The Preservation of the Separate Spheres Doctrine in Congress and the Federal Courts

Arjun Parikh
University of Michigan Law School

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THE PRESERVATION OF THE SEPARATE SPHERES DOCTRINE IN CONGRESS AND THE FEDERAL COURTS

Arjun Parikh*

ABSTRACT

In Bradwell v. State, an 1872 decision upholding an Illinois law prohibiting women from practicing law, the United States Supreme Court reasoned that the law was justified because women belonged in the “domestic sphere.” While today’s sex-based workplace exclusions are not as explicit as they once were, women still face barriers to remaining in the workforce and advancing in the workplace despite the existence of major federal legislation in the areas of pregnancy discrimination and family leave policy. Congress passed the Pregnancy Discrimination Act (PDA) in 1978 to stop pregnancy discrimination, but the PDA has not come close to eliminating pregnancy discrimination. Similarly, despite Congress’s passing of the Family and Medical Leave Act (FMLA) in 1993, ineffective family leave policy continues to hinder women’s ability to balance work and their disproportionate family caregiving obligations. After tracing the development of sex-based workplace exclusions from the 1870s through the 1970s, this Note argues that the PDA and FMLA prohibited explicit sex-based workplace exclusions while preserving other forms of sex-based workplace exclusions. This Note then analyzes proposed work-family legislation and argues that policies aimed at eliminating sex-based workplace exclusions must account for the specific experiences of women while promoting anti-stereotyping principles.

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INTRODUCTION

Congress thought it had solved pregnancy discrimination in 1978 when it passed the Pregnancy Discrimination Act (PDA) to prohibit discrimination in employment on the basis of pregnancy, childbirth, or related medical conditions. The PDA overturned General Electric Com-

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pany v. Gilbert, a 1976 case in which the Supreme Court held that pregnancy discrimination was not sex discrimination under Title VII of the Civil Rights Act of 1964.

But the PDA has not come close to eliminating pregnancy discrimination. On February 8, 2019, The New York Times ran an article revealing egregious pregnancy discrimination inside large American companies. After reviewing “thousands of pages of court and public records and [interviewing] dozens of women, their lawyers, and government officials,” The New York Times found that “[m]any of the country’s largest and most prestigious companies still systematically sideline pregnant women.” The article provides several examples of companies engaging in the exact kinds of pregnancy discrimination the PDA was supposed to prevent. At Glencore, Erin Murphy, a senior employee earning a six-figure salary, was disparaged on the trading floor by male colleagues when she got pregnant with her first child in 2013. Then, in 2016, when Murphy—then eight months pregnant with her second child—tried to discuss her career trajectory with her boss, he told her, “You’re old and having babies so there’s nowhere for you to go.” At Merck, a large pharmaceutical company that prides itself on championing women, Rachel Mountis was laid off just three weeks before giving birth despite being one of the company’s leading saleswomen. And at Walmart, Otisha Woolbright was denied a switch to light duty when she was three months pregnant, forcing her to continue her usual job that involved lifting 50-pound trays of chickens into industrial ovens daily. While Woolbright was eventually placed on light duty after a miscarriage scare, Walmart fired her just three days after she asked about maternity leave when she was seven months pregnant.

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5. Id.
6. Id. Glencore is a commodity trading giant. At Glencore, men on the company’s trading floor “bantered about groping the Queen of England’s genitals” and, as the company was preparing to move to a new office, “openly discussed how much ‘hot ass’ there would be at the gym near the new office.” Id. Ms. Murphy’s “account of Glencore’s culture was verified by two employees, one of whom recently left the company.” The employees “requested anonymity because they feared retaliation.” Id.
7. Id.
8. Id.
9. Id.
10. Id.
Pregnancy discrimination is just one of many mechanisms that either limit women’s advancement in the workplace or keep women out of the workforce altogether. Like pregnancy discrimination, family leave policy represents another area that Congress has failed to remedy despite passing major legislation. In 1993, Congress passed the Family and Medical Leave Act (FMLA) in order to give all workers an avenue to balance work and family caregiving obligations. Although most of the FMLA is gender neutral, Congress explicitly acknowledged in its findings that “due to the nature of the roles of men and women in our society, the primary responsibility for the caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.” The primary manner in which the FMLA would fulfill its purpose was by providing for up to twelve weeks of leave per year due for new parents, workers with serious health conditions, or workers with sick family members.

