

Michigan Journal of Gender & Law

Volume 20 | Issue 2

2013

Flexible Scheduling and Gender Equality: The Working Families Flexibility Act Under the Fourteenth Amendment

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Recommended Citation

Lane C. Powell, *Flexible Scheduling and Gender Equality: The Working Families Flexibility Act Under the Fourteenth Amendment*, 20 MICH. J. GENDER & L. 359 (2013).

Available at: <https://repository.law.umich.edu/mjgl/vol20/iss2/5>

<https://doi.org/10.36641/20.2.flexible>

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FLEXIBLE SCHEDULING AND GENDER EQUALITY:
THE WORKING FAMILIES FLEXIBILITY ACT
UNDER THE FOURTEENTH AMENDMENT

*Lane C. Powell**

The Working Families Flexibility Act (“WFFA”) as proposed in 2012 would create a federal right for employees to request flexible work arrangements. However, the bill contains no private right of action for employees to enforce this new right. By reframing the WFFA as an anti-discrimination statute targeting unconstitutional sex discrimination on the part of the States, the WFFA could be upheld under Section 5 of the Fourteenth Amendment, allowing Congress to provide a private right of action for both private and state employees. This Note uses the Supreme Court’s decisions on the Family Medical Leave Act in Hibbs and Coleman as the basis for analyzing how the WFFA might be upheld under the Enforcement Clause. It also argues that, in order to advance workplace equality, the WFFA should be reframed to target “work-life” balance, rather than specifically “work-family” balance. Because caregiving is so frequently viewed as a women’s issue, as long as flexible scheduling is understood as a policy for caregivers, it will be seen as a policy for women and carry the burden of stereotypes associated with working mothers. To make fundamental improvements in workplace gender equality, we need to decouple the link between flexible scheduling and caregiving.

INTRODUCTION	•	360
I.	THE WORKING FAMILIES FLEXIBILITY ACT OF 2012	• 363
	A. <i>Statutory Purpose and Substantive Provisions of the WFFA</i>	• 363
	B. <i>Enforcement of the WFFA as Currently Written</i>	• 365
II.	THE WORKING FAMILIES FLEXIBILITY ACT UNDER THE 14TH AMENDMENT	• 367
	A. <i>Finding a History of Unconstitutional Discrimination</i>	• 369

* J.D. Candidate, University of Michigan Law School, May 2014. I would like to thank Professor Ellen Katz for providing advice and guidance. I would also like to thank the editors of the Michigan Journal of Gender and Law for all their hard work.

Option 1: Lack of Flexible Scheduling Discriminates against Women as Primary Caregivers • 370
Option 2: Flexible Scheduling Policies Discriminate against Women • 371
Option 3: Discrimination against Women who Already Work Flexible Schedules • 376
B. <i>Congruence and Proportionality</i> • 378
III. “WORK-LIFE,” NOT “WORK FAMILY:” DECOUPLING FLEXIBLE SCHEDULING AND CAREGIVING • 381
CONCLUSION • 384

INTRODUCTION

In June 2012, Anne-Marie Slaughter, Professor of Politics and International Affairs at Princeton University, former Director of Policy Planning for the U.S. State Department and former Dean of Princeton’s Woodrow Wilson School of Public and International Affairs, wrote an article in *The Atlantic* entitled, *Why Women Still Can’t Have It All*.¹ Slaughter argues that women cannot “have it all” because the current socioeconomic structure of our country forces women to struggle to balance their careers and their families.² She concludes that women need “to stop accepting male behavior and male choices as the default and the ideal,” and need to shape their own career paths to create a society that works for women.³ This call to action surely resonates with women facing the conflicting pulls of work and family that Slaughter so aptly describes. But advocating for women to reject the male-centric demands of the modern workforce in order to achieve both career and family success is a far stretch from women actually being able to do so. The experience of Mary Matalin, former assistant to President George W. Bush and counselor to Vice President Dick Cheney, who stepped down from her job to spend more time with her children, reveals this gap. Slaughter quotes Matalin: “Having control over your schedule is the only way that women who want to have a career and a family can make it work.”⁴

1. Anne-Marie Slaughter, *Why Women Still Can’t Have It All*, THE ATLANTIC (June 13, 2012), <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/>.

2. *Id.* at 1.

3. *Id.* at 6.

4. *Id.* at 1.

Flexible scheduling is one policy that could provide a solution to work-family conflict.⁵ The idea behind flexible scheduling is not that employees should be allowed to work *less*, but that they should be allowed flexibility in when they work or from where they do so. Some private businesses have already implemented rules that allow employees to have flexible work arrangements.⁶ These rules may include allowing employees to work compressed workweeks where they work more hours on fewer days; to alter the starting or ending times of their workdays; or to telework from home.⁷ The federal government provides federal agencies discretion to establish flexible or compressed work schedules as options for their employees.⁸ However, while flexible work arrangements are becoming more common, they are by no means prevalent.⁹ If having control over one's work schedule is going to be a real option for a more significant percentage of American workers, flexible scheduling policies need to become the norm in American workplaces. In 2007, 2009, and again in 2012, Congress introduced the Working Families Flexibility Act, which aimed to facilitate this change in workplace culture.¹⁰

This Note examines the Working Families Flexibility Act ("WFFA" or "Act"), which would create the right for employees to request flexible work arrangements.¹¹ Part I discusses the provisions of the bill as proposed in

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5. See, e.g., *Workplace Flexibility 2010*, GEORGETOWN L., <http://www.workplaceflexibility2010.org> (last visited Nov. 9, 2013); Kenneth Matos & Ellen Galinsky, *Workplace Flexibility in the United States: A Status Report*, FAMILIES & WORK INST. 1 (2010), http://familiesandwork.org/site/research/reports/www_us_workflex.pdf [hereinafter *Workplace Flexibility*] (discussing The White House Workplace Flexibility Forum, hosted by the White House Council on Women and Girls in 2010).
 6. See, e.g., Kenneth Matos & Ellen Galinsky, *2012 National Study of Employers*, FAMILIES & WORK INST. 12 (2012), http://familiesandwork.org/site/research/reports/NSE_2012.pdf [hereinafter *National Study*].
 7. *Id.* at 14.
 8. Georgetown Law Fed. Legislation Clinic, *The Federal Employees Flexible and Compressed Work Schedules Act (FEFCWA)*, GEORGETOWN U. L. CENTER 1 (2006), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1014&context=legal>.
 9. According to a study by the Families and Work Institute, in 2012 only 7% of employers allowed all or most of their employees to work a compressed workweek; only 27% allowed all or most employees to periodically change their starting and quitting times; and only 2% allowed all or most employees to work some paid hours at home occasionally. *National Study*, *supra* note 6, at 14.
 10. Working Families Flexibility Act, H.R. 4106, 112th Cong. (2012); Working Families Flexibility Act, S. 2142, 112th Cong. (2012); Working Families Flexibility Act, H.R. 1274, 111th Cong. (2009); Working Families Flexibility Act, S. 3840, 111th Cong. (2009); Working Families Flexibility Act, H.R. 4301, 110th Cong. (2007); Working Families Flexibility Act, S. 2419, 110th Cong. (2007).
 11. S. 2142. On May 9, 2013, the House passed the Working Families Flexibility Act of 2013, which would allow workers to accrue compensatory time, or paid time off, in

2012 and highlights how the bill's enforcement provisions fail to provide a private right of action for employees to enforce their rights under the Act.

Part II explores how the bill could provide a private right of action for both private and state employees. To do so, Congress would have to reframe the WFFA as an anti-discrimination statute targeting unconstitutional behavior on the part of the States, thus allowing the WFFA to be upheld under Section 5 of the Fourteenth Amendment, otherwise known as the Enforcement Clause. This Part uses the Supreme Court's decision upholding the constitutionality of the family-leave provision of the FMLA in *Hibbs*, and the Court's subsequent decision to strike down the FMLA's self-leave provision in *Coleman*, as the basis for analyzing how the WFFA might be upheld under the Enforcement Clause.

