sickness); *Gudenkauf v. Stauffer Commc’ns*, 922 F. Supp. 465 (D. Kan. 1996) (challenging policies that restricted the plaintiff’s ability to walk away from her desk, eat at her desk, and take short breaks, which she claimed posed a hardship because of her pregnancy).

71. Cf. Chamberlain, *supra* note 25, at 1070–72 (summarizing chemical, physical, and biological hazards pregnant women potentially face at work).

72. UNIV. OF MICH. HEALTH SYS., WORKING DURING PREGNANCY (2009), [http://www.med.umich.edu/1libr/wha/wha\\_work\\_wha.htm](http://www.med.umich.edu/1libr/wha/wha_work_wha.htm).

73. Helena Taskinen et al., *Laboratory Work and Pregnancy Outcome*, 36 J. OCCUPATIONAL MED. 311, 311 (1994); see also A. D. McDonald et al., *Fetal Death and Work in Pregnancy*, 45 BRIT. J. INDUS. MED. 148, 156 (1988) (finding an excess rate of late miscarriages and stillbirths for “operating room nurses, radiology technicians, and agricultural and horticultural workers,” suggestive of the “possibility of some fetotoxic agent or agents in these occupations”); M. J. Saurel-Cubizolles et al., *Work in Operating Rooms and Pregnancy Outcome Among Nurses*, 6 INT’L ARCHIVES OF OCCUPATIONAL & ENVTL. HEALTH 235, 236 (1994) (finding higher rates of spontaneous abortion among women who worked in an operating room while pregnant or were exposed to anesthetic gases, formol, and ionizing radiation during early pregnancy).

pregnancy. Perhaps ironically, the “peak physiological efficiency that characterizes pregnancy may be a double-edged sword, magnifying a pregnant woman’s effective exposure to environmental hazards.”<sup>74</sup> As Wendy Chavkin explains, a pregnant woman is likely, for example, to inhale more of a dangerous gas because of changes in her respiratory function, to absorb more of an inhaled gas into fatty tissue because of greater blood flow, to absorb more fat-soluble toxins because of increased fatty tissue, and to eliminate toxins from her blood stream more slowly because of the greater proportion of fat.<sup>75</sup>

Second, the same physical movements that are difficult for pregnant women to perform can be associated with adverse consequences when they are performed without modification.<sup>76</sup> Studies have also shown that increased physical workload can result in a greater likelihood of an adverse pregnancy outcome as well as pain or injury to the woman.<sup>77</sup> Finally, there may be adverse effects from job conditions like irregular hours, shift work, or psychological stress.<sup>78</sup> Some studies have found that working a night shift poses a risk for pregnant women.<sup>79</sup> Although there is still much more to be learned about the effects of

74. See Chavkin, *supra* note 62, at 199.

75. *Id.* at 198–99.

76. See, e.g., Calloway, *supra* note 64, at 14–15 (citing studies); cf. Paul et al., *supra* note 64, at 155 (noting the variation among women, individually and across different cultures, in their “willingness and motivation to perform activities that can harm herself or her unborn child”).

77. See, e.g., Launer et al., *supra* note 63, at 68 (finding that “high levels of physical demand both at home and in the workplace adversely affected birthweight”); Tuula Nurminen et al., *Physical Work Load, Fetal Development, and Course of Pregnancy*, 1 5SCANDINAVIAN J. WORK, ENV’T & HEALTH 404, 412–13 (1989) (finding association between certain types and intensities of physical effort at work and adverse pregnancy outcomes but also noting the need for further research); cf. Talat J. Hassan et al., *Excessive Physical Work During Pregnancy and Birth Weight*, 1 6ASIA-OCEANIA J. OBSTETRICS & GYNECOLOGY 17, 19 (1990) (finding, in a study of the effect of excessive physical work during pregnancy on birth weight, that the “margin of safety is great for ordinary work,” but “potential effects on the fetus are manifested if extreme work is done as seen in this study”); Paul et al., *supra* note 64, at 153 (noting frequency of “musculoskeletal complaints” among pregnant women and work postures that might aggravate them).

78. See, e.g., Maureen Hatch et al., *Do Standing, Lifting, Climbing, or Long Hours of Work During Pregnancy Have an Effect on Fetal Growth?*, 8 EPIDEMIOLOGY 530, 535 (1997) (finding, as other studies have, that “a shorter work week during pregnancy appears to be advantageous for the fetus”); D. Hollander, *Improving Work Situations During Pregnancy May Help Improve Outcome*, 3 2INT’L FAM. PLAN. PERSPS. 156, 156 (2006) (concluding that “the odds that an infant was small for gestational age increased steadily with the number of risky conditions present at the beginning of pregnancy; they were 30% higher among women with 4–6 conditions than among those with none” (internal citations omitted)); cf. Lis Wiehl, *Red Door Salons: Red Faced or Right?*, FOX NEWS, Aug. 20, 2008, <http://www.foxnews.com/story/0,2933,407202,00.html> (reporting on employee’s lawsuit against Elizabeth Arden for refusing to allow her to deviate from the mandatory sixty-hour work week when reduced hours were necessitated by pregnancy complications).

79. See, e.g., Claire Infante-Rivard et al., *Pregnancy Loss and Work Schedule During Pregnancy*, 4 EPIDEMIOLOGY 73, 73–74 (1993) (finding, based on a study of 331 pregnant women, that “women who always worked evenings or nights were at a substantially higher risk of pregnancy loss compared with women who were fixed day workers”). But see Gösta Axelsson et al., *Outcome of Pregnancy in Relation to Irregular and Inconvenient Work Schedules*, 4 6BRIT. J. INDUS. MED. 393, 397 (1989) (concluding that their study “did not support the hypothesis that night work is associated with an increased risk of miscarriage”).

work on pregnancy,<sup>80</sup> workplace accommodations can be used to eliminate or reduce many known and potential dangers. An accommodation can make the job easier for the pregnant woman to perform or make the pregnant woman or her fetus safer while performing the job. The law regarding pregnancy accommodations is discussed in section IV.A below.

## II. WOMEN'S EQUAL CITIZENSHIP

Pregnancy discrimination law, like most contemporary women's rights issues, has developed under the framework of equality. But "equality" is hard to define and thus hard to measure, and disagreements over its proper definition have led to significant shortcomings in legal protection for pregnant workers. Despite a formal commitment to equality of the sexes in American constitutional and statutory law since the 1970s, many institutions, as well as aspects of women's private lives, remain deeply gendered. It is tempting to see equality in gender neutrality or in formal mandates of equal treatment. Yet, as the longstanding feminist debate about the need for a more substantive definition of equality reveals, formal equality can leave women as a group behind by failing to account for, among other things, sex-based differences. Given disputes about its proper definition, equality provides at least a partially unsatisfactory benchmark for measuring an important bottom-line: whether women who formally possess equal rights are actually full and equal participants in society.

This Article thus turns to full or equal "citizenship" as a standard by which to evaluate pregnancy discrimination law. Though itself a contested concept,<sup>81</sup> citizenship provides a substantive framework that can be used as a benchmark for assessing women's progress towards equality generally, as well as for critiquing current law's treatment of pregnant women at work.

### A. THE CITIZENSHIP FRAMEWORK

The notion of citizenship is a broad one. Though certainly used to describe one's legal status or nationality,<sup>82</sup> "citizenship" is also used more broadly to connote the rights and benefits that accrue to full members of society.<sup>83</sup> "Citizenship," in the words of T.H. Marshall, "is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to

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80. For example, a recent study found that working at all after thirty-six weeks is associated with a four-fold increase in the risk of a first-time cesarean delivery. Sylvia Guendelman et al., *Maternity Leave in the Ninth Month of Pregnancy and Birth Outcomes Among Working Women*, 19 *WOMEN'S HEALTH ISSUES* 30, 33 (2009).

81. See, e.g., Barbara Hobson & Ruth Lister, *Citizenship*, in *CONTESTED CONCEPTS IN GENDER AND SOCIAL POLITICS* 23, 23 (Barbara Hobson et al. eds., 2002) (discussing the debate over "citizenship").

82. See JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 4 (1991) ("Citizenship as nationality is the legal recognition, both domestic and international, that a person is a member, native-born or naturalized, of a state.").

83. See, e.g., Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 *UCLA L. REV.* 1161, 1185 (2008).

the rights and duties with which the status is endowed.”<sup>84</sup> The dual meaning of citizenship is reflected in the rhetorical “second-class citizen—someone who is denied full rights and recognition of membership in society” despite having formal citizenship status.<sup>85</sup>

Perhaps because of its broad “emancipatory potential,”<sup>86</sup> the citizenship framework has been widely used in social theory and progressive politics.<sup>87</sup> As Linda Bosniak notes, “[p]olitical and legal thought today are suffused with talk of citizenship;” it is used to express “the highest fulfillment of democratic and egalitarian aspirations.”<sup>88</sup> However commonly the concept is deployed though, it still has its critics. Modern invocations of citizenship have been criticized, for example, for focusing exclusively on the rights attendant to citizenship rather than its demands or obligations.<sup>89</sup> This criticism seems fair, though not necessarily a reason to avoid a rights-based use of the citizenship framework. It counsels instead for a broader conception of citizenship or a sequential consideration of the obligations that follow rights.<sup>90</sup>

The citizenship framework has been perhaps most severely criticized because of its potential for exclusion.<sup>91</sup> Some feminists, critical race theorists, and immigration scholars have argued that “citizenship” should not be invoked in progressive movements because it is an “inherently exclusionary concept,” operating to the detriment of some of society’s most vulnerable members.<sup>92</sup> While the potential for exclusion is real, the citizenship framework remains useful, uniquely so in some sense, in the context of gender.

One way to limit the potentially exclusionary effects of the citizenship framework is to detach the notion of substantive citizenship from formal citizenship status. The term “citizenship” can be used to connote belonging,

84. T.H. MARSHALL, *CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT: ESSAYS BY T.H. MARSHALL* 84 (1964); *see also* Linda Bosniak, *Citizenship and Work*, 27 N.C. J. INT’L L. & COM. REG. 497, 500 (2002) (“Equal citizenship is understood to entail enjoyment of various kinds of rights—civil rights, political rights, social rights, and cultural rights—but all of these rights are described in the language of citizenship. Enjoyment of these rights is viewed as a necessary condition for the enjoyment of equal citizenship in our society.”).

85. Bosniak, *supra* note 84, at 500.

86. Jennifer Gordon, *Transnational Labor Citizenship*, 8 OS. CAL. L. REV. 503, 513 (2007).

87. *See, e.g.*, Linda Bosniak, *Universal Citizenship and the Problem of Alienage*, 9 4NW. U. L. REV. 963, 966 (2000) (noting that “the subject of citizenship has recently enjoyed a remarkable renaissance in Anglo-American scholarly thought”).

88. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 1 (2006).

89. *See, e.g.*, RUTH LISTER, *CITIZENSHIP: FEMINIST PERSPECTIVES* 21–23 (2d ed. 2003); *see also* Bosniak, *supra* note 87, at 967 (noting that “newer literature is expressly critical of approaches that reduce citizenship to a ‘mere status’ or collection of rights”).

90. We should consider, for example, whether women’s right to work comes with an obligation to engage in paid work.

91. *See* Gordon & Lenhardt, *supra* note 83, at 1188–89 (considering critiques of “citizenship” as a framework for assessing societal inclusion).

92. *Id.*; LISTER, *supra* note 89, at 43 (“Inclusion and exclusion represent the two sides of citizenship’s membership coin. Whereas much of the literature on citizenship has traditionally focused on its inclusionary face, more radical contemporary writings tend to portray citizenship as a force for exclusion.”).

participation, or membership in society more generally. As an aspiration, it can be applied to all members of society, regardless of their formal citizenship status. Indeed, central commitments to equality in the United States, embodied in the Equal Protection Clause and important federal antidiscrimination laws, are guaranteed to all residents regardless of formal citizenship status.<sup>93</sup> We can thus draw on the citizenship framework as a proxy for measuring the integration of marginalized or disadvantaged groups into society without limiting its vision to legal citizens. Ruth Lister concludes: “While not denying the ways in which legal definitions of citizenship and citizenship practices can exclude . . . outsiders and act more generally as a disciplinary force, as an ideal it can also provide a potent weapon in the hands of disadvantaged and oppressed groups of insiders.”<sup>94</sup> If we are careful to distinguish between the two meanings of citizenship, both can be used.<sup>95</sup>

This distinction is reinforced by scholars who suggest alternative language to capture the notion of substantive citizenship. Kenneth Karst, for example, articulates the concept as “belonging”—an insistence that “the organized society treat each individual as a person, one who is worthy of respect, one who ‘belongs.’”<sup>96</sup> Judith Shklar ascribes “standing” to the range of rights and benefits due each member of society.<sup>97</sup> Many other scholars have also used alternative terminology to describe their vision of an inclusive society in which all members have the opportunity to make use of their natural talents and abilities and to participate in public life.<sup>98</sup>

Even with the potential for exclusion, it would be a mistake to abandon a concept that has figured prominently, both rhetorically and substantively, in the struggle for gender equality. As an historical matter, women’s rights advocates

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93. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–92 (1984) (holding that “employees” includes documented and undocumented aliens for purposes of applying the National Labor Relations Act); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (holding that the Equal Protection Clause applies to legal and illegal aliens); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (“We agree that aliens are protected from discrimination under [Title VII].”).

94. LISTER, *supra* note 89, at 5.

95. See, e.g., BOSNIAK, *supra* note 88, at 120–21 (discussing ways to resolve tension between internal and external notions of citizenship).

96. Kenneth L. Karst, *The Supreme Court 1976 Term: Foreword: Equal Citizenship Under the Fourteenth Amendment*, 9 HARV. L. REV. 1, 6 (1977). See generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

97. See SHKLAR, *supra* note 82, at 2–3.

98. Gretchen Ritter, for example, uses “citizenship” to describe only one’s formal legal status and “civic membership” to refer to the “broader political, legal, and social meanings that attach to one’s place within the polity.” See GRETCHEN RITTER, *THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* 6 (2006); see also Jennifer Gordon & R. A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2494–95 (2007) (arguing that “belonging” requires “the realization by individuals and groups of genuine participation in the larger political, social, economic, and cultural community”).



in the United States have long pitched their arguments in citizenship terms.<sup>99</sup> The Seneca Falls platform, for instance, used the language of the Declaration of Independence to assert that female citizens should have the same rights as male citizens.<sup>100</sup> Much women's rights litigation, from the late nineteenth century until the 1970s, pushed this citizenship-based theory of rights, though often without success. A woman barred from voting in an 1872 election, for example, challenged a Missouri law restricting suffrage to men by arguing that all *citizens* must be eligible to vote.<sup>101</sup> The Supreme Court rejected her claim, concluding, in Judith Resnik's words, that women "were citizens but citizens of a special sort, possessing not all of the attributes of citizenship that men had."<sup>102</sup> Arguments for other women's rights such as jury service and equal employment opportunity likewise drew on the language and notion of full citizenship.<sup>103</sup> Early advocates were rebuked by courts and policymakers who viewed women's physical and social differences as sufficient justification for differential treatment of two groups of citizens. Yet the claim to full citizenship—beyond formal status—defined the early women's rights movement. Modern citizenship-based claims thus draw on a long tradition, one that continues to resonate today.

Later generations of women's rights advocates continued to invoke the concept—although not necessarily the precise language—of full citizenship to challenge exclusion and to demand rights.<sup>104</sup> As Alice Kessler-Harris has written, as early as the 1950s,

[w]omen asked for equal access to employment not as a special favor to help them maintain their fitness to perform home roles, but as their right as members of a free-market economy that theoretically offered the opportunity to compete to all who wished to try. They defended their request in the language of individualism, insisting that every person had a responsibility to live up to her own capacities.<sup>105</sup>

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99. See, e.g., Joanna Grossman, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 4 6STAN. L. REV. 1115, 1141 (1994) (noting the centrality of "citizenship" arguments in women's fight for equal service on juries).

100. See DECLARATION OF SENTIMENTS, *supra* note 2; FLEXNER, *supra* note 4.

101. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

102. Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1739 (1991).

103. See generally Grossman, *supra* note 99. Alternative arguments, particularly those rooted in gender difference, were also employed, often alongside citizenship-based arguments. See *id.* at 1145–55.

104. Other civil rights movements have made similar use of the notion of citizenship. Ruth Lister has pointed out that the disability rights movement in the United Kingdom has "presented itself as a movement for full citizenship rights" and that the gay and lesbian rights movement "has also begun to deploy the language of citizenship." LISTER, *supra* note 89, at 5–6; see also T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 6 9FORDHAM L. REV. 1689, 1690 (2001) (describing the conventional narrative of citizenship as one in which "the guarantee of 'equal citizenship' can identify and invalidate forms of discrimination now deemed to impose a second-class citizenship (such as sexual orientation, disability, and maybe even poverty)").