But the FMLA has done little to change the status quo. In 2020, The Guardian reported that about a quarter of women in the U.S. return to work within two weeks of giving birth, significantly less than the six-week minimum recommended by the American College of Obstetricians and Gynecologists. For example, in Iowa, Jessica Rebeschini returned to her full-time job as a waitress just two weeks after she gave birth to her third child via an emergency C-section. Rebeschini had to pump breastmilk in the restaurant bathroom and lived in fear of reopening her C-section scar. And in Mississippi, Kristin Moody returned to her job as a waitress just one week after her emergency C-section because she could not afford to take unpaid leave. Moody “[ripped] her incision six times as a result and can no longer feel her lower stomach.” Although the lack of access to paid leave in the U.S. primarily harms women in low-wage jobs, the issue impacts women across the en-

16. Id.
17. Id.
18. Id.
19. Id.
tire wage spectrum. For example, in an op-ed for The Guardian, Charlotte Sullivan, then a full-time employee at a small liberal arts college, described being forced to abort a pregnancy because she could not afford to take unpaid leave. And one study found that more than four in ten “highly-qualified women with children are leaving careers or taking a career break.”

Overall, federal policies aimed at allowing women to stay in the workforce have not done enough. First, this Note argues that the PDA and the FMLA prohibited explicit sex-based workplace exclusions while preserving other forms of sex-based workplace exclusions. The forms of sex-based workplace exclusions the PDA and the FMLA failed to remedy are not as explicit as the exclusionary policies enunciated in the 1870s, when Justice Joseph P. Bradley, writing for the Supreme Court, opined that the “natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.” But sex-based workplace exclusions still exist because the design and enforcement of work-family legislation does not match its purpose. Second, this Note argues that policies aimed at eliminating sex-based workplace exclusions must account for the specific experiences of women while promoting anti-stereotyping principles. To accomplish this, policymakers must recognize the unique nature of pregnancy and reimagine the “ideal worker”—invariably a man with no domestic responsibility—upon which legislatures and courts craft and enforce work-family policy.

Part I begins by establishing this Note’s framework before tracing the development of sex-based workplace exclusions from the 1870s through the 1970s. Part II examines the preservation of certain forms of sex-based workplace exclusions through the enactment and enforcement of the PDA and the FMLA. Finally, Part III analyzes proposed work-family legislation and discusses avenues for reform.

20. Chantel Boyens, Michael Karpman & Jack Smalligan, Access to Paid Leave is Lowest Among Workers with the Greatest Needs, URBAN INST. (July 2022), [https://perma.cc/6VJ2-WTTD].
22. Shelley Zalis, What You Need to Know About Taking a Career Break, FORBES (Jan. 30, 2018), [https://perma.cc/8ETX-ZFV7].
23. See infra Part III.
25. Infra Part III.
In deciding *Bradwell v. Illinois* in 1872, the Supreme Court of the United States justified sex-based workplace exclusions with an insidious ideology: that women belong in the “domestic sphere.”27 In many ways, the U.S. has come a long way since *Bradwell*. Whereas a small minority of women were allowed to work for wages before the 1900s, about three-quarters of women between the ages of 25 and 54 now participate in the paid labor force.28 But as we pass the 150-year anniversary of the Court’s infamous decision, women still do significantly more domestic work than men.29 In addition, attitudes about women and domestic work have not changed as much as labor participation data might suggest. For example, one survey of American adults found that about 20% of respondents thought that women should “return to their traditional role in society,” and, when asked about the “ideal situation for women with young children,” only 12% of respondents said “working full-time,” 47% said “working part-time,” and 33% said that women with young children would ideally not work at all.30 When respondents were asked the same question about men with young children, 70% said that “working full-time” was ideal, while only 4% chose “not working at all.”31 Finally, another study found that only 57% of people think that the U.S. still has work to do regarding gender equality, while 32% say that the U.S. “has been about right” and 10% say the country has “gone too far.”32

That women have been able to force their way into the paid workforce while still performing a majority of the domestic work is a result of a reform dynamic Reva Siegel calls “preservation through transformation,” which describes how “efforts to dismantle an entrenched system of status regulation can produce changes in its constituent rules and

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27. *Bradwell*, 83 U.S. at 141.
30. *Id.*
31. *Id.*
rhetoric, transforming the status regime without abolishing it.”33 This Note borrows the “preservation through transformation” framework to evaluate how sex-based workplace exclusions have evolved over time.34

A. Bradwell (1872)

The story of sex-based workplace exclusions in the U.S. began long before Bradwell,35 but as the first Supreme Court decision to rely on the idea that women belong in the domestic sphere, the case serves as a useful starting point for this analysis.