Part III argues that, in order to truly advance workplace equality, the WFFA needs to target "work-life" balance broadly, not simply "work-family" balance. This Part argues that, because caregiving is so closely associated with women,¹² as long as flexible scheduling is seen as a policy for caregivers, it will be seen as a policy for women and therefore will carry the burden of stereotypes associated with working mothers. Flexible scheduling could improve gender equality in the workplace, but only if employees and employers see the policy as equally applicable to men and women, parents and non-parents. To make fundamental improvements in workplace gender equality, we need to decouple the link between flexible scheduling and caregiving.

exchange for their overtime hours worked, rather than taking overtime pay. H.R. 1460, 113th Cong. (2013). That bill is an updated version of a bill first introduced in 1996, then called the Working Families Flexibility Act of 1996. H.R. REP. NO. 104-670 (1996). The Working Families Flexibility Act of 2013 does not relate to the type of policies this Note terms "flexible scheduling." This Note was begun prior to the introduction of the Working Families Flexibility Act of 2013 and addresses the 2012 bill of similar title but different content.

12. See, e.g., Ellen Galinsky, Kerstin Aumann & James T. Bond, *2008 National Study of the Changing Workforce: Times are Changing*, FAMILIES & WORK INST. 14 (2011), http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf; Gary N. Powell, *The Sex Difference in Employee Inclinations Regarding Work-Family Programs: Why Does It Exist, Should We Care, and What Should Be Done about It (If Anything)?*, in INTEGRATING WORK AND FAMILY: CHALLENGES AND CHOICES FOR A CHANGING WORLD 167, 168 (Saroj Parasuraman & Jeffrey H. Greenhaus eds., 1999).

I. THE WORKING FAMILIES FLEXIBILITY ACT OF 2012

A. *Statutory Purpose and Substantive Provisions of the WFFA*

The WFFA is framed—by its factual findings, in its legislative history, and by its sponsors—as a bill to combat work-family conflict. Part 2 of the WFFA sets forth Congress’ factual findings, which function to explain Congress’ reasoning behind the Act.¹³ The Act’s findings begin by highlighting the changing demographics of the country’s workforce, including the increase in both the number of women working and the number of families “headed by either a working single parent or [two] working parents.”¹⁴ Its findings also indicate an increase in the number of households caring for older relatives or for family members with special needs.¹⁵ The findings then discuss how flexible work arrangements allow employees to balance work and family life more easily.¹⁶

Representative Caroline Maloney introduced the WFFA in 2012.¹⁷ On her personal website she argues that “even a modest change in an employee’s work schedule can make a difference in whether or not a parent or caregiver can stay in the workforce.”¹⁸ She asserts that the WFFA will help “families across the country by putting in place a process for employees to request a temporary or permanent change in their work schedules.”¹⁹ In her introduction of the Act, she cited the demographic changes described in the bill’s findings, including the statistics about working parents and households caring for older or disabled relatives, and declared that “flexible work arrangements are the key to meeting the [] diverse workforce needs” of

13. S. 2142, § 2.

14. S. 2142, § 2(1)–(3).

15. S. 2142, § 2(2)–(3).

16. S. 2142, § 2(3).

17. 158 CONG. REC. E282-03 (daily ed. Feb. 29, 2012) (statement of Rep. Carolyn B. Maloney). A bill under the name Working Families Flexibility Act was first introduced in 1996 and was designed to provide paid comp time for hourly workers in lieu of overtime pay. See *Comp Time in Lieu of Overtime Pay for Hourly Workers: Hearing Before the House of Reps.*, 105th Cong. (1997) (statement of Linda M. Smith, medical staff credentialing coordinator and secretary, Bascom Palmer Eye Institute), 1997 WL 44958. Senator Edward Kennedy reintroduced the Working Families Flexibility Act in 2007 as a bill designed to grant workers the right to request flexible schedules. 153 CONG. REC. S14849-01, (daily ed. Dec. 6, 2007) (statement of Sen. Edward Kennedy). This 2007 bill was in essence the same as the bill introduced most recently in 2012 by Representative Maloney, and reflects the bill as it is known today. S. 2142, § 2.

18. *Working Families Flexibility Act*, CONGRESSWOMAN CAROLYN B. MALONEY, <http://maloney.house.gov/issue/working-families-flexibility-act> (last visited Nov. 9, 2013).

19. *Id.*

these caregivers.²⁰ This language demonstrates that the bill's House sponsor understands the Act as targeted at work-family conflict.

The sponsors of the WFFA also highlight the benefits flexible work arrangements provide for businesses.²¹ Senator Bob Casey, introducing the bill in the Senate in 2010 for himself and Senator Tom Harkin, claimed: "For employers, [flexibility] means less turn over, higher morale and more productive employees."²² The Act's findings support this statement, noting that benefits to businesses include increased employee satisfaction, retention, productivity, and effectiveness.²³ Although the bill and its sponsors tout its positive implications for employers, the facts and arguments that they choose to place first, along with the title of the Act itself, indicate that the primary purpose of the WFFA is to help employees experiencing work-family conflict.

The WFFA gives all employees the "statutory right to request flexible work terms and conditions."²⁴ An employee may submit to his or her employer a written request for a temporary or permanent change in (1) the number of *hours* the employee works, (2) the *times* when the employee works, (3) the *location* of the employee's work, or (4) the amount of *notification* given to the employee of work schedule assignments.²⁵ In the employee's application, the employee must explain the anticipated effects that the requested change will have on the employer and potential ways to mitigate any such effect.²⁶ The employee does *not* need to state his or her reason for requesting the change.

An employer receiving an application under the WFFA has a duty to "consider" the application in accordance with regulations to be issued under the Act.²⁷ The Act specifies that these regulations will include provisions requiring that the employer and employee meet to discuss the application.²⁸ The provisions will also require the employer to give the employee a written

20. 158 CONG. REC. E282-03 (daily ed. Feb. 29, 2012) (statement of Rep. Carolyn B. Maloney).

21. *See, e.g.*, S. 2142, § 2(3); 158 CONG. REC. E282-03 (daily ed. Feb. 29, 2012) (statement of Rep. Carolyn B. Maloney); *Working Families Flexibility Act*, *supra* note 18.

22. 156 CONG. REC. S7447-01 (daily ed. Sept. 24, 2010) (statement of Sen. Bob Casey).

23. S. 2142, § 2(4).

24. S. 2142, § 4.

25. S. 2142, § 4(a).

26. S. 2142, § 4(b).

27. S. 2142, § 5(a). Depending on the covered employee in question, these regulations will be issued by the Secretary of Labor; the Comptroller General of the United States and the Librarian of Congress; the Board of Directors of the Office of Compliance; the President; or the Director of the Office of Personnel Management. S. 2142, § 13.