105. KESSLER-HARRIS, *supra* note 11, at 310.

While citizenship is not as central today in women's rights advocacy or litigation, the notion of avoiding "second-class citizenship" continues to animate courts and policymakers. Legislative history of antidiscrimination laws is replete with calls to end the lesser citizenship status of women, people of color, the disabled, and other historically disadvantaged groups. Justice Ginsburg invoked the idea of equal citizenship explicitly and powerfully in *United States v. Virginia*, in which the Court struck down the Virginia Military Institute's longstanding male-only admissions policy.<sup>106</sup> There, she wrote that "[n]either federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."<sup>107</sup> We thus cannot discount the powerful connection between citizenship and women's rights, which ultimately outweighs the concerns about exclusion.

#### B. DIMENSIONS OF CITIZENSHIP

The reliance on citizenship as a substantive measure requires some attention to its multiple dimensions. In his classic exposition, T.H. Marshall divided substantive citizenship into three parts: civil, political, and social.

The civil element is composed of the rights necessary for individual freedom—liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice . . . . By the political element I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. . . . By the social element I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society.<sup>108</sup>

Marshall claimed that these dimensions of citizenship develop in this particular order.<sup>109</sup> The history of women's rights in the United States follows this pattern—whether or not that is always the case—and bears out the idea that different strands of the citizenship bundle can be acquired at different times.<sup>110</sup> Women were never denied legal citizenship solely on the basis of their sex in

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106. 518 U.S. 515, 519 (1996).

107. *Id.* at 532.

108. *See* MARSHALL, *supra* note 84, at 71–72.

109. *Id.* at 74–78 (describing the evolution of these parts of citizenship).

110. *See* Gordon & Lenhardt, *supra* note 83, at 1185 ("Although at first glance citizenship appears to function as a unitary package, upon closer inspection it is clear that these aspects of citizenship can and do operate independently of each other."); *cf.* *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (observing that the "lack of political equality" demonstrated by the denial of suffrage to women "[was] not of itself decisive" on the question whether the state could impose restrictive hours legislation on the basis of sex).

this country,<sup>111</sup> but they went more than a century without the central political right of suffrage. The ruling in *Minor v. Happersett* that not all citizens must be eligible to vote aptly illustrates this point.<sup>112</sup> Married women were long deprived of property ownership and contract rights,<sup>113</sup> disabilities that were gradually removed by the married women's property acts.<sup>114</sup> Even after passage of the Nineteenth Amendment, women were openly denied the equal right to serve on juries and equal access to the workplace.<sup>115</sup>

### C. SOCIAL CITIZENSHIP

Marshall spoke of his final dimension—social citizenship—as encompassing “a modicum of economic welfare and security.”<sup>116</sup> William Forbath has argued that the “social citizenship tradition” in the United States has “centered on decent work and livelihoods, social provision, and a measure of economic independence and democracy.”<sup>117</sup> The right to work has been an important, though not the exclusive,<sup>118</sup> component of the struggle for social citizenship.<sup>119</sup> Vicki Schultz notes that “[a]t crucial times in our history, including the New Deal, the labor movement, the civil rights movement, and strands of the women's movement have championed an affirmative conception of the right to

111. Women did lose their U.S. citizenship when they married non-citizens until the Cable Act was passed in 1922. See LINDA KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES* 42 (1998).

112. See 88 U.S. (21 Wall.) 162, 178 (1874).

113. Under the principles of coverture, a woman's legal identity was subsumed by her husband's during marriage. See HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 93 (2002).

114. See generally Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359 (1983).

115. See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 69 (1961) (upholding Florida's jury selection system that granted automatic exemptions to women based on assumptions about their family responsibilities and availability for service); *Goesaert v. Cleary*, 335 U.S. 464, 466–67 (1948) (upholding Michigan's prohibition on female bartenders unless the bar was owned by a woman's husband or father). See generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1012 (2002) (“Soon after ratification, the judiciary moved to repress the structural significance of women's enfranchisement, by reading the Nineteenth Amendment as a rule concerning voting that had no normative significance for matters other than the franchise.”); see also Grossman, *supra* note 99, at 1116 (concluding that women's equal right to serve on juries was not cemented until *J.E.B. v. T.B.*, 511 U.S. 127 (1994)).

116. MARSHALL, *supra* note 84, at 72.

117. See William E. Forbath, *Caste, Class, and Equal Citizenship*, 9 MICH. L. REV. 1, 1 (1999).

118. The concept of social citizenship has also been important in the debate over constitutional welfare rights. See, e.g., William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 6 FORDHAM L. REV. 1821 (2001); Karst, *supra* note 96, at 40–41; Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563 (1996).

119. See, e.g., MARSHALL, *supra* note 84, at 75 (“In the economic field the basic civil right is the right to work, that is to say the right to follow the occupation of one's choice in the place of one's choice, subject only to legitimate demands for preliminary technical training.”); Bosniak, *supra* note 84, at 501 (describing conventional accounts of citizenship in which “the relationship of work to citizenship is one of necessity; a person needs to have access to decent work in order to enjoy equal citizenship”); Forbath, *supra* note 117, at 12 (“[T]he social meaning of equal citizenship must include the opportunity to earn a livelihood that enables one to contribute to supporting oneself and one's family in a minimally decent fashion.”).

work as the basis for a robust, equal social citizenship.”<sup>120</sup> Unlike civil and political citizenship, however, which are consistent with the liberal theory tradition of “negative rights,” social citizenship entails not only the removal of state-sponsored barriers to participation, but also more affirmative efforts to promote inclusion of historically marginalized or disadvantaged groups.<sup>121</sup>

Women’s struggle for equal social citizenship emerged at scattered points in history but began in earnest in the 1960s. Greater access to work was a central component of second-wave feminism, which targeted a wide range of exclusionary policies and practices that hampered women’s employment opportunities.<sup>122</sup> Advocates won key legislative successes like the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. They also scored significant litigation victories to establish a broad scope for newly passed antidiscrimination laws,<sup>123</sup> rulings which dovetailed the Supreme Court’s embrace of a constitutional right of sex equality.<sup>124</sup> These successes, along with an evolution of social attitudes about women’s proper place, opened the American workplace to women, a dramatic step in their quest for social citizenship.<sup>125</sup>

Many scholars have explored work and equal citizenship, revealing a complex and multi-faceted interrelationship.<sup>126</sup> Work facilitates political participa-

120. See Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1888 (2000).

121. See *id.* at 1938 (arguing that “[p]aid work has the potential to become the universal platform for equal citizenship it has traditionally been imagined to be, but only by attending to the specific needs of various social groups and individuals to ensure participation parity”).

122. See *infra* text accompanying notes 222–27. Cf. Joel F. Handler, *The “Third Way” or the Old Way*, 48 U. KAN. L. REV. 765, 765 (2000) (describing the 1960s and 1970s as “a period of ‘social citizenship’”).

123. See, e.g., *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (invalidating employer’s fetal-protection policy, which prohibited non-sterile women from holding jobs involving lead exposure in a battery manufacturing plant); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–40 (1989) (interpreting Title VII to prohibit employment decisions motivated by sex-role stereotyping), *superseded on other grounds by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., 42 U.S.C.); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66–67 (1986) (establishing that sexual harassment is an actionable form of intentional sex discrimination); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (establishing the “sex plus” theory of discrimination that can be used to challenge employment policies or decisions based on sex plus a neutral characteristic).

124. See *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating Alabama law providing that only husbands could be ordered to pay alimony); *Craig v. Boren*, 429 U.S. 190, 210 (1976) (invalidating Oklahoma’s sex-based drinking-age law); *Frontiero v. Richardson*, 411 U.S. 677, 678–79 (1973) (invalidating federal law presuming wives of servicemen to be dependent while requiring husbands of servicewomen to prove dependency in order to earn benefits); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (striking down Idaho law preferring male to female relatives as estate administrators).

125. The “opening” is demonstrated, among other ways, by the statistics cited in section I.A *supra*. Cf. Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 25 (1996) (noting that the ADA was premised on the goal of “equality of opportunity,” which “encompasses the opportunity to lead as valuable and satisfying a life as the rest of the population”).

126. There is also a connection between citizenship as a legal status and work. See, e.g., Bosniak, *supra* note 84, at 499.

tion rights by supporting the development of individual autonomy necessary to exercise them. As Ruth Lister argues, a primary justification for recognizing social rights as citizenship rights is because “they help to promote the effective exercise of civil and political rights by groups who are disadvantaged in terms of power and resources.”<sup>127</sup> Wage-earning is associated with independence, and independence with citizenship.<sup>128</sup> The workplace also provides a forum for exerting democratic influence. Cynthia Estlund argues that work provides “a significant deliberative forum” that facilitates individuals’ participation as citizens.<sup>129</sup> Judith Shklar argued that voting and earning are the two most important components of citizenship: “We are citizens only if we ‘earn.’”<sup>130</sup>

Work is important beyond its facilitation of democratic participation. Vicki Schultz has argued that “jobs create people” because they shape individuals’ behavior and self-conception.<sup>131</sup> Sociologists have long argued that work is intricately linked to self-identity,<sup>132</sup> but work also affects conceptions of others and standing in the community.<sup>133</sup> As Kenneth Karst has written, “[i]n our society, as much as anywhere else in the world, work is a means of proving yourself worthy in your own eyes and in the eyes of others.”<sup>134</sup> Paid work also has proven tangible benefits to the individual, including greater psychological well-being and economic security, and to society. There is little research on the well-being of pregnant female workers, but there is some evidence that they experience these benefits as well. One review study concluded that “several studies find that when working conditions are suitable, working during pregnancy is beneficial to the psychological well-being and financial status of the pregnant women.”<sup>135</sup> Finally, and most faithfully to Marshall’s conception of

127. LISTER, *supra* note 89, at 17.

128. See, e.g., ALICE KESSLER-HARRIS, *A WOMAN’S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 31–32 (1990).

129. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 53 (2000); see also LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 93 (2006) (noting that an “appeal to ‘social citizenship’ would accept the premise of the important link between work and citizenship, and would argue for a right to decent, satisfying work as a component of responsible self-government”); Eddie A. Jauregui, *The Citizenship Harms of Workplace Discrimination*, 40 COLUM. J.L. & SOC. PROBS. 347, 348 (2007) (summarizing literature on connection between citizenship and democratic or political citizenship and arguing that workplaces are the sites “where we learn about each other, work together, and exchange social and political views”).

130. See SHKLAR, *supra* note 82, at 67; see also MARSHALL, *supra* note 84, at 80 (arguing that those who needed the protection of the state were by definition not citizens; the poor were entitled to public subsidy as an *alternative* to citizenship rather than an incident of it).

131. See Schultz, *supra* note 120, at 1890.

132. See, e.g., ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 3 (1977) (arguing that “the job makes the person”).

133. See SHKLAR, *supra* note 82, at 63 (“It is in the marketplace, in production and commerce, in the world of work in all its forms, and in voluntary associations that the American citizen finds his social place, his standing, the approbation of his fellows, and possibly some of his self-respect.”).

134. Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 532 (1997).

135. Helen Pattison & Harriet Gross, *Pregnancy, Work and Women’s Well-Being: A Review*, 10 WORK & STRESS 72, 84 (1996).

social citizenship, work provides a link to economic security for individuals and their dependents.<sup>136</sup> Given these many benefits of paid work, it is not surprising that the social citizenship tradition has focused so intently on access to it.

#### D. SOCIAL CITIZENSHIP AND THE DEBATE OVER GENDER EQUALITY

Despite the concerted (and often successful) efforts feminists have deployed to increase women's access to the workplace,<sup>137</sup> it would be misleading to suggest that there is no disagreement among them about the importance of paid work or ambivalence about its centrality to social citizenship. In addition to scholars like Vicki Schultz who have argued persuasively about the value of paid work for women, recent popular press books, such as Linda Hirshman's *Get to Work* or Leslie Bennett's *The Feminine Mistake*, have taken up the mantle as well—imploring women to break the cycle of trading paid work for economic dependence.<sup>138</sup> But, at the same time, others have argued, also persuasively, that the tendency to valorize work narrowly reflects the perspective of white or upper/middle-class women. These critics have pointed out several ways in which the conventional account of work neglects the experiences, needs, and desires of other groups of women. Laura Kessler, for example, observes that “[w]ork has meant equal citizenship primarily for white, straight, economically privileged women and men; it has been a significant source of exploitation for women and men of color, lower-class whites, and gay people, many of whom have historically occupied the bottom rungs of our wage economy.”<sup>139</sup> Neil Gilbert aptly suggests that the benefits of work tend to be overstated because feminists who *write* about work tend to have relatively more

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136. See Forbath, *supra* note 117, at 16–17, 82–83, 90 (“Equality of worth, not in dollars but in the sense of having an opportunity to earn one’s livelihood, is essential.”); Karst, *supra* note 134, at 531, 534 (“Whatever other meanings work may bear, for most of us it is a crucial means of sustaining ourselves and our families.”); Schultz, *supra* note 120, at 1945–47.

137. See *supra* text accompanying notes 122–25; *infra* text accompanying note 191.

138. LESLIE BENNETTS, *THE FEMININE MISTAKE: ARE WE GIVING UP TOO MUCH?* at xxiii–xxiv (2007) (“It has become inescapably clear that choosing economic dependency as a lifestyle is the classic feminine mistake.”); LINDA R. HIRSHMAN, *GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD 2* (2006) (“Bounding home is not good for women and it’s not good for the society. The women aren’t using their capacities fully; their so-called choice makes them unfree dependents on their husbands.”).

139. Laura T. Kessler, *Transgressive Caregiving*, 3 FLA. ST. U. L. REV. 1, 72 (2005); see also, e.g., Laura T. Kessler, *Getting Class*, 5 BUFF. L. REV. 915, 918 (2008) (“[T]he emphasis on wage work as the most promising path to women’s liberation (rather than on a more robust welfare state, for example) also potentially underacknowledges the problem that safe, well-paid, fulfilling work may not be available for many women.”); Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983) (exploring the ways in which federal welfare policy both interferes with women’s equality in the wage labor market and devalues work at home); Deborah L. Rhode, *Response Essay: Balanced Lives*, 102 COLUM. L. REV. 834, 836 (2002) (rejecting “the premise that [paid] employment is always necessary or sufficient to a life well lived”); Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers’ Decisions About Work at Home and in the Market*, 4 SANTA CLARA L. REV. 1029, 1036–37 (2004) (“Advocacy of waged work as the principal means for women’s emancipation disregards the experiences of most women of color in particular. . . . Black women historically experienced work outside the home primarily as an aspect of racial subordination and the home primarily as a site of solace and resistance to white oppression.”); Michael Selmi &



satisfying and desirable jobs. He points out:

The voices of those in the privileged occupations speak most often of their own felicitous work experiences and their perceptions of the gratification that men in their circles reap from work. It is an authentic assessment based on a self-referential slice of reality, which fails to reflect the working lives of a large proportion of women and men in jobs marked by stress, tedium, and emotional exhaustion.<sup>140</sup>

Other feminists have critiqued the social citizenship tradition for its preoccupation with paid work and its failure to acknowledge the value or prevalence of care work done disproportionately by women.<sup>141</sup> Martha Fineman, among others, has warned against defining citizenship by reference to paid work, given that women shoulder substantially more of the burden of providing unpaid care and domestic work, regardless of whether they also engage in paid work.<sup>142</sup> This critique calls for greater recognition of “the importance of caregiving as a form of social contribution,”<sup>143</sup> which could take the form of greater governmental support for care work,<sup>144</sup> legal reforms to treat family work the same as paid labor,<sup>145</sup> or a reformulation of the citizenship tradition to make care work a “ground for conferring citizenship.”<sup>146</sup>

This alternative conception of social citizenship can be pursued either in conjunction with the approach described above—encouraging appreciation for both paid work *and* family care—or in lieu of it. There is, however, a tension in feminist scholarship about whether these are mutually exclusive or complemen-

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Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 *DUKE J. GENDER L. & POL'Y* 7 (2006) (bringing class issues into discussion of women and work).

140. NEIL GILBERT, *A MOTHER'S WORK: HOW FEMINISM, THE MARKET, AND POLICY SHAPE FAMILY LIFE* 113 (2008).

141. LISTER, *supra* note 89, at 23 (noting feminist critique of a conception of citizenship that exhibits “contemporary preoccupation with paid work obligations” and “tends to . . . discount[ care] as an expression of active citizenship responsibility”); McCLAIN, *supra* note 129, at 94 (identifying an “important limitation in the social citizenship tradition: its inattention to the gendered economy of care, that is women’s disproportionate responsibility for caregiving, and how this responsibility limited their full participation in the labor market and their access to forms of economic security tied to employment”).

142. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 280 (2004). See generally ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989). Data on current patterns of household work are available at Mothers and More, [http://mothersandmore.org/press\\_room/statistics.shtml](http://mothersandmore.org/press_room/statistics.shtml) (last visited Aug. 10, 2009).

143. McCLAIN, *supra* note 129, at 94.

144. See, e.g., *id.* (refocusing the historical tradition of social citizenship would “posit governmental responsibility to facilitate women’s and men’s participation in paid employment *and family work*” (emphasis added)). See generally FINEMAN, *supra* note 142.

145. Supporters of this approach have advocated for, among other things, permitting family caregivers to accrue social security benefits. See, e.g., ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 262–63 (2001); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 9 *NW. U. L. REV.* 1, 38–41 (1996).

146. Joan Tronto, *Care as the Work of Citizens: A Modest Proposal*, in *WOMEN AND CITIZENSHIP* 130, 131 (Marilyn Friedman ed., 2005).

tary goals. Ruth Lister explains this tension:

These [dilemmas] crystallize around the question: who is a social citizen? In other words, are women's claims to social citizenship rights best couched in the language of equality with men, around the 'male' model of citizen-the worker, or in the language of difference, around the 'female' model of citizen-the carer? Or is it possible to transcend the policy dilemma through a model of citizen the worker-carer, which embraces both women and men? More specifically, is the aim to change the nature of social citizenship rights so that earning is no longer privileged over caring in the allocation of these rights? Or is it to improve women's access to and position in the labour market so that they can compete on equal terms with men and can thereby gain the same employment-linked social citizenship rights?<sup>147</sup>

There is no easy resolution to these dilemmas. In my own view, there are costs to urging both accounts of social citizenship. The push to equalize paid and unpaid work as a means to women's equality risks recreating the separate spheres of ideology that feminists sought hard to overcome. The perception of women, in Vicki Schultz's words, as "inauthentic workers" is reinforced by models that assume different social roles for men and women and paid work obligations that suit those roles.<sup>148</sup> But regardless of whether we expand our vision of social citizenship for women, equal access to meaningful, paid work remains an essential component.

The concept of equal social citizenship can be used as both goal and "yardstick."<sup>149</sup> As a normative goal, it cannot be achieved without grappling with the problem of pregnant workers. Pregnancy presents a challenge for both feminist accounts of social citizenship because it often renders women temporarily incapable (or less capable) of performing their jobs, but not necessarily interested in converting their efforts to unpaid labor during or after pregnancy, even if society accords greater value to such work. They are thus denied equal social citizenship by the mere fact of pregnancy. When dealing with pregnant workers, and the potential conflicts between the physical effects of pregnancy and their jobs, the law must tend towards protecting their right to work despite potential temporary impairments. Yet, as explained in section IV.A, current law backs away from this task entirely.

### III. PREGNANCY DISCRIMINATION LAW: FROM EXCLUSION TO ACCESS

Legal protection against pregnancy discrimination at work was a 1970s invention and brought about a stark turnabout in the treatment of pregnant working women. An era of exclusion gave way to an era of access as a legal

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147. LISTER, *supra* note 89, at 167.

148. Schultz, *supra* note 120, at 1892–1919.

149. See Hobson & Lister, *supra* note 81, at 36.

regime that once permitted employers to bar pregnant women from the workplace with impunity was replaced with one that mandated pregnancy-blindness. This section will first consider the history of the exclusion of pregnant women from the workplace. It will then identify the key points in the development of contemporary pregnancy discrimination law in the twentieth century. Finally, it will focus on specific shortcomings of current law that compromise women's struggle for workplace equality and, in turn, for equal citizenship.

#### A. THE ERA OF EXCLUSION

Prior to the 1960s, there was no formal commitment in federal law to gender equality or even gender neutrality. Like women generally, pregnant women worked (or did not work) at the whim of states and employers, which could restrict their labor force participation for good reasons, bad reasons, or no reason at all. The idea of pregnant women doing paid work inspired a blend of reactions, from a paternalistic desire to protect them from the perils and demands of paid labor, to stereotypes about their physical capacity or willingness to service the "ideal worker" norm, to concerns about "lewdness" because pregnancy resulted from sex.<sup>150</sup> These very different concerns all militated in favor of excluding pregnant women partially or fully from the workforce. And, indeed, sex-differentiated employment policies—ranging from hiring criteria to working conditions to benefits—were commonplace. As Katharine Bartlett has noted, "[t]hat women may and do become pregnant is the most significant single factor used to justify the countless laws and practices that have disadvantaged women for centuries."<sup>151</sup>

In the workplace, pregnant women were certainly no better off than women generally. Employers that hired women sometimes excluded pregnant women or hindered their ability to work in ways that were unique to their condition. To the extent the law took account of women, it was primarily in the form of exclusionary or protectionist legislation, popular especially during the first part of the twentieth century. All women were potentially pregnant women, whose reproductive function needed to be carefully guarded and preserved, and states took it upon themselves to protect women's reproductive functions by imposing special limits on their working conditions.

The Supreme Court endorsed protectionist legislation for women in *Muller v. Oregon*, in which it upheld a 1903 state law restricting the number of hours women could work per day in factory or laundry jobs.<sup>152</sup> After an employer was fined ten dollars under this law for ordering a female employee to work one

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150. See generally Courtnei E. Molnar, "Has the Millenium Yet Dawned?": A History of Attitudes Toward Pregnant Workers in America, 1 2MICH. J. GENDER & L. 163, 170–76 (2005); see also LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 171–72 (2007).

151. Katharine T. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 6 2CAL. L. REV. 1532, 1532 (1974).

152. 208 U.S. 412, 423 (1908).

longer day, he challenged the law under *Lochner v. New York*, in which the Court had invalidated a similar law restricting the hours of all bakery employees on a theory of economic substantive due process.<sup>153</sup>

The defendant in *Muller* argued that Oregon could no more limit the number of hours a woman could work in a laundry than it could limit the number of hours a man could work in a bakery. The Court upheld the protectionist law, despite acknowledging that by the time this law was challenged, women in Oregon, married or single, possessed the same rights of contract and property ownership as men.<sup>154</sup> Equal rights of contract—civil citizenship, to use T.H. Marshall's typology—did not guarantee female workers identical treatment. Rather, a "woman's physical structure, and the functions she performs . . . justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."<sup>155</sup> The Court in *Muller* disassociated women's claims to citizenship and suffrage from the right to work on even terms, concluding that "political, personal, and contractual" equality would not change the protection required by "her physical structure and a proper discharge of her maternal functions."<sup>156</sup> Work, in other words, could be carried out only if consistent with a woman's primary functions of childbirth and childrearing.<sup>157</sup>

Oregon's concern was not simply with preserving women's physical capacity to reproduce, but also with their ability to fulfill the broader mandates that came with the deeply entrenched separate spheres ideology.<sup>158</sup> But certainly a core assumption underlying the Oregon law, and the Supreme Court's approval, was

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153. See 198 U.S. 45, 64 (1905). Alice Kessler-Harris notes that *Lochner* fueled the shift to sex-specific protective legislation: "Since the courts rejected the assertion that the general welfare demanded regulation for all workers, proponents moved to the position that women in their capacity as child bearers and rearers served the state's welfare in a special way." KESSLER-HARRIS, *supra* note 11, at 184.

154. *Muller*, 208 U.S. at 418.

155. *Id.* at 420.

156. *Id.* at 422.

157. The Wisconsin Supreme Court made this point quite explicitly in an 1875 case, in which it upheld the denial of admission to the first woman who applied to the state bar. *In re Goodell*, 39 Wis. 232 (1875). It was "wise" to exclude women from the legal profession because "[t]he law of nature destines and qualifies the female sex for the bearing and nurture of children of our race and for the custody of the homes of the world and their maintenance in love and honor." *Id.* at 245. The court conceded that some women might need employment, as "cruel chances of life . . . may leave women free from the peculiar duties of their sex," but concluded that "it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours." *Id.*

158. There were, of course, many other cases prior to 1970 in which courts permitted states or employers to treat women differently out of concern for safeguarding their reproductive capacity and home-and-hearth responsibilities. Justice Bradley's concurrence in *Bradwell v. Illinois*, in which he justified the exclusion of women from the Illinois state bar, is often quoted and illustrative of this type of reasoning. See 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.").

that for women work and reproduction are simply incompatible. The Court was heavily persuaded by the Brandeis brief, which highlighted

over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. . . . Perhaps the general scope and character of all these reports may be summed up in what an inspector for Hanover says: "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."<sup>159</sup>

Although the Court conceded that the brief cited to sources that "may not be, technically speaking, authorities," it viewed the special needs and limitations of pregnant and potentially pregnant workers to be "matters of general knowledge."<sup>160</sup> The Oregon law was upheld based upon a sweeping, and apparently constitutional, presumption of incapacity for pregnant and potentially pregnant women.

The ruling in *Muller* left in place laws and policies excluding women from certain occupations or limiting the terms upon which they could work in others, which were operative in almost half of the states.<sup>161</sup> It also fueled a new round of statutory enactments restricting women's work hours and cemented the normalcy of different rules for men and women at work. Alice Kessler-Harris notes that the "surprising absence of controversy about such legal prohibitions reveals the strength of popular beliefs in women's assigned roles."<sup>162</sup> Many commentators have pointed out, though, that women-only protectionist policies were not adopted across the board. As Deborah Rhode has noted, "sex-based protective labor legislation that prevailed throughout the first half of the twentieth century frequently 'protected' female employees out of jobs desirable to males," while safety concerns were "notably absent in discussions of women's far more grueling labor in farm and domestic settings."<sup>163</sup> They were concentrated, instead, in occupations with relatively higher pay that were not domi-

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159. *Muller*, 208 U.S. at 419 n.1.

160. *Id.* at 420–21.

161. *Id.* at 419 n.1.

162. KESSLER-HARRIS, *supra* note 11, at 186, 188 (noting, also, that nineteen states adopted new protective laws for women between 1909 and 1917); see also Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 22 (2007).

163. DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 34 (1997); see also Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1237–39 (1986) (observing that "[f]etal vulnerability policies excluding all fertile women have been adopted only in male-dominated industries," while "women are generally allowed to work in women's jobs without restrictions based on fetal safety"); David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality*, 34 WM. & MARY L. REV. 101, 115 (1992) ("Expressions of corporate

nated by women. The laws also tended to protect “motherhood” only for the white and relatively privileged.

Whether by design or effect, protectionist labor policies reinforced occupational segregation by gender and the pay and prestige that came with those patterns.<sup>164</sup> The legal landscape for working women did not begin to change until passage of Title VII of the Civil Rights Act of 1964, which banned employment discrimination on the basis of sex,<sup>165</sup> and the Supreme Court’s adoption of heightened scrutiny under the Equal Protection Clause for sex-based classifications in a series of cases in the early 1970s.<sup>166</sup> Even then, though, and despite the huge influx of women in the workforce, it was common for employers to single out pregnant women for special, often adverse, treatment with respect to hiring criteria, conditions of employment, and benefits.<sup>167</sup>

Against a backdrop of the burgeoning law of sex equality, working women began to push back and demand accommodations from their employers, as well as to deal practically with the conflicts they faced. The 1982 pamphlet, “The Pregnant Miner,” offering practical tips for women managing pregnancy while working in coal mines, is a great example of such local, pragmatic efforts.<sup>168</sup> Women were also bringing claims of pregnancy discrimination to the EEOC shortly after the agency was established in 1965, only to find that the subject had been given little, if any, thought on the federal legislative or administrative level. With the help of a powerful group of advocates, the EEOC issued its first pregnancy discrimination guidelines in 1972, stating that Title VII’s ban on sex discrimination extended to pregnancy discrimination.<sup>169</sup>

Equality-based rights for pregnant workers did not follow automatically from rights of women generally. Despite the tangible gains for working women, and the EEOC’s declaration that pregnancy discrimination was unlawful, the Supreme Court twice ruled in the 1970s that pregnancy discrimination is not a

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concern for the plight of fetuses . . . have been highly selective. Businesses that depend heavily on women workers have been much less scrupulous about the dangers they impose on the unborn . . .”).

164. See KESSLER-HARRIS, *supra* note 11, at 181 (“Protective legislation divided workers into those who could and could not perform certain roles. It therefore bears some of the responsibility for successfully institutionalizing women’s secondary labor force position.”).

165. See 42 U.S.C. § 2000e-17 (2006 & Supp. 2009). The act makes it “an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of . . . sex.” *Id.* § 2000e-2(a)(1). The Equal Pay Act was adopted a year earlier but was relatively narrow in focus and did not have the sweeping potential of Title VII. See Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006).

166. The Supreme Court began the movement towards heightened scrutiny in *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), before settling on “intermediate scrutiny” for sex-based classifications in *Craig v. Boren*, 429 U.S. 190 (1976).

167. See, e.g., WOMEN’S WORK, MEN’S WORK: SEX SEGREGATION ON THE JOB 46–47 (Barbara F. Reskin & Heidi I. Hartmann eds., 1986); see also KESSLER-HARRIS, *supra* note 11, at 180–214.

168. BRENDA BELL & JUNE RUSTAN, COAL EMPLOYMENT PROJECT, PREGNANT AND MINING: A HANDBOOK FOR PREGNANT MINERS (1982). My thanks to Judith Scott, General Counsel to the Service Employees International Union, for bringing this pamphlet to my attention.

169. See 29 C.F.R. § 1604.10(a) (2008).



form of sex discrimination. In *Geduldig v. Aiello*, the Supreme Court upheld California's statewide disability insurance program for private employees, which covered most disabilities but specifically excluded those resulting from dipsomania, drug addiction, sexual psychopathy, and normal pregnancy.<sup>170</sup> Plaintiffs had invoked the Court's recent rulings establishing heightened scrutiny for sex-based classifications under the Equal Protection Clause, but Justice Stewart's majority opinion insisted that they did not apply because exclusion of pregnancy did not constitute a sex-based classification. The Court explained: "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. . . . There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."<sup>171</sup> The Court deemed it obvious that there was no connection between the "excluded disability and gender."<sup>172</sup> This ruling put an end to the claim that pregnancy discrimination, barring proof of pretext, is a form of unconstitutional sex discrimination.<sup>173</sup> It also cemented the notion that the federal Equal Protection Clause guarantees only formal equality—the right of similarly situated persons to be treated the same—and provides essentially no protection in cases of real gender difference.

Two years after *Geduldig*, the Supreme Court applied this same reasoning to Title VII in *General Electric Co. v. Gilbert*.<sup>174</sup> The Court upheld the exclusion of pregnancy from a private employer's disability plan, similar to the one upheld in *Geduldig*, against a Title VII challenge.<sup>175</sup> In ruling that Title VII did not prohibit pregnancy discrimination, the Court rejected EEOC guidelines and the rulings of seven federal courts of appeals reaching the opposite conclusion.<sup>176</sup> Justice Brennan, in dissent, observed: "Surely it offends common sense

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170. 417 U.S. 484, 496–97 (1974).

171. *Id.* at 496–97 & n.20. This opinion has been rightly lampooned for its reasoning, which is essentially the same as holding that a law that discriminates against bachelors does not discriminate on the basis of sex.

172. *Id.* at 496 n.20.

173. *Geduldig* was applied as recently as 1993 in *Bray v. Alexandria Women's Health Services*, in which the Court held that discrimination against women who seek abortions is not a form of sex discrimination under the Civil Rights Act of 1866. *See* 506 U.S. 263, 269 (1993). William Eskridge has made the argument that *Geduldig* has essentially been supplanted by the statutory protections against pregnancy discrimination but concedes that the case itself remains good law. *See* William N. Eskridge, Jr., *America's Statutory "Constitution,"* 41 U.C. DAVIS L. REV. 1, 4–5 (2007). *But see* Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1873 (2006) (arguing that *Geduldig* and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), can be read together to provide that "where regulation of pregnant women rests on sex-role stereotypes, it is sex-based state action within the meaning of the Equal Protection Clause").

174. 429 U.S. 125, 137–40 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-155, 92 Stat. 2076.

175. *Id.* at 127.