Myra Bradwell was already years into a trailblazing legal career before her case reached the Supreme Court.36 But when Myra Bradwell applied for admission to the state bar, the Illinois Supreme Court denied her application because, as a married woman, Bradwell “would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client.”37 The Illinois Supreme Court denied Bradwell’s appeal, writing “That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth.”38

In Bradwell’s appeal to the Supreme Court, she argued that the right to practice law was a privilege or immunity under the Fourteenth Amendment that individual states could not take from its citizens.39 In an 8-1 decision in favor of the State of Illinois, the Court affirmed the

34. See supra Parts I.A-C.
35. Women’s Rights, ANNENBERG CLASSROOM (2022), [https://perma.cc/ZN22-98AP]. In 1769, for example, the American colonies passed a law preventing women from owning property or keeping their own earnings. This system of property ownership was in place in some states until 1900, by which time every state in the U.S. had passed legislation allowing women to own property and keep their own wages.
36. After more than a decade of helping her husband run a law firm in Chicago, Bradwell applied for and received a charter from the Illinois legislature to run a business as a married woman and founded the Chicago Legal News in 1868. Under Bradwell’s leadership, the weekly publication eventually became one of the most prominent legal publications in the U.S. In 1869, Myra Bradwell became the first woman to pass the Illinois state bar exam. In Re Lady Lawyers: The Rise of Women Attorneys & the Supreme Court, SUP. CT. OF THE U.S., [https://perma.cc/SWK8-FN2C].
37. Bradwell, 83 U.S. at 131.
lower court’s decision and explained that the right to practice law in a state’s courts was not a privilege or immunity protected by the Fourteenth Amendment.40 Despite being presented with an obvious case of sex discrimination, the Court made no reference to sex in its opinion.

One justice, however, made the subtext in the case explicit. In his concurring opinion, Justice Bradley elucidated two inextricable threads underpinning the “separate spheres” tradition. The first thread (the “civil justification”) weaponized traditional ideas of femininity to say that women were incapable of working in the “civil” sphere.41 For Justice Bradley, “natural and proper timidity and delicacy which belongs to the female sex” made women unfit for civil life.42 The second thread (the “domestic justification”) said that families depended on women staying at home: “The constitution of the family organization . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”43 Bradley continued, “The harmony . . . of interests and views which belong . . . to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.”44

While these two justifications for excluding women from the workplace achieve the same result, the existence of separate justifications matters because it forced sex-equality advocates to respond to two different lines of attack: (1) women did not belong in the workforce because they were too weak and (2) society would fall apart without women at home.

B. Lochner-Era Protective Policies for Women in the Workplace

Despite Bradwell’s endorsement of state policies excluding women from the workplace, millions of women worked for wages in the decades that followed.45 States thus had to decide whether to enact different

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40. Bradwell, 83 U.S. at 138.
41. Bradwell, 83 U.S. at 141.
42. Bradwell, 83 U.S. at 141.
43. Bradwell, 83 U.S. at 141.
44. Bradwell, 83 U.S. at 141.
45. Dep’t of Com. & Lab. Bureau of the Census, Statistics of Women at Work Based on Unpublished Information Derived from the Schedules of the Twelfth Census: 1900 (Wash. Gov’t Printing Off., 1907). Data taken from the 1900 Census shows that nearly five million out of 23,485,539 women sixteen years of age and older were engaged in paid labor. Id. Of course, whether women could work for wages at the turn of the 19th century depended largely on a woman’s marital status and whether she was young, which made her more likely to not be married.
laws for women in the workplace than the employment laws already in place for men. The Supreme Court first addressed the issue of whether states could enact different workplace legislation for women in *Muller v. Oregon*, a 1908 case that upheld the constitutionality of state restrictions on how many hours women could work. *Muller*, however, cannot be understood without comparison to the infamous *Lochner v. New York*, decided three years earlier 1905.

At issue in *Lochner* was the Bakeshop Act, a New York state law restricting the number of hours a baker could work to sixty hours a week or ten hours a day. The Court sided with *Lochner* in a 5-4 decision, holding that the Bakeshop Act interfered with the freedom to contract and that there was not a legitimate relationship between an employee’s health and whether he worked too many hours. Although the Court did not explicitly announce what level of scrutiny the Bakeshop Act needed to withstand, the Court conducted an expansive analysis that looked more like strict scrutiny.