28. S. 2142, § 5(b)(1)(A).

decision on the application.²⁹ Rejections of applications must state the employer's grounds for the decision.³⁰ The employer may propose an alternative change if it rejects the employee's application.³¹

B. Enforcement of the WFFA as Currently Written

As currently proposed, the Secretary of Labor would enforce the WFFA.³² Section 7 of the WFFA sets forth this method of enforcement.³³ Section 7 does not create a private right of action for employees to enforce the WFFA against their employers. Instead, “[a]n employee who is affected by a violation of a right [provided by the WFFA] . . . may make a complaint to the Secretary of Labor . . .”³⁴ The Secretary “shall receive, investigate, and attempt to resolve such complaints of violations in the same manner as the Secretary [does] . . . complaints of violations of . . . the Fair Labor Standards Act [(“FLSA”)] . . .”³⁵ According to Section 8 of the WFFA, if the Secretary finds there has been a violation, the Secretary may assess a civil penalty against the employer.³⁶ If the Secretary finds a violation of Section 6, which prohibits *inter alia* employer retaliation against employees for exercising rights under the Act,³⁷ the Secretary may order “such equitable relief as may be appropriate, including employment reinstatement, promotion, back pay, and a change in the terms or conditions of employment.”³⁸

There are major disadvantages to this bureaucratic method of enforcing the WFFA, already evidenced by problems in enforcing the FLSA.³⁹ Although private employees have a private right of action under the FLSA, after the Supreme Court decisions of *Seminole Tribe v. Florida* and *Alden v.*

29. S. 2142, § 5(b)(1)(B).

30. S. 2142, § 5(b)(1)(C).

31. S. 2142, § 5(b)(1)(D).

32. S. 2142, § 7(b).

33. S. 2142, § 7.

34. S. 2142, § 7(b)(1).

35. *Id.* The Fair Labor Standards Act was passed under Congress' Commerce Clause power and provides universal benefits, including setting a minimum wage and maximum work hours, for employees who meet basic employment requirements. *Arnold v. Arkansas*, 957 F. Supp. 185, 187 (E.D. Ark. 1996) (“There is no doubt that in enacting the FLSA, Congress was exercising its power pursuant to the Interstate Commerce Clause.”); Fair Labor Standards Act, 29 U.S.C.A. §§ 203, 206, 207 (Westlaw through P.L. 113-36 (excluding P.L. 113-34) (approved 9-18-13)).

36. S. 2142, §§ 7(b)(1), 8(a)(1).

37. S. 2142, § 6(b).

38. S. 2142, § 8(a)(2).

39. See, e.g., Heather Lueke, *A Right Without A Remedy: State Employees After Seminole Tribe and Alden*, 10 WM. & MARY BILL RTS. J. 217 (2001); Raymond J. Farrow, *Qualifying Immunity: Protecting State Employees' Right to Protect Their Employment Rights After Alden v. Maine*, 76 WASH. L. REV. 149, 149–50 (2001).

Maine, state employees do not.⁴⁰ They must file a complaint with the Department of Labor (“DOL”).⁴¹ While under the FLSA the DOL “does investigate employers based on employee complaints, neither the majority of its manpower nor budget allocations are devoted to these investigations. The DOL itself [has] state[d] [in annual accountability reports and performance reviews] that it does not find complaint-based actions effective for deterring or remedying violations of the FLSA.”⁴² The inability of state employees to bring private actions against their employers has made it difficult for these employees to protect their rights under the FLSA.⁴³ These problems will apply equally to the proposed employee complaint system set forth in the WFFA. In addition, unlike the FLSA, the WFFA creates no separate private right of action for private employees. Under the WFFA, all employees who wish to enforce rights under the WFFA will have to enforce those rights through complaints to the DOL. If the DOL already lacks the budget and staff to investigate sufficiently all the state claims arising under the FLSA,⁴⁴ then adding the burden of investigating all complaints under the WFFA will compound the problem.

If the rights provided to employees by the WFFA are to be meaningful, employees need to be able to bring private suits against their employers. In *Seminole Tribe* and *Alden*, the Court held that Congress cannot subject the States to private suits for damages in either federal court or state court when acting under its Article I powers.⁴⁵ As currently written, the WFFA appears to use the Commerce Clause as its source of congressional authority.⁴⁶ Under the Commerce Clause, Congress could create a private right of action in the WFFA for private employees, but not for state employees. While this potential avenue of relief for private employees is promising, it is not sufficient. Given the inadequacy of the DOL complaint system,⁴⁷ one

40. Lueke, *supra* note 39, at 217–18.

41. *Id.*

42. *Id.*

43. Farrow, *supra* note 39, at 177.

44. *See* Lueke, *supra* note 39, at 218.

45. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996); *Alden v. Maine*, 527 U.S. 706, 712 (1999).

46. In addition to the factual findings in Part II relating to the impact of flexible work on businesses, the fact that the WFFA makes no distinction between private and state employees in the enforcement provisions in section 7 or the remedies provided by section 8 is a strong indication that Congress intends the WFFA to fall under its Commerce Clause power. Sections 7 and 8 are consistent with the enforcement power and remain available remedies left to state employees by the Supreme Court after *Seminole Tribe* and *Alden*. *See* Lueke, *supra* note 39, at 217–18.

47. *See id.*

could argue that over 3.7 million state employees would be functionally unable to enforce their rights under the Act.⁴⁸

II. THE WORKING FAMILIES FLEXIBILITY ACT UNDER THE 14TH AMENDMENT

In order for Congress to grant state employees a private right of action against their employers, Congress must abrogate the States' Eleventh Amendment sovereign immunity.⁴⁹ To do so, (1) Congress must unequivocally express its intent to abrogate the States' sovereign immunity, and (2) Congress must act pursuant to a valid grant of constitutional authority.⁵⁰ Although Congress cannot abrogate the States' sovereign immunity under the Commerce Clause,⁵¹ Congress *can* do so when it acts pursuant to a valid exercise of its authority under Section 5 of the Fourteenth Amendment, also known as the Enforcement Clause.⁵²

Thus, if Congress wants to provide a private right of action for state employees under the WFFA, Congress must be able to pass—and the Court must uphold—the WFFA under the Enforcement Clause. In *City of Boerne v. Flores*, the Court articulated that in order for legislation to constitute a valid exercise of congressional authority under Section 5 of the Fourteenth Amendment, there must be “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁵³ When determining whether legislation is “congruent and proportional,” courts must (1) identify the constitutional right or rights that Congress intended the legislation to protect;⁵⁴ (2) determine “whether Congress identified a history and pattern of unconstitutional . . . discrimination by the

48. According to the U.S. Census Bureau's 2011 Annual Survey of Public Employment and Payroll, there were 3,779,258 full time employees of state governments. U.S. CENSUS BUREAU, 2011 PUBLIC EMPLOYMENT AND PAYROLL DATA (2011), available at <http://www2.census.gov/govs/apes/11stus.txt>.

49. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 517 (2004).

50. See *Lane*, 541 U.S. at 517; *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000).

51. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996); *Alden v. Maine*, 527 U.S. 706, 712 (1999).

52. See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 758 (2003); *Lane*, 541 U.S. at 518. Section 5 of the Fourteenth Amendment states: “No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.” U.S. CONST. amend. XIV, § 5.

53. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

54. *Garrett*, 531 U.S. at 365; *Lane*, 541 U.S. at 522.

States;⁵⁵ and (3) determine whether the legislation “is an appropriate response to this history and pattern of unequal treatment.”⁵⁶

The Supreme Court’s analysis of the family-leave provision of the Family Medical Leave Act (“FMLA”) in *Nevada Department of Human Resources v. Hibbs*⁵⁷ provides a guide for how the Court might find the WFFA to be a valid exercise of Congress’ power under Section 5. The WFFA as currently proposed is geared toward accommodating the caregiving needs of employees.⁵⁸ This purpose is similar to that of the family-leave provision of the FMLA, which provides employees with up to twelve weeks of unpaid leave from work if the employee’s spouse, child, or parent is suffering from a “serious health condition.”⁵⁹ Like the WFFA, the FMLA provides a universal benefit to all employees who meet basic employment requirements,⁶⁰ but it is understood to be an anti-discrimination statute and has been upheld as such under Congress’ Section 5 enforcement power.⁶¹

In *Hibbs*, the Court found that, by passing the FMLA, Congress sought to enforce “the [constitutional] right to be free from gender-based discrimination in the workplace.”⁶² The Court found that Congress had evidence of a long history of unconstitutional sex discrimination in the workplace.⁶³ In addition to a history of laws that blatantly excluded women from the workplace,⁶⁴ “States had family-leave policies that differentiated on the basis of sex.”⁶⁵ For example, employers offered maternity leave that was far longer than physically necessary for women recovering from childbirth, while offering no paternity leave.⁶⁶ The Court noted that “[t]his and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”⁶⁷

55. *Garrett*, 531 U.S. at 368.