176. *Id.* at 140–41; *id.* at 146–47 (Brennan, J., dissenting). In a recent dissent, Justice Stevens described *Gilbert* as the "one notable exception" to the Court's usual "method of interpretation." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 506 n.3 (1999) (Stevens, J., dissenting), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. "When faced with classes of

to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly ‘sex related.’”<sup>177</sup>

After *Gilbert*, women had no basis for challenging a pregnancy-based employment policy unless they could make a showing that it was merely a pretext for sex discrimination. The Court did, however, invalidate one policy, in *Nashville Gas Co. v. Satty*, which forced pregnant women to take leave and then denied them their previously accumulated seniority when bidding for new positions afterwards.<sup>178</sup> As the Court read *Gilbert*, employers were not required to provide benefits to “one sex or the other ‘because of their differing roles in the scheme of human existence,’” but neither could they “burden female employees in such a way as to deprive them of employment opportunities.”<sup>179</sup>

Together, these rulings left pregnant women in essentially ungarded terrain. Fifteen years after the Supreme Court first began to acknowledge that sex discrimination might be unconstitutional, and twelve years after Congress declared sex-based employment decisions to be unlawful, women still had no equality-based right against pregnancy discrimination. Pregnancy-based policies were presumptively neutral and subject to challenge only upon proof of pretext for sex discrimination or, in the case of employers covered by Title VII, actionable disparate impact. Not all employers discriminated on the basis of pregnancy,<sup>180</sup> but those that did ran little risk of legal consequences.

#### B. THE ERA OF ACCESS

Despite, or perhaps because of, the Supreme Court’s stumbles in *Geduldig* and *Gilbert*, the 1970s marked the transition from exclusion to access for pregnant workers.<sup>181</sup> During that decade, the Supreme Court recognized limited due process protection against exclusion or ejection from the workforce because of pregnancy. More importantly, Congress passed landmark legislation to protect pregnant employees from discrimination in 1978. Fifteen years later, Congress adopted a gender-neutral leave law that would give some pregnant women an additional measure of job security. This section will describe the constitu-

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individuals or types of discrimination that fall outside the core prohibitions of anti-discrimination statutes,” Justice Stevens wrote, “we have consistently construed those statutes to include comparable evils within their coverage, even when the particular evil at issue was beyond Congress’ immediate concern in passing the legislation.” *Id.* at 505.

177. *Gilbert*, 429 U.S. at 149 (Brennan, J., dissenting).

178. 434 U.S. 136, 137 (1977).

179. *Id.* at 142 (quoting *Gilbert*, 429 U.S. at 139 n.17).

180. Though the Court had upheld California’s disability system in *Geduldig*, the law was later amended voluntarily to provide coverage for pregnancy-based disability. *See* 1979 Cal. Stat. 2034–36 (codified at CAL. GOV’T CODE § 18135 (Deering Supp. 2009)).

181. The 1970s marked more broadly the transition into the modern era of sex equality. Most importantly, developments relating to contemporary women’s rights issues have their origins in or around that decade. On the history of “second-wave feminist strategies to reallocate the unpaid work and the economic burdens associated with pregnancy, childbirth, and childrearing,” see Deborah Dinner, *Reproductive Work: From Social Rights to Individual Rights, 1966–1978* (2008) (unpublished manuscript, on file with author).

tional and statutory components that compose modern pregnancy discrimination law.

### 1. Limited Due Process Protection for Pregnant Workers

During the same year it rejected an equal protection-based right against pregnancy discrimination in *Geduldig*, the Supreme Court invalidated aspects of public school mandatory leave policies for pregnant teachers. At issue in *Cleveland Board of Education v. LaFleur* were policies from two school districts forcing pregnant teachers to leave work early in their pregnancies.<sup>182</sup> One school district also forced teachers to wait three months after childbirth before returning to work, regardless of their individual condition or capacity.<sup>183</sup> There, the Court invoked the Due Process Clause, with its long-established protection for rights related to reproduction—contraception, abortion, and childrearing, among other privacy-based rights—to conclude that policies like these infringed “‘one of the basic civil rights of man.’”<sup>184</sup> But the Court’s ostensible concern was procedural, not substantive. It invoked the irrebuttable presumption doctrine—then emerging, now defunct—to strike down the challenged policies.<sup>185</sup> The twin assumptions that no pregnant women were fit to work after the fourth month and that no new mothers were fit to work until three months after childbirth were deemed sufficiently arbitrary as to fail constitutional scrutiny.<sup>186</sup> The school boards could ensure competence and continuity of instruction without presuming all pregnant women equally incapacitated by their condition.

The Supreme Court reached a similar conclusion the following year in *Turner v. Department of Employment Security*, a case challenging a provision of Utah’s unemployment compensation rules that prohibited a pregnant woman, because of presumed incapacity, from collecting unemployment benefits from twelve weeks prior to her due date until six weeks after she actually gave birth.<sup>187</sup> In a per curiam opinion, the Court struck down this provision because “[i]t cannot be doubted that a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth.”<sup>188</sup> In effect, *LaFleur* and *Turner* created a due process right against stereotyping for pregnant workers. States and public employers could not

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182. 414 U.S. 632, 634 (1974).

183. *Id.* at 635 n.1.

184. *Id.* at 639–40 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

185. *Id.* at 644–45. On the demise of this doctrine, see John C. Jeffries, Jr. & Daryl L. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1237–38 (1998) (noting that the Court “threw in the towel” on this doctrine, which was awkwardly used to remedy “substantive concerns” with “procedural restrictions”).

186. *LaFleur*, 414 U.S. at 651.

187. *Turner v. Dep’t of Employment Sec.*, 423 U.S. 44, 44 (1975) (per curiam). In 1982, Congress passed the Federal Unemployment Tax Act, which specifically prohibits states from denying unemployment compensation “solely on the basis of pregnancy or termination of pregnancy.” 26 U.S.C. § 3304(a)(12) (2006). On the historical prevalence of pregnancy exclusions in state unemployment laws, see KAMERMAN ET AL., *supra* note 7, at 37.

188. *Turner*, 423 U.S. at 46.

conclusively presume them incapable by the mere fact of pregnancy without running afoul of federal due process protections. As the Court stated in a later case, “women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.”<sup>189</sup> These cases reflected a shift in constitutional thinking about the propriety of legislating for the general rule rather than the exception: states were not entitled to assume any pregnant woman was incapable of work even though many of them might well be. The same shift was occurring simultaneously in equal protection doctrine as the Court began to insist, for the first time, that laws reflect individual characteristics or circumstances rather than generalizations about women’s abilities or roles.<sup>190</sup>

## 2. The Pregnancy Discrimination Act of 1978

Outrage over the Supreme Court’s ruling in *General Electric Co. v. Gilbert* gave rise immediately to the Campaign to End Discrimination Against Pregnant Workers, a coalition that first proposed, and ultimately secured, a new law banning pregnancy discrimination.<sup>191</sup> The Pregnancy Discrimination Act of 1978 (PDA) heralded a new era for pregnant workers: equal access to the workplace. The PDA provides:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . .<sup>192</sup>

The first clause of the PDA redefines “sex” in the list of prohibited characteristics to include “pregnancy, childbirth, or related medical conditions.”<sup>193</sup> This new definition had the effect of overruling *Gilbert* by declaring pregnancy

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189. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991).

190. Compare *Hoyt v. Florida*, 368 U.S. 57, 63 (1961) (upholding Florida’s automatic jury-service exemption for all women based on family responsibilities, even though not all women had such obligations), and *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (using the legal disabilities imposed on married women to justify exclusion of all women from the practice of law), with *Frontiero v. Richardson*, 411 U.S. 677, 678–79 (1973) (refusing to uphold statutory scheme that presumed servicewomen’s husbands to be independent and servicemen’s wives to be dependent).

191. See William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 627–28 (1991). Federal law, here, was a follower rather than a leader. By the time the Pregnancy Discrimination Act was enacted, half of the states had fair employment laws that also protected workers against pregnancy discrimination. COMM. ON EDUC. & LABOR, PROHIBITION OF SEX DISCRIMINATION BASED ON PREGNANCY, H.R. REP. NO. 95-948, at 3 (1978), reprinted in 1978 U.S.C.C.A.N. 4749.

192. 42 U.S.C. § 2000e(k) (2006).

193. *Id.* The PDA merely amends Title VII; it thus applies to the same employees and employers. Title VII only applies to employers with at least fifteen employees. *Id.* § 2000e(b).

discrimination to be a form of sex discrimination that can be challenged with any otherwise available theory of liability.<sup>194</sup> The Act was introduced “to reflect the ‘commonsense’ view and to insure that working women are protected against all forms of employment discrimination based on sex.”<sup>195</sup>

This clause embraced the same anti-stereotyping rule embodied in the ruling in *LaFleur*. The mere fact of pregnancy, in other words, should not determine a woman’s employment status or rights. Rather, she should be judged with pregnancy-blindness based solely on her actual capacity. The PDA “was premised on the core principle of equality to establish the importance of basing hiring decisions on individual merit and qualifications, rather than stereotypes and assumptions.”<sup>196</sup> Because of its broad prohibition on pregnancy-based policies or decisions, and the broad reach of Title VII, the PDA almost single-handedly ended the era of exclusion. Employment policies and practices that reflected false assumptions about pregnant women, as well as those that reflected animosity or hostility toward pregnant women, were now invalid.

The meaning of the second clause of the PDA, which directs that pregnant women be treated the same “as other persons not so affected but similar in their ability or inability to work,”<sup>197</sup> was not self-evident. Second-wave feminists had converged on formal equality theory—the idea that women have the right to be assessed individually rather than as a group and the right to be treated like men to the extent they are the same—as the primary tool to break down barriers to women at work and elsewhere. But there was more disagreement about the best way to approach equality when there were relevant sex differences.<sup>198</sup> The

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194. A facial policy that discriminates on the basis of pregnancy is invalid unless the employer proves non-pregnancy to be a bona fide occupational qualification (BFOQ). *See infra* note 228 and accompanying text. Additionally, pregnancy discrimination may be challenged under a disparate impact theory, but such a claim provides only limited opportunity for success. *See infra* subsection IV.B.1.b. Finally, intentional acts of pregnancy discrimination against an individual or a class can be challenged under either the pretext or mixed motive model of disparate treatment. Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819, 836–54 (2001).

195. S. REP. NO. 95-331, at 3 (1977).

196. NAT’L P’SHIP FOR WOMEN & FAMILIES, *supra* note 37, at 13; *see also* S. REP. NO. 95-331, at 3 (“As the testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace.”); *id.* at 6 (noting that general policies regarding pregnant employees “have long-term effects upon the careers of women and account in large part for the fact that women remain today primarily in low-paying, dead-end jobs”).

197. 42 U.S.C. § 2000e(k).

198. *See generally* RITTER, *supra* note 98, at 242–60. The disagreements over the appropriate theory of equality predated this debate. As Serena Mayeri explains, “[s]ince the early 1920s, American feminism had been divided, often sharply, into two opposing camps,” one insisting that “an ERA eliminating all legal distinctions between men and women was necessary to secure women’s equal status in American society,” the other fighting for “protective labor legislation . . . they believed [to be] essential to the well-being of working women.” Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 762 (2004); *see also* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955 (1984) (arguing that “an equality doctrine that denies the reality of biological difference in relation to reproduction reflects an idea about personhood that is inconsistent with people’s actual experience of themselves and the world”).



“equal treatment” feminists urged formal equality—pregnant women should receive only what other temporarily disabled workers receive—in order to promote better conditions for all workers and to avoid promoting harmful gender stereotypes.<sup>199</sup> “Special treatment” or “accommodation” feminists,<sup>200</sup> in contrast, urged a substantive equality model, advocating for accommodation of pregnancy and childbirth when necessary to ensure equal outcomes for men and women in workplaces that were developed around the needs and abilities of the prototypical male worker.<sup>201</sup> The debate over the merits of formal versus substantive equality has been important in other contexts as well, but interpretation of the PDA provoked the sharpest conflict.<sup>202</sup> At its core, this was a dispute about the most effective way to promote workplace equality for women.

This conflict peaked in the 1980s in two cases challenging the meaning of the PDA’s second clause. In *Miller-Wohl Co. v. Commissioner of Labor & Industry*, an employer challenged a Montana law requiring maternity leave, alleging that it was inconsistent with the PDA’s guarantee that pregnant workers be treated “the same as” other temporarily disabled workers.<sup>203</sup> Three years later, a similar issue arose in *California Federal Savings & Loan Ass’n v. Guerra*, a case in which the Supreme Court was asked to consider whether a California law, which required employers to provide up to four months unpaid leave for pregnancy- or childbirth-related disability, had been preempted by the PDA.<sup>204</sup> The equal treatment and accommodation coalitions split in both cases about the proper interpretation of the PDA’s second clause.

The Montana Supreme Court adopted an accommodation approach in *Miller-Wohl*, permitting the state to insist on maternity leave regardless of whether leave was provided for comparably disabled workers.<sup>205</sup> The U.S. Supreme Court followed suit in *Guerra*, concluding the PDA’s second clause operated as a floor, rather than a ceiling, on the benefits that could be made available to

199. See, e.g., Wendy O. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 196–97 (1982); Wendy O. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 351–52 (1985). The ACLU adopted an official policy statement in 1985 supporting this approach. See *Documents: ACLU Policy, Pregnancy Discrimination*, CIVIL LIBERTIES, Spring 1985, at 8 (“[T]he ACLU does not support laws, regulations, policies or practices which treat persons affected by pregnancy differently from other persons not so affected but similar in their ability or inability to work.”).

200. The accommodationists were colloquially referred to as the “West Coast Feminists,” the equal treatment group as the “East Coast Feminists.”

201. See, e.g., Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women’s Equality*, 1 3GOLDEN GATE U. L. REV. 513, 537–57 (1983); Ann C. Scales, *Towards a Feminist Jurisprudence*, 5 6IND. L.J. 375, 426–30 (1981).

202. The debate provoked much legal scholarship. See, e.g., Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 8 6COLUM. L. REV. 1118 (1986).

203. 692 P.2d 1243, 1248 (Mont. 1984), *vacated by* *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 479 U.S. 1050 (1987), *reinstated by* *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 744 P.2d 871, 874 (Mont. 1987).

204. 479 U.S. 272, 274–76 (1987).

205. *Miller-Wohl*, 692 P.2d at 1254.



pregnant workers.<sup>206</sup> They could not, in other words, be treated any worse than other temporarily disabled employees, but they could be treated better. Under this interpretation of the PDA, employers can choose to provide no benefits or leave for disability without violating the PDA, but cannot exempt pregnant women from the benefits they do provide; they are also permitted to provide benefits *only* for disability related to pregnancy, excluding disabilities attributable to all other causes.<sup>207</sup>

### 3. The FMLA and State Leave Laws

During the 1980s, the focus of legislators and advocates shifted to a gender-neutral leave law as a means of resolving some of the conflicts faced both by pregnant women and parents who worked in the paid labor force. After an eight-year, hard-fought battle, the Family and Medical Leave Act of 1993 (FMLA) was enacted.<sup>208</sup> The FMLA provides eligible employees with up to twelve weeks of *unpaid* leave per year if needed to care for a newborn or newly adopted child, to care for a seriously ill family member, or to attend to one's own serious health condition.<sup>209</sup> Because FMLA leave is unpaid, its real appeal is job security, as well as the continuation of employment benefits during leave.<sup>210</sup>

Although the FMLA reaches broadly to enable workers to better balance the varying demands of illness and family care with employment, it protects pregnant workers in two specific ways. A pregnant employee can take "serious health condition" leave, intermittently or for a continuous period, to seek prenatal care or to stop working because of pregnancy-related disability.<sup>211</sup> A pregnant woman can also take FMLA leave as needed for childbirth and to care for a newborn child.<sup>212</sup> As useful as it might be for some workers, the FMLA has been widely criticized for some obvious shortcomings: the available period of leave is short, regardless of the duration of the necessitating circumstance;

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206. *Guerra*, 479 U.S. at 285 (quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

207. The adoption of the Americans with Disabilities Act in 1990 imposed additional requirements on employers with respect to many disabled workers. *See* 42 U.S.C. § 12101 (2006). As discussed below, it has been held inapplicable in most cases to pregnancy-related disability. *See infra* note 253 and accompanying text.

208. Family and Medical Leave Act of 1993, Pub. L. No. 103-03, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654 (2006)). On the legislative history of the FMLA, see Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 36–39 (2004).

209. 29 U.S.C. § 2612(a)(1), (c). To be eligible for FMLA leave, an employee must have worked at least 1250 hours in the previous year for an employer with at least fifty employees within a seventy-five-mile radius of where the employee reports to work. *Id.* § 2611(2).

210. *See* Grossman, *supra* note 208, at 20.

211. *See* 29 C.F.R. § 825.112 (2006) (prenatal care leave); *id.* § 825.114(a) (work incapacity leave); *id.* § 825.117 (intermittent leave).

212. *See id.* § 825.112(a)(1) (childbirth and newborn care leave).

almost 40% of American employees are not eligible for FMLA protection;<sup>213</sup> and many eligible to take leave forego it because it is unpaid.<sup>214</sup>

State laws improve upon the FMLA in some respects and thus fill part of the federal law gap. The FMLA sets forth the minimum leave covered employers must provide to eligible employees; states are free to raise the floor or sweep in additional employers or employees. According to a summary compiled by the National Partnership for Women and Families, the women's advocacy group (then called the Women's Legal Defense Fund) that drafted and pushed the FMLA through Congress, state law is more generous than federal law in many instances.<sup>215</sup> Even with the limits noted, federal and state leave laws form an important part of the law that protects pregnant working women.