*Id.* In 1900, only about 5% of married women were “gainful workers, and about 68% of the women that worked for wages were under the age of 35.” *Id.* at 11. As a special report on the 1900 Census authorized by Congress explained, “a large proportion of the women who take up an occupation in early life abandon it later when they marry” because “marriage, like an occupation, normally and usually imposes upon a woman certain duties and responsibilities, namely those arising from the area of the home and family, involving in the majority of cases more or less labor in the form of housework.” *Id.* at 11. Note that the above data does not reflect the experiences of Black women in 1900, many of whom were engaged in paid labor.

48. *Lochner* is regarded as one of the Court’s biggest mistakes. See, e.g., James B. Stewart, *Did the Supreme Court Open the Door to Reviving One of Its Worst Decisions?*, N.Y. Times (July 5, 2022), [https://perma.cc/7K29-95RJ].
51. *Lochner*, 198 U.S. at 59. The Court warned that allowing the New York legislature to regulate the working hours of bakers because the occupation carried with it “the seeds of unhealthiness” would lead to unfettered regulations on workers, which in turn would endanger a man’s ability to provide for his family: “But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank’s, a lawyer’s or a physician’s clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one’s living could escape this all-pervading power, and the acts of the legislature . . . might seriously cripple the ability of the laborer to support himself and his family.”
The Court did not apply such rigorous scrutiny to an Oregon law that prohibited women from working more than ten hours per day in factories or laundries. In upholding the Oregon statute, the Court invoked both justifications for sex-based workplace exclusions used in *Bradwell*. For the Court, to invoke *Lochner* was to assume “that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor.” Just as the *Bradwell* court relied on the stereotype that women were too timid and delicate to exclude women from the “civil sphere,” the *Muller* Court explained that women were too physically weak for extended physical labor.

The Court also invoked the *Bradwell* court’s domestic justification, writing that legislation restricting women’s right to work was not only legal, but that it was “largely for the benefit of all.” In the Court’s words, “as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race.” Naturally, as the Court saw it, women belonged in the domestic sphere because society could not function any other way.

Contrasting *Lochner* with *Muller* illustrates two components underpinning the “transformation-through-preservation” of sex-based workplace exclusions. First, *Muller* reinforced two stereotypes: (1) women belong in the domestic sphere and (2) women do not belong in the civil sphere. Courts and legislatures relied on the reasoning in *Muller* for decades to keep women from fully participating in the workforce.

52. The Oregon statute provided that "no female (shall) be employed in any mechanical establishment, or factory, or laundry in this State more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day." 1903 Or. Laws 148.
55. *Muller*, 208 U.S. at 419.
56. *Muller*, 208 U.S. at 421. The Court asserted the truth of these stereotypes with the help of the Brandeis Brief, which relied primarily on pseudoscience. For example, to support the assertion that women suffered more than men from long workdays, Brandeis quoted a doctor who explained that “[w]oman is badly constructed for the purposes of standing eight or ten hours upon her feet” because of the “peculiar construction of the knee and the shallowness of the pelvis, and the delicate nature of the foot as part of a sustaining column.” The Brandeis Brief vol. 4, at 205 (last visited May 17, 2023), [https://perma.cc/DDU9-7LC4].
57. *Muller*, 208 U.S. at 422.
59. The legacy of *Muller* endured for decades. See, e.g., People v. Charles Schweinler Press, 108 N.E. 639 (N.Y. 1915) (upholding a New York statute barring women
While such laws varied in form, their effects were consistent with the stereotypes endorsed in *Bradwell* and *Muller*. Second, *Muller* opened the door for paternalistic legislation that relied on the idea that women were less fit for the “civil sphere” than men. This had the tangible effect of making women less attractive candidates to employers that were not subject to maximum hour workplace legislation. This reality exemplifies the interaction between legislation regulating the so-called “civil sphere” and gender stereotypes.

*Muller* was overturned fifteen years later in *Adkins v. Children’s Hospital of D.C.*, but *Adkins* was decided on contract grounds and did not directly address the separate spheres component of *Muller*. More than sixty years after *Muller*, the Ninth Circuit was presented with *Struck v. Secretary of Defense*, a case that explicitly implicated the separate spheres doctrine. The issue in *Struck* was the constitutionality of an Air Force regulation that required women in the Air Force who became pregnant to either have an abortion or leave the military. Ruth Bader Ginsburg, then with the ACLU’s Women’s Rights Project, argued that the regulation violated the Fourteenth Amendment’s Equal Protection Clause because it prevented a class of people—pregnant women—from working without “consideration of individual capacities.”