56. *Lane*, 541 U.S. at 530.

57. *Hibbs*, 538 U.S. at 725.

58. See Working Families Flexibility Act, S. 2142, 112th Cong. § 2 (2012).

59. Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (Westlaw through 2013 P.L. 113-31); *Hibbs*, 538 U.S. at 724.

60. S. 2142, § 3(2) (requiring that employees meet the general statutory definition and work at least twenty hours per week or 1,000 hours per year); FMLA § 2611.

61. See *Hibbs*, 538 U.S. at 728, 740. Unlike the FMLA, however, the WFFA does not create an automatic right to accommodation by one’s employer. It only creates the “right to request” a schedule change. S. 2142 § 4.

62. *Hibbs*, 538 U.S. at 728.

63. *Hibbs*, 538 U.S. at 729.

64. *Hibbs*, 538 U.S. at 729.

65. *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1332 (2012) (plurality opinion) (citing *Hibbs*, 538 U.S. at 727).

66. *Hibbs*, 538 U.S. at 731.

67. *Hibbs*, 538 U.S. at 731.

The Court also found that the States administered facially neutral family-leave policies in discriminatory ways because granting leave or determining its length was left to the discretion of employers or individual supervisors.⁶⁸ The Court ultimately found that this history of unconstitutional discrimination in the administration of family leave benefits warranted “prophylactic [Section 5] legislation,” or legislation “that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”⁶⁹ Finally, the Court found that the family-leave provision of the FMLA was a congruent and proportional remedy to the identified constitutional violation because Congress had already tried traditional anti-discrimination legislation with Title VII but continued to face “a difficult and intractable problem” with sex discrimination, and the FMLA was narrowly targeted and limited in scope.⁷⁰

This application of the *Boerne* test in *Hibbs* provides a guide for how the Supreme Court might also uphold the WFFA under the Fourteenth Amendment. First, the Court must be able to recognize that the WFFA seeks to enforce the same right as the FMLA—the right to be free from gender-based discrimination in the workplace.⁷¹ Second, the Court would need to be able to identify a history of unconstitutional gender discrimination that the legislation targets.⁷² Finally, the Court must be able to find that the WFFA is a congruent and proportional remedy to the constitutional violation it seeks to correct.⁷³

A. *Finding a History of Unconstitutional Discrimination*

As discussed in Part I, the WFFA is currently framed as a solution to the changing composition of the American workforce and the caregiving demands on American workers.⁷⁴ This Part will discuss three potential ways that the WFFA could be reframed as a remedy to unconstitutional gender discrimination by the States. Option 1 analyzes the argument that the lack of flexible scheduling for state employees discriminates against women be-

68. *Hibbs*, 538 U.S. at 732.

69. *Hibbs*, 538 U.S. at 727–28.

70. *Hibbs*, 538 U.S. at 737–40.

71. *Hibbs*, 538 U.S. at 735. Congress could easily make this clear in the text of the Act. Beyond this presumed change, Parts A and B of Part II will assume that Congress leaves the substantive provisions of the WFFA as currently written.

72. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 524–25 (2004); *Hibbs*, 538 U.S. at 728; *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001).

73. See *Lane*, 541 U.S. at 530 (“The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment.”); *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

74. Working Families Flexibility Act, S. 2142, 112th Cong. § 2 (2012).

cause women are most often the primary household caregivers. Option 2 examines the argument that existing state flexible scheduling policies discriminate against women in their text or administration. Option 3 argues that there is purposeful gender discrimination in how women are treated after they begin working flexible schedules and proposes adding an anti-retaliation provision to the WFFA to address this problem.

Option 1: Lack of Flexible Scheduling Discriminates against Women as Primary Caregivers

One possible argument for upholding the WFFA under Section 5 of the Fourteenth Amendment is that women tend to be their families' primary caregiver and, as such, are affected more by a lack of flexibility in their work schedules. In her statement to the Senate in support of the WFFA, Judith Lichtman, Senior Advisor for the National Partnership for Women & Families, stated that "women continue to have primary responsibility for family caregiving" despite the fact that they "now make up half of America's workforce."⁷⁵ Although fathers are spending more time with their children today than they have in the past, "mothers still spend significantly more time per workday, on average, caring for their children."⁷⁶ Even when both parents work full time, women still bear more of the domestic responsibilities.⁷⁷

Professor Joan Williams argues that "[e]mployers discriminate against women when they structure work to require employees . . . to have gender privileges typically available only to men."⁷⁸ The "ideal-worker norm," also called the "full-time, face-time norm," is used by scholars to describe traditional employment structures where workers are assumed to have no caregiving or domestic responsibilities.⁷⁹ The nine to five, five-day workweek was designed for men who had wives at home to care for their children and households.⁸⁰ Moreover, even this work schedule is more conducive to caregiving responsibilities than the schedule afforded to many in either very

75. *Beyond Mother's Day: Helping the Middle Class Balance Work and Family: Hearing before the S. Comm. on Health, Educ., Labor, and Pensions*, 112th Cong. 1 (2012) (statement of Judith L. Lichtman, Senior Advisor, National Partnership for Women & Families).

76. Galinsky et al., *supra* note 12.

77. Powell, *supra* note 12.

78. JOAN WILLIAMS, *UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT* 76 (2001).

79. Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 *CONN. L. REV.* 1081, 1083 (2010); WILLIAMS, *supra* note 78, at 64.

80. WILLIAMS, *supra* note 78, at 64.

high-powered or very low-wage jobs, where hours may be unpredictable or fall at any time of the day or night. There is a strong argument that requiring workers to conform to schedules designed without caregiving needs in mind has a discriminatory effect on women, and the WFFA is designed to target and remedy this discrimination.

This disparate impact argument poses a problem for upholding Congress' ability to pass the WFFA under the Enforcement Clause. The heart of the argument is that inflexible work scheduling policies have a greater impact on women than on men. This argument was rejected as a basis for upholding the FMLA's self-care provision under the Enforcement Clause in *Coleman*.⁸¹ There, the Court stated that although neutral self-care leave restrictions might have a disparate impact on women because most single parents are women, evidence of disparate impact "alone is insufficient [to prove a constitutional violation] even where the Fourteenth Amendment subjects state action to strict scrutiny."⁸² In order for the WFFA to apply to the States under Section 5 of the Fourteenth Amendment, there must be not only a neutral state policy with a discriminatory effect, but also discriminatory *administration* of the policy by the State.⁸³

Option 2: Flexible Scheduling Policies Discriminate against Women

Another argument for upholding the WFFA under Section 5 of the Fourteenth Amendment is that women are suffering intentional discrimination from the flexible scheduling policies currently offered by the States. This argument tracks the one upheld for the FMLA's family-leave provision in *Hibbs*⁸⁴ and found absent for the FMLA's self-care provision in *Coleman*.⁸⁵

The self-care provision of the FMLA at issue in *Coleman* was struck down in part because the Court found that Congress' concern when passing that provision was really "a concern for discrimination on the basis of illness, not sex."⁸⁶ This finding leaves the WFFA vulnerable to the argument that Congress is actually concerned about discrimination on the basis of caregiving responsibilities, rather than on the basis of sex. One response to this argument is that, given that women are typically the primary caregivers in families, discrimination against those with caregiving responsibilities is

81. *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1333, 1337 (2012) (plurality opinion).