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A last note on protection against pregnancy discrimination: an enormous number of workers, many of them women, are not covered by state or federal antidiscrimination laws. Domestic workers, for example, are generally excluded from Title VII's protection because their employers will not meet the fifteen-employee minimum.<sup>216</sup> The FMLA applies only to even larger employers, those with at least fifty employees.<sup>217</sup> Thus, when we focus our lens on pitfalls of current law, we should be mindful of those who do not benefit from existing protections at all.

#### IV. EVALUATING THE CURRENT FRAMEWORK: THE FAILED PROMISE OF SOCIAL CITIZENSHIP

Without question, the PDA opened doors to the workplace, and the FMLA has made it easier for some women to stay at a job or leave and return despite short-term interruptions in working capacity. The PDA was used to invalidate a wide variety of traditional policies, practices, and stereotypes that had kept pregnant women from entering the workforce or continuing in their jobs during or after pregnancy. These protections have enabled pregnant women and moth-

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213. See DAVID CANTOR ET AL., DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 2000 UPDATE tbl.A2-3.1 (2000), available at <http://www.webharvest.gov/peth04/20041118135457/http://www.dol.gov/asp/fmla/APPX-A-2-TABLES.htm>.

214. See *id.* at tbl. 2.17, available at <http://www.webharvest.gov/peth04/20041118135126/http://www.dol.gov/asp/fmla/chapter2.htm#2.2.4> (reporting that 77.6% of leave-needers listed ability to afford as one of the reasons for not taking leave); see also Greenberg, *supra* note 70, at 247-48 (noting specific limitations of FMLA for pregnant women).

215. See NAT'L P'SHIP FOR WOMEN & FAMILIES, STATE FAMILY AND MEDICAL LEAVE LAWS THAT ARE MORE EXPANSIVE THAN THE FMLA, <http://www.nationalpartnership.org/site/DocServer/Statesandunpaid-FMLLaws.pdf?docID=968> (last visited Nov. 6, 2009). On the advocacy groups behind the FMLA, see generally RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW (1995); Janet Benshoof, *The Truth About Women's Rights*, 6 WM. & MARY J. WOMEN & L. 423, 427 (2000); Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 239 (1994).

216. See 42 U.S.C. § 2000e(b) (2006).

217. 29 U.S.C. § 2611(4)(A)(1) (2006).

ers to increase dramatically their labor force participation.<sup>218</sup> But does the law go far enough in promoting women's equal social citizenship? Section III lays out the key components of federal pregnancy discrimination law. But a mere description of these components can be misleading because it fails to reveal the gaps. This section considers in more detail the nature of the rights provided to pregnant workers, focusing specifically on the role capacity plays in the assignment of rights. With its failure to account for the physical effects of pregnancy that may temporarily affect working capacity, current law virtually ignores the increasingly common problem of conflicts between pregnancy and work.

#### A. RIGHTS FOR PREGNANT WORKERS UNDER CURRENT LAW

Advocates of the PDA sought to eliminate pregnancy as a basis for employment-based decisionmaking. They wanted employers to see pregnant women not as pregnant, or even as women, but as workers, a focus that flows naturally from the long history of exclusionary policies based on false assumptions about pregnant women's abilities and desires. The resulting legal framework thus tries to force attention on individual capacity rather than the generalized attributes of pregnant women. This emphasis on capacity has made possible some important gains but has fallen short of protecting a pregnant woman's right to work.

##### 1. The Right to an Individualized Assessment of Capacity

The central guarantee of pregnancy discrimination law today is the right of pregnant workers not to be *presumed* incapable. This was the right claimed—and granted—in *LaFleur* by women who did not want to be told, as a group, when they were too pregnant to continue working or not recovered enough to come back.<sup>219</sup> The Supreme Court acknowledged that these were individual decisions: “[T]he ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter.”<sup>220</sup> Applied the following year to Utah's unemployment compensation law, this right meant that Mary Ann Turner was entitled to a “more individualized approach” in assessing her actual capacity and availability to work—and thus her eligibility for unemployment benefits—rather than simply being deemed ineligible on the basis of her condition.<sup>221</sup>

The constitutional protection prohibits state laws and public sector employers from utilizing presumptions of incapacity, but the PDA grants the same right to women who work for employers covered by Title VII. Policies and decisions cannot be based on an employee's pregnancy separate and apart from any effects of that condition on her ability to work. Pregnancy-blindness was an

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218. See *supra* section I.A.

219. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974).

220. *Id.* at 645.

221. See *Turner v. Dep't of Employment Sec.*, 423 U.S. 44, 46 (1975) (per curiam).

intentional thrust of the PDA<sup>222</sup>: “[T]he treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work.”<sup>223</sup>

The right to individualized assessment is, in essence, a right against stereotyping. In *Maldonado v. U.S. Bank*, the Seventh Circuit ruled that the defendant employer could not fire a woman who announced her pregnancy “simply because it believes pregnancy *might* prevent the employee from doing her job.”<sup>224</sup> The plaintiff, Jessica Maldonado, was hired as a part-time bank teller, a job that required her to be available six days a week to cover for vacationing full-time tellers, especially over the summer. Her supervisor fired her after learning of her pregnancy with a probable due date in July.<sup>225</sup> But the court reversed summary judgment for the employer because it acted without “sufficient specific evidence (apart from general assumptions about pregnancy) that [she] would require special treatment.”<sup>226</sup> Maldonado had not declared she would need time off and even intimated that she might terminate the pregnancy.<sup>227</sup> The employer thus had acted prematurely in discharging her for the failure to comply with the requirements of the job.

Individual determinations of pregnant women’s capacity have been bypassed in contexts where courts have deemed it impracticable. Take, for example, the relatively common policy of airlines of restricting flight attendants from flying during all or part of pregnancy. Many of these policies predate the PDA but, somewhat puzzlingly, have survived it. In a series of cases in the late 1970s and early 1980s, courts upheld airline policies mandating the layoff of flight attendants at a certain point during pregnancy on the theory that their condition rendered them less able to ensure the safety of the passengers. To pass legal muster, the employer defending a facial policy singling out pregnant women for special employment rules must demonstrate that not being pregnant is a bona fide occupational qualification (BFOQ).<sup>228</sup> In *Harriss v. Pan American World*

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222. AMENDING TITLE VII, CIVIL RIGHTS ACT OF 1964, S. REP. NO. 95-331, at 3–6 (1977).

223. *Id.* at 4.

224. 186 F.3d 759, 761 (7th Cir. 1999); *cf.* *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120, 130 (2d Cir. 2004) (permitting a woman to proceed with a claim of sex discrimination because her employer *assumed* that her status as a mother would mean that she would not devote herself sufficiently to the job).

225. *Maldonado*, 186 F.3d at 764.

226. *Id.* at 768; *see id.* at 769 (“The PDA makes it unlawful for an employer to assume that pregnant women will be less productive than other employees.”). For other cases refusing to permit employers to act based on false or premature assumptions about a pregnant worker’s capacity, *see, for example, Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378, 381 (1st Cir. 1998), upholding plaintiff’s jury verdict where employer terminated her out of a belief that “she was likely thereafter to have a poor attendance record,” and *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 437 (8th Cir. 1998), upholding plaintiff’s jury verdict where employer refused to permit her “to return to work before it was aware of [the plaintiff’s] actual physical capabilities.”

227. *Maldonado*, 186 F.3d at 765.

228. Under the current formulation, a BFOQ is established when the qualification is (i) “reasonably necessary to the essence of the business”; and either (ii) “all or substantially all individuals excluded from the job involved are in fact disqualified,” or (iii) “some of the individuals so excluded possess a

*Airways, Inc.*, for example, female flight attendants unsuccessfully challenged the airline's "stop" policy that required a woman to disclose her pregnancy within twenty-four hours of becoming aware of it and immediately commence an unpaid sick leave, and the "start" policy, which permitted them to return to work no sooner than sixty days following delivery.<sup>229</sup> The court in *Harriss* upheld the forced leave policy for flight attendants based on a non-pregnancy BFOQ. It deferred to the trial court's factual findings that the essence of an airline's business is safe travel, that the ability of flight attendants to operate at full capacity is "vital to emergency management," and that pregnant attendants are more likely to be impaired during an emergency due to fatigue, nausea, vomiting, or miscarriage.<sup>230</sup> It was thus justifiable, according to the court of appeals, to impose a mandatory leave policy on all pregnant flight attendants for the entire duration of their pregnancies.<sup>231</sup> In other cases, courts have upheld variations of forced leave policies for pregnant flight attendants.<sup>232</sup> These cases are anomalous, however. Outside of the airline context, current law protects the right to individual consideration of capacity. As explained below, this right does nothing for a pregnant woman who is actually incapable of performing her duties, but it does protect the woman who does not fit the stereotypes about pregnancy-induced incapacity.

## 2. The Right To Work if Fully Capable

The right of individualized assessment is simply a predicate for exercising a more substantive right: the right to work if fully capable. If they are able to perform the job despite being pregnant, women must be permitted to work on the same terms as everyone else.<sup>233</sup> Specifically, this means that employers cannot force pregnant women to take leave or modified duty irrespective of their own capacities. Police officer Kimberly Allison-LeBlanc sued for reinstatement after the office of state police applied its policy that "[a] pregnant officer

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disqualifying trait that cannot be ascertained except by [proxy]." *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n.24 (1985) (adopting and quoting the BFOQ test from 29 C.F.R. § 1625.6(b) (1984)). Some of the airline pregnancy cases predate *Criswell* but nonetheless apply a similar analysis. *See, e.g.*, *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984).

229. 649 F.2d 670, 672–73 (9th Cir. 1980).

230. *Id.* at 675 (citing *Harriss v. Pan Am. World Airways, Inc.*, 437 F. Supp. 413, 421–22 (N.D. Cal. 1977)).

231. *See id.* at 676.

232. *Levin*, 730 F.2d at 995–96 (upholding policy requiring flight attendants to discontinue flying upon discovery of pregnancy); *In re Nat'l Airlines, Inc.*, 434 F. Supp. 249, 263 (S.D. Fla. 1977) (upholding the exclusion of all pregnant flight attendants during the third trimester and permitting airline to require medical certification after thirteen weeks of pregnancy), *aff'd sub nom. In re Pan Am. World Airways*, 905 F.2d 1457 (11th Cir. 1990); *Condit v. United Air Lines, Inc.*, No. 74-250-A, 1976 WL 615, at \*5–7 (E.D. Va. Sept. 3, 1976), *aff'd per curiam*, 558 F.2d 1176 (4th Cir. 1977) (upholding policy requiring flight attendants to discontinue flying upon discovery of pregnancy).

233. *See, e.g.*, *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 646 (8th Cir. 1987) (noting that "[p]regnant women who are able to work must be permitted to work on the same conditions as other employees" (quoting S. REP. NO. 95-331, at 3 (1977))).

shall not be allowed to remain on patrol status” to her.<sup>234</sup> The court deemed the policy, under which a “pregnant police officer was automatically deemed disabled due to her condition,” to constitute “discrimination per se.”<sup>235</sup>

Pregnancy does not, however, provide any kind of safe harbor from adverse employment decisions—pregnant women can be fired, laid off, or treated badly just like everyone else who works at the whim of his or her employer. The right to work if capable simply means that women cannot be deprived of employment opportunities or benefits *because of pregnancy*.<sup>236</sup> Recall Jessica Maldonado, who could have been legally fired anticipatorily if the bank had produced stronger evidence that she would need full time off for childbirth, or at the time of birth as soon as she did not show up for a shift.<sup>237</sup> Her actual incapacity would have been grounds for termination.

The PDA adopts, in effect, a policy of pregnancy-blindness. This may seem like a small guarantee, but this aspect of the PDA effectively ended the most common employer policies regarding pregnancy. After 1978, covered employers could no longer openly refuse to hire pregnant women, force them to take leave at a particular point during pregnancy, or require them to stay away for a period of time after childbirth—policies that were once commonplace. Analogous state laws provide the same protection for a capable pregnant woman’s right to work. New York’s human rights law, for example, prohibits an employer from compelling a pregnant employee to take a leave of absence “unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.”<sup>238</sup>

Because the right to work flows from capacity, the legal definition of capacity becomes important. Does it contemplate only the woman’s physical capability of performing a job or her ability to perform it without injuring a fetus? “Fetal protection policies,” in which women were excluded or otherwise restricted from jobs or tasks based on potential danger to their unborn babies regardless of ability or willingness to perform the job, were commonplace in certain occupations, particularly those where workers were exposed to hazardous substances or conditions.<sup>239</sup> In *UAW v. Johnson Controls, Inc.*, employees challenged a policy that expressly excluded women who were pregnant or capable of bearing

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234. *Allison-LeBlanc v. Dep’t of Pub. Safety & Corr.*, 671 So. 2d 448, 450 (La. Ct. App. 1995).

235. *Id.* at 452–53; *see also* Greenberg, *supra* note 70, at 225 (discussing successful complaint by state troopers who had been put on “temporary modified duty” against their will solely because they were pregnant).

236. *See, e.g.*, *Maldonado v. U.S. Bank*, 186 F.3d 759, 766 (7th Cir. 1999) (noting that “an employer can dismiss an employee for excessive absenteeism, even if the absences were a direct result of the employee’s pregnancy”); AMENDING TITLE VII, CIVIL RIGHTS ACT OF 1964, S. REP. NO. 95-331, at 6 (1977) (observing that “employers will no longer be permitted to force women who become pregnant to stop working regardless of their ability to continue”).

237. *Maldonado*, 186 F.3d at 767–68.

238. N.Y. EXEC. LAW § 296(1)(g) (McKinney Supp. 2009).

239. WOMEN’S WORK, MEN’S WORK, *supra* note 167, at 46 (reporting estimate by federal officials that fetal protection policies “close at least 100,000 jobs to women”).



children from jobs at a battery manufacturing plant that involved lead exposure.<sup>240</sup> Before Title VII was enacted, Johnson Controls excluded women altogether from battery-manufacturing jobs.<sup>241</sup> Once that policy became unlawful, it first adopted a policy warning pregnant and fertile women not to choose jobs with lead exposure because of potential risk to a fetus but then later shifted to an outright ban on fertile women.<sup>242</sup>

The Court struck down the fetal-protection policy, holding that under the BFOQ exception to Title VII's ban on sex discrimination or directly under the PDA, risk to a woman's fetus is not an aspect of her *capacity* to work.<sup>243</sup> The "safety" exception that had developed in BFOQ cases did not extend to the safety of a fetus. While a particular job may pose genuine risk to gestating or future offspring, the decision whether to tolerate it must be left to the individual woman. In other words, employers cannot define a woman's *capacity* to work by perceived or actual risks to maternal or fetal health.

This ruling was important for pregnant women's access to work but was also a double-edged sword. On the one hand, employers can no longer deprive women of work opportunities because of potential risks to fetuses; on the other hand, as discussed below, women who seek to avoid such risks may not have the right to alternative duties or other accommodations. Employers can legally frame the "choice" that is left to women under decisions like *Johnson Controls* as all-or-nothing, permitting women who are capable of working during pregnancy to continue their jobs on the same terms as all other employees but forcing women who are incapable—by virtue of true physical incapacity or refusal to take certain risks—to leave their jobs either temporarily or permanently.<sup>244</sup> This rule certainly has a class-based effect as well because women from lower socioeconomic status are more likely to hold jobs that pose hazards in the first place and less likely to be able to choose safe pregnancy over income.

### 3. The Right To Leave During Periods of Incapacity

For pregnant women who are incapacitated by pregnancy-related disability, the PDA grants only a comparative right to leave. Under the second clause of the PDA, as interpreted by the Supreme Court in *Guerra*, employees with pregnancy-based disability must get at least as much leave as those temporarily disabled for other reasons.<sup>245</sup> Although there is no ceiling on the benefits an

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240. 499 U.S. 187, 190–91 (1991).

241. *Id.* at 191.

242. *Id.* at 191–92.

243. *Id.* at 203–04, 206.

244. *See, e.g.,* *Armstrong v. Flowers Hosp., Inc.*, 812 F. Supp. 1183, 1191 (M.D. Ala. 1993) (upholding employer's refusal to accommodate pregnant nurse's request to avoid treating AIDS patients because of perceived increased risk). On *Johnson Controls* generally, see Alison E. Grossman, Note, *Striking Down Fetal Protection Policies: A Feminist Victory?*, 77 VA. L. REV. 1607 (1991).