Ginsburg’s explanation for why the regulation violated the Fourteenth Amendment’s Equal Protection Clause implicated both the civil and domestic justifications for sex-based workplace exclusions discussed in Part I.A. First, Ginsburg wrote that the Air Force regulation assumed that “a woman who becomes pregnant is not fit for duty, but should be confined at home to await childbirth and thereafter devote herself to child care.” Second, Ginsburg criticized the self-reinforcing nature of the domestic justification, arguing that the “presumably well-meaning exaltation of woman’s unique role in bearing children has, in effect, de-

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64. *Id.* at 52.
nied women equal opportunity to develop their individual talents and capacities and has impelled them to accept a dependent, subordinate status in society.” In any case, Struck became moot before the Court could decide it, setting the stage for two cases that forced Congress to act: Geduldig v. Aiello (1974) and General Electric Company v. Gilbert (1976).


In Geduldig, a group of women challenged California’s exclusion of pregnancy from its disability insurance system—which paid benefits to private employees who were temporarily unable to work because of a disability—on the grounds that the system violated the Fourteenth Amendment’s Equal Protection Clause. The Court held that California’s temporary disability insurance program did not violate the Equal Protection Clause because, under the program, “[t]here is no risk from which men are protected and women are not.” The Court continued, “Likewise, there is no risk from which women are protected and men are not.”

Two years later, the Court extended the logic of Geduldig to Gilbert, a class action in which the female employees at the General Electric

65. Id. In later years, scholars provided theoretical and empirical support to Bader Ginsburg’s arguments. According to Naomi Cahn, actions by American courts and legislatures like Bradwell and Muller have rendered the “domestic sphere” as one of the few arenas in which women could retain some kind of power. See Naomi Cahn, The Power of Caretaking, 12 YALE J.L. & FEMINISM 177 (2000). Cahn argued that these actions furthered the very stereotypes underpinning the separate sphere doctrine. Id. at 179 (“Mothers’ power within the home has developed not only through an ideology of domesticity that celebrates women’s maternal roles, but also through women’s actual performance of childcare and housekeeping.”).

68. Geduldig, 417 U.S. 484.
69. Gilbert, 429 U.S. 125.
70. Geduldig, 417 U.S. at 486-87.
71. Geduldig, 417 U.S. at 497.
73. Geduldig, 417 U.S. at 497.
Company (GE) challenged the company’s disability benefits program. Like the California insurance system at issue in Geduldig, GE excluded pregnancy from its comprehensive disability benefits program. The key difference between the two cases was that the plaintiffs in Gilbert sued under Title VII of the 1964 Civil Rights Act, which differed from the Equal Protection Clause because it prohibited disparate impact in addition to disparate treatment. But this difference was not enough for the Court to abandon the view of pregnancy it announced in Geduldig. After noting that GE’s disability program was “strikingly similar” to the plan in Geduldig, the Court held that GE’s program did not have a disparate impact on women because there was “no proof that [GE’s program] is in fact worth more to men than to women.”

Neither Geduldig nor Gilbert transformed pregnancy discrimination law, but the Court’s decisions highlight two key concepts that courts and legislatures employ in preserving sex-based workplace exclusions. First, the decisions show how courts and legislatures wield formal equality to ignore the substantive effects of their policies. Formal equality requires only that a law applies to all people equally, and existing inequalities in society mean that formal inequality invariably results in unequal outcomes. In Geduldig, the Court applied formal equality to hold that California’s exclusion of pregnancy from its disability insurance program did not differentiate between men and women. Rather, the Court reasoned, the system differentiated between non-pregnant people and pregnant people, an acceptable distinction because pregnancy “is an objectively identifiable physical condition with unique characteristics.” The Court applied the same logic of formal equality from Geduldig in Gilbert: “[P]regnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits.” In addition, the Court’s framing of pregnancy as an “additional risk, unique to women” demonstrates how the formal equality frame-

74. Gilbert, 429 U.S. at 125.
75. Gilbert, 429 U.S. at 125.
77. Gilbert, 429 U.S. at 133.
78. Gilbert, 429 U.S. at 138.
81. Geduldig, 417 U.S. at 496 n.20.
83. Gilbert, 429 U.S. at 139.
work, in the context of pregnancy discrimination, centers the male body and thus privileges the “ideal worker.”