82. *Coleman*, 132 S. Ct. at 1337 (citing *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372–73 (2001)) (internal quotation marks omitted).

83. See *Coleman*, 132 S. Ct. at 1334 (explaining the holding in *Hibbs*).

84. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003).

85. See *Coleman*, 132 S. Ct. at 1334–35.

86. *Coleman*, 132 S. Ct. at 1335.

really discrimination against women. In *Coleman*, the Court cites the FMLA's finding that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men."⁸⁷ This quote shows that the Court already recognizes that caregiving responsibilities are often gendered, and so the argument that concern for discrimination on the basis of caregiving is really concern for discrimination on the basis of sex will not be difficult to make.

Unlike the state family-leave policies cited by Chief Justice Rehnquist in *Hibbs*,⁸⁸ state flexible scheduling policies are not facially discriminatory. Most state laws relating to flexible scheduling do not even mention families or caregiving.⁸⁹ If they do, they use gender-neutral language, saying, for example, that agencies should develop alternative work schedules "to assist state employees in meeting the needs of their families."⁹⁰ Thus, the Court will not be able to find that state flexible scheduling policies are facially discriminatory. The Court, however, could still find state conduct violating the Constitution if States administer their facially neutral policies in a discriminatory way.⁹¹

In *Coleman*, Justice Kennedy highlighted that "[n]othing in the record shows employers formulated self-care leave policies based on [the] view" that "women take self-care leave more often than men."⁹² There is evidence that the same is not true for flexible scheduling policies.⁹³ James Levine, Director of the Fatherhood Project at the Families and Work Institute, ar-

87. *Coleman*, 132 S. Ct. at 1335 (quoting FMLA, 29 U.S.C. § 2601(a)(5)).

88. *Hibbs*, 538 U.S. at 733 ("[S]even States had childcare leave provisions that applied to women only.").

89. See Georgetown Law, *Flexible Work Arrangements*, WORKPLACE FLEXIBILITY 2010, http://workplaceflexibility2010.org/index.php/policy_components/flexible_work_arrangements/ (last visited Nov. 9, 2013) (follow "Examples of State Flexible Work Arrangements (FWA) Laws (Chart)" hyperlink).

90. OKLA. STAT. ANN. tit. 74 § 840-2.26 (Westlaw through 2013 Legis. Sess.).

91. See *Coleman*, 132 S. Ct. at 1334.

92. *Coleman*, 132 S. Ct. at 1334–35 (plurality opinion).

93. As Justice Ginsburg described in her *Coleman* dissent, "[t]he 'pervasive sex-role stereotype that caring for family members is women's work' . . . [leads] employers to regard parental and family-care leave as a women's benefit." *Coleman*, 132 S. Ct. at 1347 (Ginsburg, J., dissenting) (quoting *Hibbs*, 538 U.S. at 731). The same has been said of flexible work policies. See, e.g., Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203, 1215 (2010) ("To the extent that it is associated with women's needs and with family caretaking, workplace flexibility will assume—indeed, already has assumed—a gendered character and meaning."). See also JAMES A. LEVINE & TODD L. PITTINSKY, *WORKING FATHERS: NEW STRATEGIES FOR BALANCING WORK AND FAMILY* 58, 60 (1997); *National Study*, *supra* note 6, at 41.

gues that family-friendly policies designed for working parents are really understood to be mother-friendly policies designed for working mothers.⁹⁴ He finds that “society . . . has defined work-family so exclusively as a women’s issue” that policies targeting this conflict are seen by both employers and employees as policies designed for women.⁹⁵ One of the significant findings of a 2012 study by the Families and Work Institute was that “[o]rganizations where women make up less than 25% of the employees are more likely to have a low level of flexibility than organizations where women represent a larger share of the workforce.”⁹⁶ The same study found that a high percentage of women in the workforce is one of the characteristics that predicts whether an employer will have flexible scheduling policies, providing additional evidence that employers design flexible work policies with women in mind.⁹⁷

The government’s current treatment of flexible scheduling provides further evidence that flexible scheduling is seen as a policy for women. In 2010, the White House Council on Women and Girls hosted the White House Workplace Flexibility Forum.⁹⁸ The Women’s Bureau of the U.S. Department of Labor hosted the resulting *National Dialogue on Workplace Flexibility*.⁹⁹ In a hearing before the Senate, the Director of the Women’s Bureau stated that “[s]ecuring a flexible workplace for women and families is essential to balancing the daily demands of work and personal life”¹⁰⁰ The government’s own framing of flexibility reinforces the idea that flexible work policies are viewed as women’s policies.

But even if employers formulate flexible work policies with the belief that women will use them more or derive more benefit from them than men do, to have unconstitutional discrimination, employers must act on these beliefs in the administration of their flexible work policies.

One might expect such a stereotypical framework for flexible scheduling to result in far more women working flexible schedules than men. Statistical evidence about the percentages of men and women working flexible schedules does not reveal such a discrepancy.¹⁰¹ A 2004 study by the Families and Work Institute found that 68% of men and 79% of women who

94. LEVINE & PITTINSKY, *supra* note 93.

95. *Id.* at 60.

96. *National Study*, *supra* note 6, at 41.

97. *Id.* at 7.

98. *Workplace Flexibility*, *supra* note 5.

99. *Id.* at 2.

100. *Balancing Work and Family in the Recession: How Employees are Coping: Hearing Before the Joint Econ. Comm.*, 111th Cong. 71 (2009) (statement of Karen Nussbaum, Director, Women’s Bureau of the United States Department of Labor).

101. Victoria Brescoll, Jennifer Glass & Alexandra Sedlovskaya, *Ask and Ye Shall Receive? The Dynamics of Employer-Provided Flexible Work Options and the Need for Public*

have access to flexibility use it.¹⁰² A 2006 study by Corporate Voices for Working Families found that men and women use flexible work policies at a similar rate across income levels, with middle-income men using them at a slightly higher rate than middle-income women.¹⁰³ These data do not support an argument that employers administer their flexible scheduling policies in a discriminatory way.

One could argue that these data are not representative of the administration of flexible scheduling policies by state employers since the studies involved looked only at private employees. However, a 2004 study by the Bureau of Labor Statistics supports the finding that men and women work flexible schedules at comparable levels across the spectrum of private-public employment. The Bureau of Labor Statistics study not only included state government employees but looked at these employees in a separate category.¹⁰⁴ This study found that 30.7% of male state government employees worked flexible schedules, while 26.6% of female state government employees worked flexible schedules.¹⁰⁵

In a June 2013 study, Professors Victoria Brescoll, Jennifer Glass, and Alexandra Sedlovskaya address the appearance of gender parity in flexible scheduling. They explain that “flexible schedules are more commonly available to workers in high-status positions of authority and in managerial and professional occupations,” which are positions most frequently occupied by men.¹⁰⁶ Thus, “[t]he combination of lower availability among mothers but [higher rates of use] when available leads to rough gender parity between men and women in the use of flexible scheduling on a regular basis.”¹⁰⁷ But even with this explanation, these statistics cannot be used to support an argument that employers grant flexible schedules in a discriminatory way.

While the raw data regarding who *works* flexible schedules do not support an argument of discriminatory administration, the data regarding responses to requests for flexible schedules does support the argument.

Policy, 69 J. SOCIAL ISSUES (SPECIAL ISSUE) 367, 370 (2013) (citing the “rough gender parity between women and men using flexible scheduling on a regular basis”).

102. James T. Bond, Ellen Galinsky & E. Jeffrey Hill, *When Work Works: A Status Report on Workplace Flexibility*, FAMILIES & WORK INST. 6 (2004), <http://familiesandwork.org/3w/research/downloads/status.pdf>.