245. *See* *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 291 (1987).

employer can provide for pregnancy-based disability, as long as the benefit corresponds to the “actual physical disability,” there is no absolute floor either.<sup>246</sup> Employers can safely stiff all temporary disabled employees, subject only to the remote possibility of triggering disparate impact liability. Although harsh leave policies have, in a small number of cases (none of them recent), been successfully challenged under disparate impact theory,<sup>247</sup> they have also been upheld in some cases, including by a number of appellate courts in the last decade.<sup>248</sup>

As discussed above, the FMLA is a more reliable source of leave for pregnancy-related disability than the PDA. If eligible, employees have an absolute right to medically necessary leave, though the disability often outlasts the permissible leave period. Like the PDA, however, the FMLA is of little use for pregnant women with only partial incapacity. As Catherine Albiston has noted, it “does little to help pregnant women who are forced out of their jobs even though they could work with minor accommodations.”<sup>249</sup> Here, state laws can be important if they provide greater access to leave for pregnant women. California, for example, requires employers to permit women up to four months leave for disability related to pregnancy or childbirth.<sup>250</sup> California also uses the state disability insurance program to provide some paid leave to workers who have to take time off to care for an ill family member or to bond with a new

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246. *Id.* at 290. Policies that provide leave or benefits beyond the period of actual disability can be challenged as sex discrimination unless also made available to fathers. *See, e.g.,* *Schafer v. Bd. of Pub. Educ.*, 903 F.2d 243, 248 (3d Cir. 1990) (invalidating one-year childbearing leave made available only to female employees because there was no evidence that “normal maternity disability . . . extends to one year”). Title IX, which prohibits sex discrimination by federally funded educational institutions, is unusual in requiring some absolute accommodations for pregnant students, including student-athletes, regardless of how other temporarily disabled students are treated. *See* *Brake*, *supra* note 49, at 339.

247. *See* *U.S. EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 654–55 (N.D. Ill. 1991) (invalidating policy prohibiting sick leave during first year of employment on disparate impact grounds); *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 692 P.2d 1243, 1245 (Mont. 1984), *vacated by* *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 479 U.S. 1050 (1987), *reinstated by* *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 744 P.2d 871, 874 (Mont. 1987) (holding that one-year no-leave policy had a disparate impact on women); *see also* *Abraham v. Graphic Arts Int’l Union*, 660 F.2d 811, 819–20 (D.C. Cir. 1981) (reversing grant of summary judgment to employer on validity of ten-day maximum leave policy that fell “considerably short of the period generally recognized in human experience as the respite needed to bear a child” and remanding for determination of the need for such a policy).

248. *See* *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861–62 (5th Cir. 2002) (upholding, against a disparate impact challenge, a policy limiting leave within the first ninety days of employment to three days); *Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 581, 584 (7th Cir. 2000) (upholding, against a disparate impact challenge, the discharge of a pregnant employee for absenteeism after she was deemed ineligible for leave under the FMLA).

249. Catherine Albiston, *Anti-Essentialism and the Work/Family Dilemma*, 2 *BERKELEY J. GENDER L. & JUST.* 30, 38–39 (2005) (discussing *Harvender v. Norton Co.*, 4 Wage & Hour Cas. 2d (BNA) 560 (N.D.N.Y. 1997), for the proposition that, while the FMLA requires employers to make leave available for pregnancy-related disability, “it does not require employers to structure work so that pregnant women can continue working during their pregnancy”).

250. *See* CAL. GOV’T CODE § 12945(a) (Deering Supp. 2009).

child.<sup>251</sup> Although concerted efforts have been made to expand the federal FMLA, all proposals have failed to become law.<sup>252</sup>

#### B. SOCIAL CITIZENSHIP AND WORKPLACE ACCOMMODATIONS FOR PREGNANCY

The law provides robust protection for a pregnant woman's right to work, as long as she can perform her job on the same terms as she did when not pregnant or as required by her employer. She may also be entitled to leave in some circumstances if her capacity is partially or totally impaired, though often this will be without pay. As discussed in the previous sections, a pregnant woman is entitled to be assessed based on her actual capacity to work. She is also entitled to work if capable and, in some circumstances, is entitled to leave pending a resumption of her work capacity. The crucial question not yet covered is whether she has a right to workplace accommodations that may permit her to continue working despite temporarily impaired capacity. Federal law all but abandons the pregnant woman in need of such accommodations. She has no absolute right to work unless she is able to fully perform the duties of her job, and she has no absolute right to the accommodations that might allow her to do so.

##### 1. Existing Law on the Pregnant Woman's Right To Work

The PDA does not provide pregnant employees with the absolute right to reasonable or necessary accommodations. An employer cannot refuse to make workplace accommodations to a pregnant woman *because* he resents her presence or believes working will hinder her health or her family's development. But neither is the employer required to make even minor accommodations, even if the consequence is that the pregnant woman must leave her job.

*a. The PDA's Comparative Right of Accommodation.* Although the Americans with Disabilities Act may also seem like a natural source of rights in this context, most courts have held it inapplicable to disability arising from a normal pregnancy.<sup>253</sup> Likewise, although the Due Process Clause has been read to

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251. See CAL. UNEMP. INS. CODE § 3301(a)(1) (Deering 2005) (providing six weeks paid leave for birth or adoption of a child). A handful of other states also provide paid pregnancy or parental leave. See NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 215 (listing state laws).

252. See, e.g., Govtrack.us, H.R. 1369: Family and Medical Leave Expansion Act, <http://www.govtrack.us/congress/bill.xpd?bill=h110-1369> (last visited Oct. 8, 2009).

253. See, e.g., *Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002) (noting that "the majority of federal courts hold that pregnancy-related complications do not constitute a disability under the ADA"); *Gudenkauf v. Stauffer Commc'ns, Inc.*, 922 F. Supp. 465, 474 (D. Kan. 1996) (rejecting plaintiff's ADA claim because her "pregnancy was not unusual or abnormal" and the "conditions she experienced with the pregnancy were not outside the normal range"); see also Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 8 2GEO. L.J. 193 (1993) (urging application of the ADA to pregnancy-related disability); D'Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal To Amend the Pregnancy Discrimination Act*, 3 2HOUS. L. REV. 1411 (1996) (same). The Americans with Disabilities Act Amendments Act, signed into law in 2008, may provide

preclude pregnancy-based stereotyping, it does not provide any right to workplace accommodations necessitated by pregnancy.<sup>254</sup> The PDA is thus the only potential source under federal law for a pregnant woman's right to workplace accommodations.

An employer covered by the PDA or an analogous state law must provide accommodations only to the extent it provides them for other temporarily disabled employees or as required by disparate impact theory.<sup>255</sup> Any right to workplace accommodations under the PDA is thus comparative rather than absolute. The PDA takes its cues from a formal equality framework, which defines rights in comparison to those possessed by similarly situated groups. The PDA designates other temporarily disabled workers—those “not so affected, but similar in their ability or inability to work”—as the appropriate comparison group. Thus, the question of entitlement to accommodations turns on whether the employer has provided or would provide a similar accommodation to a member of the comparison group. If not, the employer can safely withhold it from the pregnant woman, subject only to the minimal requirements of disparate impact law discussed below. Judge Richard Posner wrote in a well-known pregnancy discrimination case:

The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . to make it as easy, say, as it is for their spouses to continue working during pregnancy. Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees.<sup>256</sup>

The comparative right of accommodation has proven to be quite limited in practice.<sup>257</sup> It can be difficult, for example, to find comparators to illustrate that the employer has deviated from the equal treatment principle. The search for a comparator is often elusive, as Kimberley Troupe, a saleswoman at Lord & Taylor department store who suffered chronic and debilitating morning sickness

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some protection for pregnant women because of its broader definition of “major life activity,” impairment of which triggers the ADA workplace provisions. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

254. *See, e.g.,* *Roller v. City of San Mateo*, 572 F.2d 1311, 1316 (9th Cir. 1977) (“Due process does not require the city to provide alternative employment for its employees when disabled. It simply precludes the city from depriving pregnant women of the employment theretofore enjoyed on the basis of an irrebuttable presumption as to working capacity.”).

255. *See, e.g.,* *Maldonado v. U.S. Bank*, 186 F.3d 759, 762 (7th Cir. 1999) (“[U]nder the PDA, employers are not required to give pregnant women special treatment; they must only treat them the same as all other employees.”).

256. *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (citations omitted).

257. *See generally* Albiston, *supra* note 249, at 38 (“Women who, because of pregnancy, are temporarily unable to perform their jobs as those jobs are currently structured continue to find themselves in a difficult position.”).

during pregnancy, discovered.<sup>258</sup> She was fired for chronic tardiness right before she began maternity leave.<sup>259</sup> The court suggested that to prevail under a pregnancy discrimination theory, she needed to prove that her employer would *not* have fired a “hypothetical Mr. Troupe” with a similar record of tardiness and plans to take a medically necessary leave.<sup>260</sup> This sets a high bar for proof.

Recent cases challenging employers’ light-duty policies reveal another potential limit on the comparative right of accommodation. Recall the potential conflicts identified in section I.C above. Many of the conflicts between pregnancy and work could be reduced or avoided by temporary modification of job duties or location. Colloquially, these are referred to as “light-duty” assignments. A law enforcement officer who does desk duty in place of patrol is a typical example of such an arrangement. Many employers provide light-duty assignments to those injured on the job but not those injured off the job. Under such a policy, a woman with a pregnancy-related disability could not receive a light-duty assignment, even though at least a subset of other temporarily disabled employees could. In all but one case, courts have upheld these policies against PDA challenges, ruling that they are “pregnancy-blind,” and therefore valid, because the eligibility does not expressly turn on pregnancy.<sup>261</sup> These cases, in my view, are wrongly decided, in part because they ignore the PDA’s mandate that pregnant women be treated as well as others “similar in their ability or inability to work”; the PDA does not delegate to employers the right to select *any* neutral comparison group for the purpose of granting workplace accommodations. It specifically directs them to focus on capacity alone. Yet, courts have been surprisingly tacit in evaluating these policies.<sup>262</sup>

*b. The Limits of Disparate Impact Protection.* In theory, disparate impact law should compensate for some of the shortcomings of the PDA’s comparative right of accommodation by invalidating some of the harsh employment policies that make it difficult for women to work through pregnancy. Under Title VII,

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258. See *Troupe*, 20 F.3d at 735–36.

259. *Id.*

260. See *id.* at 738. For greater exploration of this suggestion, see Jessica Carvey Manners, Note, *The Search for Mr. Troupe: The Need To Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 6 OHIO ST. L.J. 209 (2005). See also Greenberg, *supra* note 70, at 240–47 (considering difficulties with finding a comparator); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 9 COLUM. L. REV. 2154, 2187 (1994) (noting that “[c]ourts have . . . been reluctant to draw an easy inference of invidious motive in claims of disparate treatment based on pregnancy”).

261. See, e.g., *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 638–39 (6th Cir. 2006) (upholding light-duty policy restricted to on-the-job injuries); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312–13 (11th Cir. 1999) (same); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998) (same).

262. But see *Lochren v. County of Suffolk*, No. 08-2723-CV, 2009 WL 2778431, at \*1 (2d Cir. Sept. 3, 2009) (noting that pregnant police officers were successful in invalidating a policy that did not allow them to be put on light-duty status). For details of the case, see Joanna L. Grossman, *A Big Win for Pregnant Police Officers: A Jury Finds a New York County’s Police Department Liable for Failing To Accommodate Pregnancy-Related Disability*, FINDLAW’S WRIT, June 27, 2006, <http://writ.news.findlaw.com/grossman/20060627.html>.

employees can challenge “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”<sup>263</sup> Because the PDA extended Title VII’s protections to pregnant workers, they, too, can rely on this theory of unintentional discrimination.<sup>264</sup> Though this cause of action has theoretical promise in the pregnancy context, as Reva Siegel outlined more than two decades ago,<sup>265</sup> it has proved decidedly ineffectual thus far.<sup>266</sup> The reality is that plaintiffs almost never prevail on such claims in the pregnancy context.

There are a number of reasons why disparate impact theory has not turned out to be more useful for pregnant workers. Although most courts acknowledge the theoretical existence of disparate impact theory under the PDA,<sup>267</sup> some refuse to apply it in its true form. These courts treat the second clause of the PDA—which guarantees that pregnant workers are treated “the same as” other temporarily disabled workers similar in their ability or inability to work—as a ceiling on what accommodations employers can be forced to provide. Judge Posner, for example, in *Troupe*, described disparate impact as a “permissible theory” under the PDA but cautioned that “properly understood,” it was not a “warrant for favoritism” and could not be used to prevent employers from treating pregnant workers “as badly as they treat similarly affected but nonpregnant employees.”<sup>268</sup> Other courts have taken a similar tack—claiming to recognize disparate impact law but refusing to allow it to provide anything more than a comparative right to accommodation or leave. The Fifth Circuit, in *Stout v. Baxter Healthcare Corp.*, refused to apply disparate impact to claims

in which the plaintiff’s only challenge is that the amount of sick leave granted to employees is insufficient to accommodate the time off required in a typical

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263. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Courts have held that disparate impact theory can be used to challenge terms and conditions of employment, as well as hiring practices. *See, e.g.*, *Scherr v. Woodland Sch. Cmty. Consol. Dist. No. 50*, 867 F.2d 974, 980 (7th Cir. 1988).

264. *See Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (“[D]isparate impact is a permissible theory of liability under the Pregnancy Discrimination Act, as it is under other provisions of Title VII.”).

265. *See* Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 9 *YALE L.J.* 929, 956 (1985) (arguing for recognition of disparate impact theory under the PDA).

266. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 *UCLA L. REV.* 701, 751 (2006) (noting that “pregnancy cases typically fail under the disparate impact approach”).

267. It is perhaps worth noting that the federal government has filed briefs arguing *against* the availability of disparate impact theory in pregnancy cases. *See, e.g.*, *Scherr*, 867 F.2d at 977–78 & n.1; Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 11 *5HARV. L. REV.* 642, 662–63 (2001) (discussing same).

268. *Troupe*, 20 F.3d at 738; *see also* *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312 (11th Cir. 1999) (“Appellee, however, was under no obligation to extend this accommodation to pregnant employees. The PDA does not require that employers give *preferential treatment* to pregnant employees.” (emphasis added)); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998) (“Urbano’s claim is thus not a request for relief from discrimination, but rather a demand for *preferential treatment*; it is a demand not satisfied by the PDA.” (emphasis added)).



pregnancy. To hold otherwise would be to transform the PDA into a guarantee of medical leave for pregnant employees, something we have specifically held that the PDA does not do.<sup>269</sup>

These courts, in other words, tend to equate any remedy for disparate impact as mandating “preferential treatment,” which they view as violating the PDA.<sup>270</sup> This view of the second clause negates the ability of disparate impact theory to operate as any sort of backstop or absolute floor.

Even when courts are not openly dismissive of disparate impact claims, plaintiffs have not met with much success. One potential obstacle is the inability to identify, as required under the statute, a particular “employment practice” that produces the disparate impact. Courts have held, for example, that any discretionary decision—such as the decision to deny a particular woman’s request for pregnancy-related leave—cannot be challenged as a practice.<sup>271</sup> Another held that the elimination of an attorney’s part-time position is not an “employment practice” for purposes of a disparate impact challenge.<sup>272</sup>

A second obstacle arises when courts prejudge the merits of the claim by refusing to apply disparate impact analysis to “legitimate” job requirements like attendance. As the Seventh Circuit reasoned in *Dormeyer v. Comerica Bank-Illinois*, in which it refused to allow a pregnant employee to attack an absenteeism policy, “[t]he concept of disparate impact was developed and is intended for cases in which employers impose eligibility requirements that are not really necessary for the job.”<sup>273</sup> Disparate impact theory can be used to challenge “rules or practices that arbitrarily exclude pregnant women” but not to argue “that the employer should be required to excuse pregnant employees from having to satisfy the *legitimate* requirements of their job.”<sup>274</sup> But the *Dormeyer* court bypassed the mechanism by which that distinction is to be drawn: disparate impact analysis. In the usual case, the plaintiff makes out a *prima facie* case by showing that a particular employment practice has a disproportionate impact on a protected class. The burden then shifts to the defendant-employer to prove that the practice is nonetheless justified by “business necessity.” It may well be that many of the job requirements that pregnant workers have difficulty satisfying indeed are justified by business necessity, but it is the employer’s burden to prove it if a disparate impact has been shown.<sup>275</sup> Not all policies that fall into legitimate *categories*—like leave or attendance policies—are in fact

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269. 282 F.3d 856, 861 (5th Cir. 2002).

270. See, e.g., *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 692 (M.D. Fla. 1994) (“This Court recognizes the Supreme Court’s opinion that the Pregnancy Discrimination Act was not intended to provide accommodations to pregnant employees when such accommodations rise to the level of preferential treatment.” (citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 216–18 (1991))).