_Geduldig_ and _Gilbert_ also show how opponents of workplace equality co-opt feminist arguments. Throughout the 1940s and 1950s, feminist advocacy premised “the claim to benefits . . . on working women’s needs and the social importance of pregnancy.” But “gender ideologies rooted in the family-wage ideal and rising hostility to the New Deal welfare state proved insurmountable obstacles.” This led feminist advocates to change course and instead frame arguments about what is now known as the “temporary disability paradigm,” which framed benefits for pregnant workers as “an antidiscrimination right rather than . . . an independent claim to a social welfare entitlement.” Against that backdrop, the plaintiffs in _Geduldig_ argued that “while pregnancy itself is _not_ a disability, disabilities _caused_ by pregnancy are similar to disabilities now compensated in all relevant respects.” In response, California appropriated feminist arguments to argue that special treatment for pregnancy would make it harder for women to gain “social acceptance for roles alternative to childbearing and childrearing,” an argument the Court endorsed in their decision.

Congress overturned _Gilbert_ when it passed the PDA in 1978, thus repudiating—at least to some degree—the theory of equality underpinning _Geduldig_. Still, the legacy of _Geduldig_ continues to figure prominently in both the Title VII pregnancy discrimination landscape and family-leave policy. As Dinner writes, “Despite the partial repudiation of the logic of _Geduldig_ by Congress’ enactment of the PDA, this now-infamous decision continued through the late twentieth century to act as a firewall severing state regulation of pregnancy from sex equality under the U.S. Constitution.”

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85. _Id._ at 82.
86. _Id._ (referencing Dorothy Sue Cobble, _THE OTHER WOMEN’S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA_ 127-32 (William Chafe, Gary Gerstle, Linda Gordon & Julian Zelier eds.) (2004)).
87. _Id._ at 82-83.
89. _Id._ at 89 (quoting Reply Brief for Appellant at 2, _Geduldig_, 417 U.S. 484 (No. 73-640)).
90. _Id._ at 93.
II. PRESERVATION THROUGH TRANSFORMATION

Before the PDA and the FMLA, Geduldig and Gilbert represented the status quo. This meant that the federal government did not provide women with benefits for pregnancy. In addition, because Title VII did not extend to pregnancy, pregnant women could not seek from the courts a remedy for pregnancy discrimination by company employees or corporate benefits policies that excluded pregnancy from coverage. And women—or anyone else, for that matter—generally lacked access to family leave.

The lack of federal legislation resulted in two harms. First, the federal government’s unwillingness to require pregnancy benefits or provide protection from pregnancy discrimination left it to private businesses to fill in the gaps. When private businesses inevitably failed to act, women and families had to find solutions for themselves. Because sex stereotypes permeated private businesses and existing family structures, relying on both of those entities was always going to continue pushing women out of the workforce at disproportionate rates to men. Second, the government’s silence implicitly endorsed the idea that neither pregnancy nor family care were worth government attention.

A. The Pregnancy Discrimination Act of 1978 (PDA)

Congress passed the Pregnancy Discrimination Act in 1978, reversing Gilbert in light of pressure from feminist activists, labor unions, and civil rights groups. Congress explained that the “basic principle” of the PDA is that “women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work.” Congress attempted to effectuate that principle by amending Title VII of the Civil Rights Act of 1964 to include pregnancy discrimination in its definition of sex discrimination: “The terms ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.” This change, in theory, would protect women against practices

91. Ray & Bell, supra note 3, at 621-25.
[such as] being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion.”

The PDA also applied the same “basic principle” to benefits, providing that a “woman unable to work for pregnancy-related reasons is entitled to disability benefits or sick leave on the same basis as employees unable to work for other medical reasons.”

But the PDA’s emphasis on treating pregnant women the same as men portended its limited capacity to end pregnancy discrimination: How can pregnant women identify “similarly-situated” men when men do not experience pregnancy? The incoherence of the PDA’s design raises the question of how much Congress truly meant for the PDA to protect women from pregnancy discrimination.

The reasons underpinning the PDA’s failures begin with the mess of competing forces at the PDA bargaining table: the final text of the PDA represents a compromise between feminist activists, the business lobby, and anti-abortion activists. As Deborah Dinner writes, these three groups “drew upon two legal discourses in debating pregnancy discrimination: liberal individualism and . . . ‘neomaternalism.’”