103. Shelley Waters Boots & Anna Danziger, Urban Inst., *A Comparison of Men's and Women's Access to and Use of FWAs*, WORKPLACE FLEXIBILITY 2010 1–2 (Apr. 30, 2008), <http://workplaceflexibility2010.org/images/uploads/FWAComparisonbyGender.pdf>.

104. See *Workers on Flexible and Shift Schedules in May 2004*, BUREAU OF LABOR STATISTICS 6 (July 1, 2005, 10:00 AM), <http://www.bls.gov/news.release/pdf/flex.pdf>.

105. *Id.*

106. Brescoll et al., *supra* note 101.

107. *Id.*

The study published by Professors Brescoll, Glass, and Sedlovskaya found that managers were more likely to grant flexibility requests from high-status male workers who asked for the flexible schedule for reasons related to career advancement, such as taking professional development classes, than they were to grant requests from female workers for the same reason.¹⁰⁸ The authors hypothesize the following:

[T]he signaling association between female gender and family care may be so strong that even high-status women seeking accommodations to advance their careers might be suspected of either dissembling their reason for the accommodation or less deserving of the chance to gain further training because they will withdraw or lower their work effort at some point in the future.¹⁰⁹

The study also found that low-status male workers were more likely to have caregiving-based requests for flexible schedules granted than high-status male workers.¹¹⁰ Significantly, “[w]omen, irrespective of their reason for requesting flextime and their status, were less likely than high-status men to have their request granted.”¹¹¹ The authors conclude that “women workers . . . faced a gendered wall of resistance to their requests for schedule flexibility.”¹¹²

Unlike in *Hibbs* where, “[b]ecause employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave,”¹¹³ this study shows that the reverse is true with flexible scheduling—it is women whose requests for flexible scheduling are denied.¹¹⁴ Despite this difference in outcome, the source of the discrimination is still “invalid gender stereotypes” that affect women in the workplace.¹¹⁵ For example, employers may deny women leave because of the explicit emphasis women place on their family care obligations, or because employers automatically assume women are requesting leave for caregiving reasons.¹¹⁶

This study provides evidence for a congressional finding of unconstitutional gender discrimination by state employers in the administration of

108. *Id.* at 371, 381.

109. *Id.* at 382.

110. *Id.*

111. *Id.* at 383.

112. *Id.* at 384.

113. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

114. Brescoll et al., *supra* note 101, at 384.

115. *Hibbs*, 538 U.S. at 730.

116. Brescoll et al., *supra* note 101, at 370.

their facially neutral flexible scheduling policies. For the Court to find that Congress has a sufficient evidentiary basis to abrogate state immunity under the Enforcement Clause, however, there would likely need to be more studies supporting this finding and more evidence that discrimination by state employers compares to that by private employers.¹¹⁷ While the study by Brescoll, Glass, and Sedlovskaya is unlikely alone to be a sufficient basis for the Court to uphold the WFFA under Section 5 of the Fourteenth Amendment, it provides an in-road for an argument that the WFFA targets gender discrimination in the administration of States' existing flexible scheduling policies.

Option 3: Discrimination against Women who Already Work Flexible Schedules

Another source of intentional gender discrimination in flexible scheduling may be found in how employees are treated after they begin working a flexible schedule. Evidence indicates that even if flexible schedules are available, some workers avoid using them because of the stigma attached to working a flexible schedule.¹¹⁸ Thirty-nine percent of employees polled in the Families and Work Institute's 2004 study stated that employees who use flexible work options are "less likely to get ahead in their jobs or careers."¹¹⁹ The same study found that 43% of working parents believe that working a flexible schedule will have a negative effect on their careers, while only 35% of non-parents believe this.¹²⁰ These data show that employees believe that their peers who work flexible schedules suffer discrimination, and those who self-identify as caregivers report this sentiment in higher numbers.

While both men and women may fear that using a flexible schedule will have a negative effect on their job advancement, women have an additional reason to be anxious. Given the persistent stereotype that women

117. In Justice Ginsberg's dissent in *Coleman*, she highlighted that, although many studies were of the experiences of private sector employees, there was ample evidence for "Congress . . . to believe that a pattern of workplace discrimination against pregnant women existed in public-sector employment, just as it did in the private sector." *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1343–44 (2012) (Ginsberg, J., dissenting).

118. See, e.g., WILLIAMS, *supra* note 78, at 94 (quoting a report written for the Glass Ceiling Commission) ("Many employees and employers view the use of family-friendly policies and the desire for career advancement as mutually exclusive choices."); Brescoll et al., *supra* note 101, at 370 ("Narrative accounts of workers afraid to use their employer's flexibility policies because they believe their work careers would suffer as a result are plentiful.").

119. Bond et al., *supra* note 102.

120. *Id.*

who are mothers are less competent¹²¹ and less committed to their work,¹²² women are also concerned about their job security. As the Court pointed out in *Hibbs*, “[s]tereotypes about women’s domestic roles . . . foster[] employers’ stereotypical views about women’s commitment to work and their value as employees.”¹²³ Professors Joan Williams and Cynthia Thomas Calvert argue that employer biases that caregivers do not make good workers may be reinforced when a mother requests a flexible schedule.¹²⁴ Williams and Calvert find that switching to a flexible work schedule is one of the main triggers of bias against women as mothers, which can manifest as, for example, the provision of less challenging assignments, more stringent performance evaluations, or harsher workplace disciplinary action.¹²⁵

To address this problem, the WFFA would have to be changed substantively. One critical change would be amending the “Prohibited Acts” section to prohibit not only retaliation against employees who have requested flexible schedules but discrimination against employees who have been granted them.¹²⁶ Just as the Act currently allows equitable relief for retaliation against employees for exercising rights under the Act, it could also allow equitable relief for retaliation against employees who have been granted flexible schedules, “including employment reinstatement, promotion, back pay, and a change in the terms or conditions of employment.”¹²⁷ Such a change to the statute would reinforce that employees who use flexible schedules are not to be stigmatized. It would be a step toward addressing a major concern of employees who consider requesting or utilizing flexible schedules.

The addition of this provision would make upholding the WFFA under Section 5 of the Fourteenth Amendment more plausible, given the evidence of discrimination against women who move to working flexible schedules.¹²⁸ With the aforementioned anti-retaliation provision added to the WFFA, the Court could find that Congress acted upon evidence that

121. See, e.g., John Williams & Cynthia Thomas Calvert, *Emerging Family Responsibilities Claims Under the Family and Medical Leave Act and Sex Discrimination Laws*, in LITIGATING EMPLOYMENT DISCRIMINATION AND EMPLOYMENT-RELATED CLAIMS AND DEFENSES IN FEDERAL AND STATE COURTS 23, 31–32 (2007).

122. See, e.g., Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003); see also Brescoll et al., *supra* note 101, at 371.

123. *Hibbs*, 538 U.S. at 736.

124. See Williams & Calvert, *supra* note 121, at 27.

125. *Id.* at 31–35; Brescoll et al., *supra* note 101, at 371.

126. See Working Families Flexibility Act, S. 2142, 112th Cong. § 6(b) (2012).

127. See S. 2142, § 8(a)(2).

128. See, e.g., Williams & Calvert, *supra* note 121, at 30–33; see also Tara Siegal Bernard, *The Unspoken Stigma of Workplace Flexibility*, N.Y. TIMES (June 14, 2013), http://www.nytimes.com/2013/06/15/your-money/the-unspoken-stigma-of-workplace-flexibility.html?_r=1&.

States were violating the constitutional right to be free from gender discrimination in the workplace with their discriminatory treatment of female employees who currently work flexible schedules. The addition of a provision to protect these employees would allow Congress to frame the WFFA as necessary “to eliminate . . . [the] perpetuation of . . . invalid stereotypes, and thereby dismantle persisting gender-based barriers to the . . . retention[] and promotion of women in the workplace.”¹²⁹ This congressional purpose was upheld in *Hibbs* as a reasonable basis for Congress’ regulation of state family-leave laws with the FMLA.¹³⁰ Congress would still need a strong record in its legislative history of retaliation against women working flexible schedules, but this angle to the WFFA would strengthen the basis for upholding the Act under Section 5.