271. See, e.g., *Barrash v. Bowen*, 846 F.2d 927, 931 (4th Cir. 1988) (per curiam).

272. See *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1156 (7th Cir. 1997).

273. 223 F.3d 579, 583 (7th Cir. 2000).

274. *Id.* at 584.

275. See 42 U.S.C. § 2000e-2(k) (2006).

necessary to the normal operation of the employer's business.

A final, but important, obstacle is that courts tend to require statistical proof of a disparate impact. Courts have been largely unwilling to accept non-statistical showings of impact<sup>276</sup> or to rely on broader societal data to support a claim of disparate impact.<sup>277</sup> And plaintiffs have been mostly unsuccessful in making the requisite statistical showing,<sup>278</sup> though it is hard to generalize about the reasons for their failures. In many cases, the sample is just too small, particularly in so-called non-traditional occupations for women. It is unlikely that enough pregnant women will have been adversely affected by any particular policy to show a statistically significant impact. The same is true for smaller employers.<sup>279</sup> In other cases, there seems to be confusion about the proper comparison groups for statistical analysis.<sup>280</sup> And, in a large number of cases, statistical evidence is simply not offered, for reasons that are not obvious on a cold record.<sup>281</sup> Given these specific obstacles and the incredibly small number of cases in which pregnant workers have prevailed on disparate impact claims, it seems fair to conclude that the theory provides little meaningful protection for pregnant workers beyond that provided by disparate treatment or formal policy models of discrimination.<sup>282</sup> Rethinking the best way to conceptualize "disparate impact" in the pregnancy context would be an appropriate next step.

Together, the limits of the comparative right of accommodation and courts' anemic approach to disparate impact law in this context mean that pregnant

276. See *Lang v. Star Herald*, 107 F.3d 1308, 1314 (8th Cir. 1997) (plaintiff "'must offer 'statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion' of benefits because the beneficiaries would be women'" (quoting *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 681 (8th Cir. 1996))); *Maganuco v. Layden Cmty. High Sch. Dist.*, 212, 939 F.2d 440, 444 (7th Cir. 1991) ("'prima facie proof of a pattern or practice of discrimination'" requires plaintiff to show "'gross statistical disparities'" (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977))).

277. See, e.g., *Ilhardt*, 118 F.3d at 1157 (refusing, in disparate impact case challenging the elimination of a part-time position, to take notice of studies showing that the majority of part-time workers are women with child-care responsibilities).

278. See, e.g., *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1314-15 (11th Cir. 1994); *Davidson v. Franciscan Health Sys.*, 82 F. Supp. 2d 768, 774-75 (S.D. Ohio 2000); *Dimino v. N.Y. City Transit Auth.*, 64 F. Supp. 2d 136, 157-58 (E.D.N.Y. 1999); *Kelber v. Forest Elec. Corp.*, 799 F. Supp. 326, 333 (S.D.N.Y. 1992); *Ahmad v. Loyal Am. Life Ins. Co.*, 767 F. Supp. 1114, 1119 n.2 (S.D. Ala. 1991); *Porter v. Kansas*, 757 F. Supp. 1224, 1230 (D. Kan. 1991).

279. See, e.g., *Lang*, 107 F.3d at 1314 (finding "no evidence . . . of a disproportionately adverse impact on pregnant women" in part because employee conceded that employer was too small for statistical analysis).

280. See, e.g., *Maganuco*, 939 F.2d at 443-44; *O'Hara v. Mt. Vernon Bd. of Educ.*, 16 F. Supp. 2d 868, 886-87 (S.D. Ohio 1998).

281. See, e.g., *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1314 (11th Cir. 1999); *Crnokrak v. Evangelical Health Sys. Corp.*, 819 F. Supp. 737, 744-45 (N.D. Ill. 1993).

282. Christine Jolls has argued that disparate impact provides absolute protection against the harshest employment policies that disadvantage pregnant workers. See Jolls, *supra* note 267, at 660-65. While she is undoubtedly right that "the logic of disparate impact liability requires employers to provide certain benefits, such as leave from work, to pregnant employees," *id.* at 660, the protection is undermined by the reality that plaintiffs almost never prevail on disparate impact claims in the pregnancy context.

women in many cases do not have the right to continue working if pregnancy has even minimally impaired their capacity.

## 2. Accommodation and Equal Citizenship

The existing legal regime is untenable when measured against the standard of equal citizenship. By virtue of the law's failure to insist on reasonable accommodation for the physical effects of pregnancy, women are systematically deprived of the right to participate in paid work on equal terms and, thus, of equal social citizenship.

The consequences of withholding light-duty or other workplace accommodations to pregnant employees can be severe. For many women who work in jobs where significant physical exertion is required, or where the working environment is hazardous, an employer's failure to provide light-duty or make some other modification is fatal to her ability to continue working. For those without available leave, an employer's failure to provide a necessary accommodation is tantamount to termination. For others, the lack of accommodation will cause them to exhaust paid or unpaid leave, leaving none to use during recovery from childbirth or when caring for a new baby. Those who do take leave will often do so without pay and sometimes suffer dire economic consequences. Many on unpaid leave will also lose seniority, benefits, and opportunities for advancement.

Ironically, the lack of a right to reasonable accommodations means that women will continue to lose ground in the occupations in which they need to gain it most—those traditionally dominated by men.<sup>283</sup> Women are less likely to continue working through pregnancy when they hold jobs that require physical exertion. Data from the National Longitudinal Survey of Youth showed that “strength requirements of the job had a significant effect on [pregnant workers'] exits from work.”<sup>284</sup> Another study found evidence of increased risk of preterm delivery among electrical equipment operators, janitors, textile workers, and food service workers, compared with “markedly reduced” risk for teachers and librarians.<sup>285</sup> A study in Connecticut found that women worked later into pregnancy the “less hard the physical labor required” and the “more flexible the

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283. There are “pink collar” jobs such as house cleaning or nursing that may also require heavy work or create potentially hazardous conditions and are thus equally difficult for pregnant women to maintain without accommodation. *See, e.g., Women in Blue-Collar Labor, supra* note 30, at 23. But physical requirements are much more common in many traditionally male-dominated occupations.

284. Desai & Waite, *supra* note 25, at 560.

285. David A. Savitz et al., *Maternal Occupation and Pregnancy Outcome*, 7 EPIDEMIOLOGY 269, 270 (1996) (studying effect of occupation on late pregnancy outcomes based on data from the National Maternal and Infant Health Survey); *see also* Nicole Mamelle et al., *Prematurity and Occupational Activity During Pregnancy*, 3 AM. J. EPIDEMIOLOGY 309, 313 (1984) (finding greater risk of premature birth with certain occupations over others); Martha Tabor, *Pregnancy and Heavy Work: What Is the Effect of Strenuous Activity in Pregnant Women in the Manual Trades*, OCCUPATIONAL HEALTH & SAFETY, Feb. 1983, at 19, 20 (noting results of one survey showing increased risk of miscarriage and birth defects among pregnant miners).

work conditions.”<sup>286</sup> The data showing an inverse correlation between age and educational level, on the one hand, and likelihood of work during and late into pregnancy also support these findings.<sup>287</sup> One team of researchers suggested that it may well be

the case that jobs that require more education are more conducive to accommodating pregnant women. Women working at these jobs may be more likely to sit during the day, have easy access to rest facilities, not engage in manual labor, and not be exposed to hazardous materials or conditions. Also, their schedules may be more flexible, allowing for ease of scheduling medical appointments, late arrivals, and early departures.<sup>288</sup>

These data points support what feminist scholars have long argued: many workplaces are designed around the prototypical male worker, which produces conflict and, in many cases, the need for women to be “accommodated.”<sup>289</sup> As Maxine Eichner has argued, “Demands of physical strength beyond that which most women possess, scheduling that conforms to typically male life patterns, job descriptions calling for stereotypically masculine traits, and myriad other requirements modeled on male characteristics perpetuate women’s exclusion from traditionally male jobs.”<sup>290</sup> The male default in workplace and job design has led to many cases testing standard work requirements like height, weight, strength, and running speed, challenges occasioned by the influx of women into workplaces and jobs designed without them in mind.<sup>291</sup> Most of these cases are litigated under disparate impact theory, and the results have been mixed. Disparate impact law is not a panacea, but it has been useful in forcing some employers to restructure workplaces or job descriptions to avoid inadvertently restrictive standards and the exclusion of women that cannot be justified by

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286. Chavkin, *supra* note 62, at 203 (citing Nina Jane Kleinberg, *Pregnant on the Job: An Exploratory Study of the Experience of Working During Pregnancy* 112–30 (May 1981) (unpublished M.S.N. thesis, Yale University School of Nursing) (on file with the Cushing/Whitney Medical Library, Yale University)).

287. *See supra* text accompanying notes 27–28.

288. JOHNSON & DOWNS, *supra* note 32, at 6.

289. Maxine N. Eichner, Note, *Getting Women Work that Isn’t Women’s Work: Challenging Gender Biases in the Workplace Under Title VII*, 9 YALE L.J. 1397, 1398–99 (1988); *see also* JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 13–39 (2000) (criticizing the “ideal worker” norm as driven by a male prototype).

290. Eichner, *supra* note 289, at 1398–99.

291. *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 323–24 (1977) (challenging height and weight requirements for correctional officers in maximum security prison); *Lanning v. Se. Pa. Transit Auth.*, 308 F.3d 286, 288 (3d Cir. 2002) (challenging minimum run time requirement for transit police officers); *Evans v. City of Evanston*, 881 F.2d 382, 383 (7th Cir. 1989) (challenging agility test requirement for firefighters); *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 52 (8th Cir. 1977) (challenging minimum height requirements for pilots); Joanna Grossman, *What Defines “Business Necessity” in the Discrimination Context? A Federal Appellate Case Grapples with How Fast Transit Police Officers Must Run*, FINDLAW’S WRIT, Nov. 19, 2002, <http://writ.news.findlaw.com/grossman/20021119.html> (discussing *Lanning*).

business necessity. There have also been a number of recent cases in which women have challenged the lack of worksite restroom facilities because biology and social norms make urinating in public more difficult for them.<sup>292</sup>

Pregnancy simply exacerbates this tendency of predesigned and inflexible workplaces and jobs to exclude as women seek to integrate across the occupational spectrum. There is no question that most workplaces and jobs have been designed without consideration of the particular needs or limitations of pregnant workers. As one review of the well-being of pregnant workers observed, “working environments and working conditions are not well suited to pregnant women.”<sup>293</sup> Until the last few decades, working during pregnancy, particularly into the later stages, was the exception, not the rule.<sup>294</sup> And the high degree of occupational segregation confined women to certain jobs, many of which did not conflict significantly with the physical effects of pregnancy.<sup>295</sup> Although occupational segregation by sex is still an entrenched problem—more women work as secretaries than in any other job<sup>296</sup>—women have made “inroads into nontraditional occupations,” most dramatically during the 1970s, but continuing today.<sup>297</sup>

Accommodation is the link between pregnant working women and equal social citizenship. The failure of current law to acknowledge a pregnant woman’s right to work despite temporary, partial impairments or risks systematically undermines the ability of women to attain workplace equality.<sup>298</sup> It shortcuts the careers of individual women, exacerbates the glass ceiling many women face, and, perhaps even worse, reinforces a long history of occupational segregation. Using equal social citizenship as a “yardstick,”<sup>299</sup> we see that existing law’s

292. See, e.g., *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 436 (7th Cir. 2000) (noting, in dicta, that the absence of restroom facilities on a construction site could violate Title VII if it “deters women (normal women, not merely women who are abnormally sensitive) but not men from seeking or holding a particular type of job”); *Lynch v. Freeman*, 817 F.2d 380, 387–89 (6th Cir. 1987) (recognizing disparate impact claim due to lack of facilities); see also Mary Anne Case, *All the World’s the Men’s Room*, 74 U. CHI. L. REV. 1655, 1655–56 (2007) (discussing Judge Posner’s assertion in *DeClue* that lack of restroom facilities could constitute disparate impact).

293. Pattison & Gross, *supra* note 135, at 84.

294. See *supra* text accompanying notes 10–28.

295. Even today, there is a long list of jobs in which women occupy less than 25% of the positions. See WOMEN’S BUREAU, U.S. DEP’T OF LABOR, QUICK FACTS ON NONTRADITIONAL OCCUPATIONS FOR WOMEN (2009), <http://www.dol.gov/wb/factsheets/nontra2008.pdf>.

296. See U.S. DEP’T OF LABOR, *supra* note 16. The top five “most prevalent occupations” for women in 2008 also included registered nurses, elementary and middle school teachers, cashiers, and retail salespersons. See *id.*

297. WOMEN’S BUREAU, *supra* note 295. For comparison, see WOMEN’S BUREAU, U.S. DEP’T OF LABOR, NONTRADITIONAL OCCUPATIONS FOR WOMEN IN 1999 (1999), <http://www.dol.gov/wb/factsheets/nontra99.htm>. For a detailed analysis of occupational segregation by sex through the mid-1980s, see WOMEN’S WORK, MEN’S WORK, *supra* note 167, at 18–36.

298. Cf. Magid, *supra* note 194, at 821 (2001) (“Increasingly, women’s ability to give birth and continue to work seems to be in spite of, rather than because of, passage of the PDA.”).

299. See LISTER, *supra* note 89, at 5–6 (noting historical importance of equal citizenship as a goal of rights movements and proposing a focus on citizenship in the women’s movement as both a “process” and an “outcome”).

failure to insist on even minimal accommodations for the physical effects of pregnancy means that women are not equal participants in the workplace. Women are thus consigned to a second-class status by virtue of this legal framework.

As aspiration rather than yardstick, the concept of equal social citizenship militates in favor of defining equality by reference to outcomes rather than treatment. This returns us to the 1980s debate over the proper way to conceptualize equality in the pregnancy context, in which feminists divided over whether to seek pregnancy-related accommodations or, instead, insist on a pure equal treatment principle.<sup>300</sup> In that context, Herma Hill Kay argued for an “equality of opportunity” approach, which would provide a justification for “removing barriers which prevent individuals from performing according to their abilities.”<sup>301</sup> She proposed an “episodic analysis” of pregnancy, which would “avoid penalizing women as the result of their reproductive behavior and thus permit us to accommodate pregnancy within a legal and philosophical framework that affirms the equality of women and men.”<sup>302</sup> She conceives of the pregnant woman as someone who, “unlike a man who engages in reproductive behavior, [is] placed at a temporary disadvantage with respect to equality of opportunity.”<sup>303</sup> But the inequality “does not stem from an innate difference in ability, but rather from a condition or circumstance that prevents certain uses or developments of that ability.”<sup>304</sup> She concludes that the law should accommodate the temporary impairment in order to provide equal opportunity for men and women, both of whom reproduce, to put their innate abilities to use in the workplace.<sup>305</sup> “In order to maintain the woman’s equality of opportunity during her pregnancy,” she posits, “we should modify as far as reasonably possible those aspects of her work where her job performance is adversely affected by the pregnancy.”<sup>306</sup>

Kay’s distinction between temporary impairments, on the one hand, and innate ability, on the other, is at the heart of the concept of equal citizenship. All members of society should have the same opportunity to capitalize on their innate abilities, unimpeded by formal or other barriers to equal participation. In her landmark opinion in *United States v. Virginia*, Justice Ruth Bader Ginsburg invoked this same conception of equal citizenship to invalidate Virginia Military Institute’s longstanding male-only admissions policy.<sup>307</sup> Ginsburg wrote that full citizenship requires “equal opportunity to aspire, achieve, participate in and

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300. See *supra* text accompanying notes 198–207.

301. Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1, 26 (1985).

302. *Id.* at 2.

303. *Id.* at 26.

304. *Id.*

305. *Id.* at 37–38.

306. *Id.* at 27.

307. 518 U.S. 515, 519 (1996).



contribute to society based on [one's] individual talents and capacities."<sup>308</sup> This conception of citizenship also better allows for the celebration of women's differences while still ensuring equal opportunity, thus avoiding the disputes that have plagued the equality debate.

Justice Ginsburg again invoked this definition of equal citizenship in her dissent in *AT&T Corp. v. Hulteen*, a recent case involving pregnancy discrimination.<sup>309</sup> The case involved questions raised by AT&T's refusal to grant service credit for pregnancy-related disability leaves taken between 1968 and 1974, before passage of the PDA, despite granting credit to other temporarily disabled workers who took similar leaves, which left the women with lower pension payments for life.<sup>310</sup> Seven Justices sided with AT&T because they viewed the initial different treatment as lawful at the time.<sup>311</sup> In her dissent, Justice Ginsburg criticized the majority for reading the PDA to allow women to be penalized in perpetuity for taking pregnancy-related leaves.<sup>312</sup> She condemned the refusal to heed the PDA's "core command" that employers must "cease and desist" disadvantaging female employees on the basis of pregnancy.<sup>313</sup> She also linked the particular situation raised by *Hulteen* to a broader history of inequality for pregnant workers, one in which "[c]ertain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers and active citizens."<sup>314</sup> Kay's and Ginsburg's analyses support the claim for greater accommodation of pregnancy as a matter of equal social citizenship.

### 3. Preliminary Thoughts on Accommodation

Concern for women's equal citizenship dictates greater workplace accommodations for pregnant workers. The law's emphasis should be on preserving women's innate capacity through a temporary period in which that capacity might be altered. Such an approach would trade our current tendency to equate pregnancy-blindness with equality or fairness for an accommodation approach that would better promote full and equal participation of women in the paid workforce. Disability rights scholars have offered nuanced analyses of the benefits and challenges of accommodating disabled workers, many of which are analogous here.<sup>315</sup> One clear benefit is the role accommodation mandates play

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308. *Id.* at 532.

309. 129 S. Ct. 1962, 1978 (2009) (Ginsburg, J., dissenting).

310. *Id.* at 1967 (majority opinion). For a more detailed analysis of the case, see Joanna L. Grossman, *AT&T v. Hulteen: The Supreme Court Deals a Blow to Once-Pregnant Retirees*, FINDLAW'S WRIT, May 26, 2009, <http://writ.news.findlaw.com/grossman/20090526.html>.

311. *Hulteen*, 129 S. Ct. at 1970. The ruling turned on the majority's determination that the pensions were based on a "bona fide seniority system" and thus received special deference. *Id.* at 1969–70.

312. *Id.* at 1976 (Ginsburg, J., dissenting).

313. *Id.* at 1975–76.

314. *Id.* at 1978.

315. See generally Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 8 9VA. L. REV. 825 (2003) (urging greater consideration of the cost

in forcing employers, and society, to “question[] the inherency of established workplace norms.”<sup>316</sup>

To be sure, there are risks to mandating accommodation. It may, first and foremost, perpetuate stereotypes about the incapacity of pregnant women to work, the overcoming of which has been the centerpiece of modern pregnancy discrimination law.<sup>317</sup> Also, it may breed resentment from coworkers or supervisors, who perceive accommodations to be preferential treatment.<sup>318</sup> An accommodation mandate may also foster paternalistic attitudes, encouraging employers and others to invade pregnant women’s privacy and autonomy.<sup>319</sup> Mandatory accommodation may deter employers from hiring women because they will perceive them as more costly, or encourage employers to find covert ways to drive pregnant or potentially pregnant women from the workplace to avoid the obligation to accommodate.<sup>320</sup> Finally, greater emphasis on accommodation may also undermine the moral force of antidiscrimination law because it departs from the conventional notions of bias that unquestionably need to be eliminated from workplace policies and practice. Michael Selmi, for example, has argued that disparate impact theory, through which accommodation rights are sometimes gained, has “stunted the evolution of a more robust definition of inten-

of disability-related accommodations and their effectiveness at expanding work opportunities for the disabled); Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008) (arguing that courts should pay greater attention to the ways in which accommodations for the disabled benefit all workers when considering whether they impose an undue hardship to the employer); Karlan & Rutherglen, *supra* note 125 (considering a negligence-based approach to defining reasonable accommodations under the ADA); Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 84–85 (2003) (proposing a “law and economics framework for assessing disability-related accommodations”).

316. Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 580 (2004) (arguing that the accommodations mandated in the ADA force employers to reconsider the “inherence” of workplace structures).

317. See, e.g., Calloway, *supra* note 64, at 22 (noting, in the context of pregnancy accommodation, that “[h]ighlighting differences stereotypes gender roles and provides a justification for imposing harmful limitations on women”). See generally Issacharoff & Rosenblum, *supra* note 260 (discussing concern about stereotyping related to accommodation); *supra* text accompanying notes 41–45 (reviewing current studies on pregnancy bias in the workplace).

318. Studies have shown, for example, that work is usually reassigned to coworkers when an employee takes maternity leave and that many workers perceive that pregnant women receive preferential treatment in the workplace. See, e.g., Gueutal & Taylor, *supra* note 7, at 475 (noting, among other findings, that most study subjects “felt that organizations were doing too much in terms of reducing workloads and schedules for [pregnant employees] and were personally unwilling to take on additional duties to assist a [pregnant employee]”).

319. See Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 115 (1989) (expressing concern that accommodation might “simply reconstitute [women’s] role in a new and more oppressive patriarchy”); Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 328 (2003) (noting that a mandate to accommodate caregiving obligations could “translate into paternalism, as the beneficiaries are viewed as uniquely in need of extra assistance or protection” and that “[p]aternalism, like resentment, could lead to further limits on women’s opportunities and roles”).

320. See, e.g., Calloway, *supra* note 64, at 23 (noting that cost spreading and better enforcement of discrimination laws could counteract any incentive for employers to “avoid hiring women to avoid the costs of accommodating their pregnancy”).

tional discrimination.”<sup>321</sup> Samuel Bagenstos has argued that efforts to bolster Title VII’s ability to reach “structural” discrimination lack the “generally accepted normative underpinnings of antidiscrimination law.”<sup>322</sup> These concerns are real but insufficient to overcome the countervailing benefits. At a minimum, a legal framework that keeps pregnant women in their jobs will create a counter-narrative of a woman’s proper place. And employers may well discover, as they did in the FMLA context,<sup>323</sup> that the cost and inconvenience of providing reasonable accommodations is less than they fear.<sup>324</sup>

An accommodation model for pregnant workers might take different forms, but the essence is to maximize the opportunity for pregnant women to continue working despite the temporary physical effects of pregnancy.<sup>325</sup> In the context of pregnancy, this approach might entail short-term modifications of tasks, or assignment to alternative positions, when justified by a particular woman’s medical condition.<sup>326</sup> Making such adjustments would enable more pregnant women to stay at work, especially those who labor in physically demanding jobs; this is an important precondition for their capturing the citizenship values of work.

As a matter of legal structure, an accommodation law could be modeled on the Americans with Disabilities Act (ADA), which guarantees reasonable workplace accommodations for disabled individuals that do not pose an undue hardship on their employers.<sup>327</sup> Accommodations could be granted simply by amending the ADA to include pregnancy as a qualifying disability, thus bypassing some of the doctrinal difficulties disabled workers have faced in trying to access the rights granted under the statute. Courts have, however, been notoriously hostile to accommodation mandates generally, resulting in narrow interpretations of statutory requirements and excessive deference to employer assertions of hardship.<sup>328</sup> It may be, then, that a narrower or more specific approach will

321. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 781 (2006).

322. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 3 (2006).

323. Grossman, *supra* note 208, at 52 (discussing survey results showing that employers “were able to implement the leave policies required by the [FMLA] with minimal cost or administrative difficulty, and with ‘no noticeable effect’ on productivity or profitability” (citations omitted)).

324. See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 89 (2003) (citing human resource literature to suggest that “it is far from clear that ‘accommodation’ is expensive in the context of a restructured workplace”).

325. Cf. Karlan & Rutherglen, *supra* note 125, at 38–39 (describing accommodation as asking “how the job might be modified to enable more individuals to perform it” rather than “taking job descriptions as a given”).

326. See, e.g., Paul et al., *supra* note 64, at 158 (“To prevent musculoskeletal complaints [among pregnant women at work], various measures are possible, for example, adapting the work situation, changing the use of decision latitude, adapting workplace layout, and improving work posture and work technique.”).

327. See Karlan & Rutherglen, *supra* note 125, at 5–14 (describing the right of accommodation under the ADA).

328. See, e.g., Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision To Redeem Title VII*, 7 TEX. L. REV. 317, 323 (1997) (noting courts’ failure to take a

ultimately be more protective than a general mandate of “reasonable accommodation.”

Another approach would be to work within the existing Title VII structure to argue for greater accommodation of pregnancy-related disability. The EEOC recently issued interpretive guidance that encourages employers to be more flexible about task reassignment for pregnant workers, but this recommendation is not binding beyond what the PDA requires.<sup>329</sup> Although there are inherent limits within the existing statutory structure, enforcing employers’ equal treatment obligations in the light-duty context and making greater use of disparate impact theory could lead to modest improvement.

A third option would be to urge passage of a federal law modeled either on state laws that deal directly with accommodations for pregnancy-related disability or on state laws that target pregnancy accommodations directly. California, for example, amended its Fair Employment and Housing Act in 1999 to respond to three specific gaps in federal law.<sup>330</sup> First, it requires employers to provide “reasonable accommodation for an employee for conditions related to pregnancy, childbirth, or related medical conditions” if requested based on a doctor’s advice.<sup>331</sup> A pregnant woman who needed frequent breaks to go to the bathroom, for example, might invoke this provision. Second, the law prohibits employers from excluding pregnant women from any policy providing light-duty assignments (“less strenuous or hazardous”) to other temporarily disabled employees.<sup>332</sup> Finally, even in the absence of a light-duty policy, the law prohibits an employer from refusing a pregnant woman’s medically supported request for a transfer to light-duty “where that transfer can be reasonably

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truly accommodationist approach to Title VII religious claims despite the law’s “specific accommodationist language”); Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1818 (2005) (arguing that the ADA’s “accommodation mandate . . . has been limited by courts’ interpretations”).

329. See EEOC, *supra* note 47 (recommending that employers “reassign job duties that employees are unable to perform because of pregnancy or other caregiving responsibilities” (emphasis omitted)).

330. See CAL. GOV’T CODE § 12945 (Deering Supp. 2009). Louisiana has adopted a nearly identical law. See LA. REV. STAT. ANN. § 23:342 (Supp. 2009); see also CONN. GEN. STAT. § 46a-60(a)(7)(E) (2003) (requiring employers to make reasonable efforts to transfer a pregnant employee if the “employer or pregnant employee reasonably believes that continued employment in the position held by the pregnant employee may cause injury to the employee or fetus”); MINN. STAT. § 363A.08 subdvs. 5, 6 (2008) (requiring employers to make “reasonable accommodations” for pregnancy-related disability).

331. CAL. GOV’T CODE § 12945(b)(1).

A woman is “disabled by pregnancy” if, in the opinion of her health care provider, she is unable because of pregnancy to work at all or is unable to perform any one or more of the essential functions of her job or to perform these functions without undue risk to herself, the successful completion of her pregnancy, or to other persons. . . . [A] woman is also considered to be “disabled by pregnancy” if she is suffering from severe “morning sickness” or needs to take time off for prenatal care.

CAL. CODE REGS., tit. 2, § 7291.2 (g), (f) (1990).

332. CAL. GOV’T CODE § 12945(b)(2). This provision eliminates the policies discussed above, which tend to restrict light-duty assignments to employees with on-the-job injuries.

accommodated.”<sup>333</sup> There are other states that mandate accommodations for pregnant workers under narrower circumstances.<sup>334</sup> This provision dampens the potential Hobson’s choice created by *UAW v. Johnson Controls*—to continue working in a dangerous job or forego employment. Under this provision, a pregnant woman might be able to temporarily transfer to a less strenuous or dangerous assignment in order to avoid unemployment and potential risk to herself and her fetus. These laws provide a starting point for thinking about how we might better accommodate the needs of pregnant workers.

### CONCLUSION

Many scholars have called for an expansion of leave laws for pregnancy-related disability as well as to accommodate the demands of parenting.<sup>335</sup> But greater attention needs to be paid to the justifications and mechanisms for establishing more robust protection of a pregnant woman’s right to work.<sup>336</sup> This Article has set forth the theoretical justification for mandating greater accommodation of pregnancy-related disability and the practical consequence for failing to do so.

The story of pregnant women and work in the United States is an unfinished one. The current pregnancy discrimination framework has been tremendously important in opening up the American workplace to women, most of whom will both work and become pregnant at some point. But the same emphasis on individual capacity that was crucial to dismantling the long-held stereotypes about the limitations and incapacities of pregnant women now serves as a stumbling block to future progress towards workplace equality. The statutory and constitutional frameworks have combined to eliminate most employment disadvantages for pregnant women based solely on stereotype or overbroad generalizations about the physical limitations of pregnancy and childbirth as

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333. *Id.* § 12945(b)(3). This provision also specifies, though, that “no employer shall be required by this section to create additional employment that the employer would not otherwise have created, nor shall the employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.” *Id.*

334. Illinois, for example, prohibits employers from refusing light-duty assignments for pregnant law enforcement officers or firefighters “where that transfer can be reasonably accommodated.” 775 ILL. COMP. STAT. 5/2-102 (H) (2008); *see also* TEX. GOV’T CODE ANN. § 411.0079 (Vernon 2005) (requiring “reasonable efforts to accommodate” a law enforcement officer with partial physical restriction because of pregnancy and requiring transfer to a light-duty position upon medical necessity if one is available).

335. *See generally* Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies*, 8 J.L. FAM. STUD. 1 (2006); Grossman, *supra* note 208; Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 1 5WASH. U. J.L. & POL’Y 65 (2004); Marc Mory & Lia Pistilli, Note, *The Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families*, 1 8HOFSTRA LAB. & EMP. L.J. 689 (2001).

336. On accommodation of pregnancy, *see* Issacharoff & Rosenblum, *supra* note 260, at 2154 (“We contend that given the substantial number of mothers in the work force, many of whom have career aspirations, society must affirmatively accommodate pregnancy, not merely prevent pregnancy-based discrimination.”). *See generally* Calloway, *supra* note 64; Laura Schlichtmann, *Accommodation of Pregnancy-Related Disabilities on the Job*, 1 5BERKELEY J. EMP. & LAB. L. 335 (1994); Millsap, *supra* note 253.



well as fetal-protection policies. But, the lack of a basic right to reasonable accommodation of pregnancy-related disability overlooks the real physical effects of pregnancy and childbirth on women and their employment opportunities.

A full exploration of an effective accommodations model is beyond the scope of this Article. There are obviously many factors to be considered in designing an appropriate legal model—organizational feasibility, employer cost, impact on other employees, and other unintended consequences such as perpetuating stereotypes about women in the workplace. However, our collective thinking so far has been too fearful of mandatory accommodations.<sup>337</sup> It is often the case that very minimal accommodations are required to enable a pregnant woman to continue working. Consider the number of female actresses who have shielded their pregnancies from audiences through the clever use of props or camera angles, or convinced producers to rewrite an entire television or movie story line to include a pregnancy.<sup>338</sup> While celebrities are no more “just like us” than marathon runners, the techniques producers use to accommodate pregnant actresses suggest that a little creativity goes a long way.

The consequence of persisting with our current antidiscrimination model that guarantees equal treatment but fails to account for differences is the failure of women’s full citizenship potential. Access and integration are not one and the same. As scholars have noted in other contexts, opening the door to a closed institution is only the first step for historically disadvantaged groups: retaining and integrating participation in that institution is a much longer and more complicated process.<sup>339</sup> The current antidiscrimination model thus opens workplace doors to pregnant and potentially pregnant women but offers little to ensure they can make full use of their innate talents and capacities once inside. Therefore, women are often individually deprived of economic security, as well as other benefits of working, and, as a group, are relegated to a kind of second-class citizenship. A genuine commitment to women’s equal social citizenship can be carried out only by a legal framework that accounts for the capacity and potential incapacity of pregnant women. Both are essential to promoting women’s full participation in the workforce.

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337. *See, e.g., Sussman v. Salem, Saxon & Nielsen*, 153 F.R.D. 689, 693 (M.D. Fla. 1994) (“To require an employer to make reasonable accommodations for a pregnant employee is to require the employer to relinquish virtually all control over employees once they do become pregnant.”).

338. Julia Louis-Dreyfus was pregnant twice while filming “Seinfeld,” though her character Elaine Benes was never pregnant. *See* Wikipedia, Elaine Benes, [http://en.wikipedia.org/wiki/Elaine\\_Benes](http://en.wikipedia.org/wiki/Elaine_Benes) (last visited Oct. 7, 2009) (noting her real-life pregnancies and the techniques used to hide them from the audience).

339. *See, e.g., AM. BAR ASS’N COMM’N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN IN THE LEGAL PROFESSION* 13 (2001), available at <http://www.abanet.org/ftp/pub/women/unfinishedagenda.pdf> (noting the persistence of obstacles to equality for women lawyers despite eradication of formal barriers to education and employment); Devon Carbado et al., *After Inclusion 3* (Duke Law Sch. Legal Studies Research Paper Series, Research Paper No. 210, 2008), available at <http://ssrn.com/abstract=1138795> (“[B]ecause of shifts in our legal and social norms about equality, the context in which racial animus is practiced and experienced transcends the door of access and includes the ladder of advancement.”).