B. Congruence and Proportionality

Even if the Court finds unconstitutional state discrimination against women who request or work flexible schedules, the remedy provided by the Act must still be congruent and proportional to the injury to be prevented in order to be a valid abrogation of state sovereign immunity under Section 5 of the Fourteenth Amendment.¹³¹ In other words, the appropriate scope of the legislation depends on the scope of the problem it is designed to address. For example, in *Tennessee v. Lane*, the Court found that the “requirement of program accessibility” in Title II of the ADA was “congruent and proportional to its object of enforcing the right of access to the courts.”¹³² The Court made clear, however, that part of the proportionality of the legislation was that the remedy was limited: Title II only required “reasonable modifications [to accommodate those with disabilities] . . . and only when the individual seeking modification is otherwise eligible for the service.”¹³³

In *Hibbs*, the Court found that the family-leave provision in the FMLA was congruent and proportional to its goal of remedying unconstitutional gender discrimination in the workplace for several reasons.¹³⁴ First, because Congress had already tried attacking the problem of gender discrimination in the workplace with Title VII and had “confronted a ‘difficult and intractable problem,’” the FMLA’s format as a universal benefit was

129. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 734 n.10 (2003).

130. *Hibbs*, 538 U.S. at 734 n.10.

131. *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

132. *Tennessee v. Lane*, 541 U.S. 509, 531 (2004).

133. *Lane*, 541 U.S. at 532.

134. *Hibbs*, 538 U.S. at 737–40.

justified.¹³⁵ The Court explained that “[b]y creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.”¹³⁶ Second, the provision was “narrowly targeted at the faultline [sic] between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship.”¹³⁷ Finally, the Court found significant the fact that Congress had included a number of other limitations on the FMLA’s scope, such as requiring only unpaid leave, excluding certain employees from eligibility, and limiting the number of weeks of leave to twelve.¹³⁸

Like the FMLA, the WFFA is “narrowly targeted at the faultline [sic] between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship.”¹³⁹ The WFFA is likewise limited in its scope, and actually even more so than the FMLA: while the FMLA provides employees with a right to family leave and requires employers to grant this leave, the WFFA provides employees only a right to *request* flexible work arrangements and requires employers only to engage in a discussion with the employee about this request.¹⁴⁰ This limitation could be compared to how the Title II of the ADA requires only “reasonable modifications” by States.¹⁴¹

The limited scope of the WFFA raises a potential problem for justifying why the WFFA is written as a universal benefit, granting an affirmative right to both men and women, rather than as a traditional anti-discrimination statute, simply forbidding discrimination against a protected group. On one hand, the justification in *Hibbs* does not map perfectly given that the WFFA does not *require* that employers provide flexible schedules. The justification in *Hibbs* suggests that the WFFA might be more congruent and

135. *Hibbs*, 538 U.S. at 737.

136. *Hibbs*, 538 U.S. at 737.

137. *Hibbs*, 538 U.S. at 738.

138. *Hibbs*, 538 U.S. at 738–40.

139. *See Hibbs*, 538 U.S. at 738–39.

140. Working Families Flexibility Act, S. 2142, 112th Cong. § 6(b) (2012). While the Court has struck down prophylactic legislation for applying too “broadly to every aspect of state employers’ operations,” the Court has never struck down legislation as incongruent for applying too narrowly. *Hibbs*, 538 U.S. at 738 (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001)).

141. *See Tennessee v. Lane*, 541 U.S. 509, 532 (2004).

proportional if it mandated that employers provide flexible schedules.¹⁴² On the other hand, given the fact that the States' constitutional violation consists of discriminating against female employees who ask to use, or are currently using, the states' *existing* policies, the WFFA could be amended to simply ban gender-based discrimination against those who request or work flexible schedules.

The point of, and need for, a universal benefit is to normalize requesting and working flexible schedules. To promote true workplace equality, flexibility must no longer be seen as an anomaly from the existing, traditional employment structure.

Discrimination analysis is designed to ensure that no one is denied equal opportunity within the existing structure; it is not designed to change the structure to the least discriminatory, most opportunity-maximizing pattern. Discrimination analysis is geared to providing the same opportunity for all, not the best opportunity for all The discrimination model is tied only to the elimination of structural flaws, not to the creation of a fairer, more accessible or more humane structure.¹⁴³

For flexible scheduling policies to promote true workplace equality, flexibility must become a normal part of the employment structure. The universal benefit that the WFFA provides is critical to achieving this goal. As Professor Dowd articulates, anti-discrimination laws aim to give everyone equal access to the existing structures.¹⁴⁴ When the existing structures themselves promote inequality and Congress wants to address this inequality, Congress must find alternative ways to do so. Providing a universal right to request a flexible schedule is one such way Congress can address the inequality present in the current employment system. This right is designed to address unconstitutional state discrimination, and it is congruent and proportional to the identified constitutional violation, because anti-discrimination legislation would be ineffective in addressing this particular problem.

142. Given the difficulty this would pose for some types of workplaces, however, such a requirement would be unlikely to be viewed as "limited." *Lane*, 541 U.S. at 531. *See generally* Brescoll et al., *supra* note 101, at 385 (noting that "While ['right to ask' laws] may not be strong enough to overcome the resistance to schedule flexibility for women uncovered here, at minimum, they force some reflection on the part of managers who may otherwise respond with . . . gender-biased beliefs.>").

143. 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, 139 (1989).

144. *Id.*

III. “WORK-LIFE,” NOT “WORK FAMILY:” DECOUPLING FLEXIBLE SCHEDULING AND CAREGIVING

One major feminist critique of flexible scheduling is that, rather than helping working women, “flexibility has the potential to undermine equality” in the workplace.¹⁴⁵ Professor Vicki Schultz argues that allowing an individual worker to sidestep traditional workplace norms through the use of flexibility does not eliminate these norms.¹⁴⁶ Schultz claims that “it is likely that women will disproportionately opt for [flexible scheduling] choices,” which will cause “workplace flexibility . . . [to] assume . . . a gendered character and meaning.”¹⁴⁷ While the studies discussed in Part II do not support the assumption that women will disproportionately be the employees who request or are granted flexible schedules,¹⁴⁸ Schultz is correct in her statement that workplace flexibility “will assume—indeed, already has assumed—a gendered character and meaning.”¹⁴⁹ This gendered character threatens to undermine the goal of using flexible scheduling as a means for women to avoid being forced to choose between having a family and having a successful career.

Even if flexible scheduling policies are written in gender-neutral language, when they are framed as policies to facilitate “work-family” balance, or to help employees with caregiving responsibilities, this framing reinforces the gendered nature of the policy. As discussed in Part II, childcare is still primarily the responsibility of women.¹⁵⁰ The impact that this responsibility has on women’s careers “is only reinforced by the perpetuation of gender stereotypes evident in references to . . . jobs that accommodate parental needs as . . . ’mommy tracks.’”¹⁵¹ Caregiving for elderly or disabled family members is also done primarily by women.¹⁵² When flexible scheduling is associated with caregiving, it takes on a gendered character in the minds of employers. Even if men use flexible work policies at similar percentage rates

145. Schultz, *supra* note 93, at 1203.

146. *Id.* at 1214.

147. *Id.* at 1203.

148. See Bond et al., *supra* note 102; Boots and Danziger, *supra* note 103, at 1; *Workers on Flexible and Shift Schedules in May 2004*, *supra* note 104, at 6.

149. Schultz, *supra* note 93, at 1215. See, e.g., LEVINE & PITTINSKY, *supra* note 93; *Balancing Work and Family in the Recession: How Employees are Coping: Hearing Before the Joint Econ. Comm.*, 111th Cong. 1 (2009) (statement of Karen Nussbaum, Director, Women’s Bureau of the United States Department of Labor).

150. Powell, *supra* note 12. See, e.g., Galinsky et al., *supra* note 12.

151. Martin Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 32 (1998) (attributing the origin of the term “mommy track” to Felice N. Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV. 65 (1989), <http://hbr.org/1989/01/management-women-and-the-new-facts-of-life/ar>).

152. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 738 n.10 (2003).

with women, or are actually granted flexible schedules at higher rates than women, as long as flexible scheduling is viewed as a policy for women with caregiving needs, women who use it risk hurting their career prospects.¹⁵³ As Schultz argues, the view that flexibility is a women's policy "will tend to exacerbate women's marginalized status rather than improve it."¹⁵⁴

In order for flexible scheduling not to be viewed as a policy only for women, thus reinforcing gender stereotypes and inequality in the workplace, it needs to be requested by, and granted to, both men and women,¹⁵⁵ both parents and non-parents.¹⁵⁶ To actualize this scenario, the mentality surrounding flexible scheduling needs to move away from a model based on easing work-family conflict and toward a model based on helping all people achieve a better work-life balance generally.

The primary way to attack the stereotypes currently associated with flexible scheduling, and thus to combat discrimination against women who work flexible schedules, is to decouple the concept of flexible scheduling from caregiving responsibilities. This decoupling will not occur simply by prohibiting discrimination against those already working flexible schedules. It will only occur when a critical mass of workers—men and women, parents and non-parents—work flexible schedules so that flexible scheduling is the norm, not the anomaly. While Professor Schultz is correct that "[a]llowing individuals to opt out of an existing set of norms . . . does not necessarily change those norms,"¹⁵⁷ if enough people opt out so as to change what is seen as the standard pattern of behavior, the norm will change as well.

153. See Dwyer Gunn, *The Flex Time Ruse: Does Working Flexibly Harm Women?*, SLATE (Mar. 28, 2013, 8:06 AM), http://www.slate.com/articles/double_x/doublex/2013/03/flex_time_is_not_the_answer.html (arguing that women's career progress is hurt by working a flexible schedule because of the stigma associated with flexible work policies). See also Brescoll et al., *supra* note 101, at 370.

154. Schultz, *supra* note 93, at 1216. See also Bernard, *supra* note 128.

155. Men who request flexible schedules are more likely to hide that they are changing their schedule for reasons related to childcare. Powell, *supra* note 12, at 167. When men do not want to admit to their employers that they are requesting a flexible schedule for childcare reasons, it may discourage them from requesting it at all. See Chuck Halverson, *From Here to Paternity: Why Men Are Not Taking Paternity Leave under the Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 271 (2003) ("Social stigma is the main hurdle to men taking FMLA paternity leave."). It may also further brand women who work flexible schedules with the stereotypes that come with being a working mother. See Williams & Calvert, *supra* note 121, at 27; *Hibbs*, 538 U.S. at 736.

156. See Bernard, *supra* note 128 ("For women to be able to take advantage of these arrangements without judgment, men need to use them freely, too."); Bond et al., *supra* note 102.

157. Schultz, *supra* note 93, at 1214.

If the goal of flexible scheduling is to promote work-life, rather than work-family, balance, the WFFA has a critical problem. The WFFA is framed through its title—the *Working Families* Flexibility Act—and through its factual findings¹⁵⁸ and legislative history¹⁵⁹ as a policy to help caregivers. This framing risks entrenching, and possibly worsening, the gendered character of flexible scheduling. As long as caregiving is associated with women, making “caregivers” or “working families” the intended beneficiaries of the policy will mean that flexible scheduling is understood as a policy for women.

One step in creating a statute that promotes actual workplace equality is changing the name of the WFFA to something that frames it as a policy to promote work-life balance for all employees. For example, it could be called the Work-Life Balance Act. Another step would be to eliminate the factual findings about the needs of caregivers for workplace flexibility. As shown by the discussion in Part II, findings about the unique needs of caregivers—let alone the unique needs of women—are not necessary (and not sufficient) for upholding the Act under the Fourteenth Amendment. Rather, it would be sufficient to add the additional anti-retaliation provision discussed above and legislative history documenting the current problems with discrimination against women requesting and working flexible schedules.

A potential paradox arises, however, with the need to pass such a statute under the auspices of the Fourteenth Amendment. This constitutional basis requires arguing that the Act is designed to prevent unconstitutional gender discrimination. At the same time, however, structuring the Act as a universal benefit targeted at “work-life balance” is necessary to normalize flexible scheduling and decouple the idea of flexibility from gender. Using the Fourteenth Amendment as the basis for the Act risks re-forging the very link between gender and flexible scheduling that the Act works to destroy.

One response to this paradox is that the effect of the Act on society’s view of flexible work is unlikely to be determined by the section of the Constitution under which the Act is upheld. Just as it is functionally irrelevant to those who are compelled to purchase health insurance under the Affordable Care Act whether the individual mandate was upheld under the Commerce Clause or the Taxing Clause,¹⁶⁰ it likely will be irrelevant to employees exercising their rights under the hypothetical “Work-Life Balance

158. Working Families Flexibility Act, S. 2142, 112th Cong. § 2 (2012).

159. *See, e.g.*, 158 CONG. REC. E282-03 (daily ed. Feb. 29, 2012) (statement of Rep. Carolyn B. Maloney).

160. *See generally* Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012) (upholding the Patient Protection and Affordable Care Act under the Taxing Clause and finding that the Act would be unconstitutional under the Commerce Clause).

Act” whether that right was upheld under the Commerce Clause or the Enforcement Clause. What will matter is that they are exercising a right that was created by Congress to help all Americans achieve a better work-life balance, rather than a right created to help caregivers (i.e., women) balance work with family responsibilities.

Another option is to abandon efforts to frame the Act under the Fourteenth Amendment altogether. As discussed in Part I, Congress could give a private right of action to private employees under the Commerce Clause.¹⁶¹ The bill is already well framed to do so given the factual findings about the positive effects of flexible scheduling on businesses.¹⁶² A consequence would be that public employees are relegated to the DOL complaint system, which as discussed in Part I, is not ideal.¹⁶³ However, granting a private right of action to private employees would still cover the majority of American workers. Abandoning efforts to grant a private right of action to state employees would mean that Congress would not have to make any findings about discrimination against women; indeed, Congress could, if politically capable, avoid any specific mention of women and caregiving. Passing the Act under the Commerce Clause would allow Congress to focus on potential gains for American businesses and American “work-life balance” generally. As discussed above, this tactic might go furthest in promoting gender equality in the workplace.

CONCLUSION

Writer, mother, and flex-worker Dwyn Gunn argues, “[r]educing the stigma associated with . . . flexible work arrangements that can help facilitate women’s careers may be the best way to improve gender equality in the U.S.”¹⁶⁴ This Note proposes that a federal law aimed at facilitating and, most importantly, normalizing the use of flexible schedules in American workplaces would be a valuable step toward gender equality. The WFFA as currently written has serious shortcomings, both from an enforcement perspective and from an equality perspective. Two changes would enhance the Act’s ability to advance gender equality in the workplace and improve work-life balance for workers of all types: (1) an additional anti-retaliation provision to target discrimination against those who work flexible schedules, and (2) an emphasis on work-life balance rather than work-family balance. ❀

161. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996); *Alden v. Maine*, 527 U.S. 706, 712 (1999).

162. S. 2142, § 2(8)–(13).

163. See Lueke, *supra* note 39, at 217–18.

164. Gunn, *supra* note 153.