Liberal individualism, which developed in response to the kinds of discrimination codified in Muller, “emphasized principles of same treatment, private choice, and neutrality under law.” The doctrine entered popular discourse again in the 1970s during debates about women’s reproductive rights. Feminists used liberal individualism to advance “an affirmative vision of choice that encompassed childbearing women’s right to economic autonomy.” In contrast, the business lobby and conservative state representatives coopted liberal individualism to “serve market libertarian interests.” As Deborah Dinner writes, the business lobby drew on the privacy logic of Roe v. Wade to justify pri-

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96. Id.
99. Id.
100. Id. at 456. After Muller, feminist activists “came to understand sex-based protective laws as an injurious group classification of women that would undermine equal access to work opportunities.” Id. at 463.
101. Id. at 480.
102. Id.
103. Id.
vate, familial responsibility for the costs of pregnancy.” Thus, for the business lobby, “the notion of reproductive choice justified classifying pregnancy as a voluntary condition rather than a temporary disability.” Finally, the business lobby argued that “because women now had the ability to choose whether to occupy roles as mothers or workers, discrimination on the basis of pregnancy did not amount to sex discrimination.”

Liberal individualism’s influence on the PDA may be found in its second clause, which mandates that pregnant women or women affected by medical conditions related to pregnancy “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.”

In contrast to liberal individualism, neomaternalism “leveraged the social value of motherhood to lay claim to state entitlements for pregnant workers.” Neomaternalism built on New Deal era maternalist reform efforts that had leveraged the social value of motherhood to “argue for protective labor standards for women workers and social-welfare entitlements protecting low-income women and children.” Maternalist arguments lost salience in the late 1960s and 1970s, primarily because arguments in sex discrimination cases “undermined the legitimacy of legal arguments explicitly based on sex-role stereotypes.” Then, neomaternalism accounted for the rapidly shifting legal landscape by using the rhetoric of maternalism “that motherhood constituted a service to society” to “advance a new legal ideal affirming pregnant women’s right to economic independence as well as security.” Neomaternalism thus added to the maternalist argument that women played a fundamentally distinct role from men to argue that the distinction merited workplace entitlements for pregnant women, an addition that became necessary to

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104. Id. at 481.
105. Id.
106. Id.
108. Dinner, supra note 98, at 456.
109. Id.
110. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).
111. Dinner, supra note 98, at 477. Deborah Dinner cites two additional [but inextricable] reasons for the demise of maternalist advocacy. First, “the feminist movement put pressure on businesses and states to conform to a legal regime that would transform gender norms rather than reinforce them.” Id. at 478. Second, “feminists began to argue that sex-role stereotypes inflected the business lobby’s statistics about the costs of pregnancy disability benefits.” Id.
112. Id. at 456.
counter arguments by the business lobby’s co-opting of liberal individualism. Neomaternalism’s influence on the PDA is reflected by its first clause, which prohibits discrimination “on the basis of pregnancy, childbirth, and related medical conditions.”

Finally, anti-abortion activists advocated both for and against the PDA. Some anti-abortion activists “opposed both abortion and pregnancy discrimination benefits on the basis that they disrupted traditional gender roles,” while others “both took an anti-abortion stance and supported legislation that challenged traditional gender and sexual ideologies.” While the alliance forged by pro-PDA anti-abortion activists and feminist activists proved vital to passing the PDA, there is evidence that the alliance ultimately led to a provision in the bill that “exempted employers from mandatory coverage of abortion except when necessary to save the life of the mother.”

Part II of this Note argues that the PDA preserves sex-based workplace exclusions through three distinct mechanisms: (1) The similarly-situated litigation requirement, (2) the similarly-situated requirement for pregnancy-related benefits, and (3) reinforcement of the idea that pregnancy is a private economic responsibility that employers and employees should handle. Part II concludes by discussing the harms the PDA reinforced and created by deferring to private businesses on pregnancy discrimination policies and conflicts.

1. The Similarly-Situated Litigation Requirement

This subsection begins with the history of the phrase “similarly situated” and language like it before examining its use in the context of the PDA. The phrase “similarly situated” was first used by the Supreme Court in the early 1800s in the context of property law. The way the phrase is used now, however, has its roots in late 19th century Equal Protection Clause cases in which the Court asked whether facially-neutral legislation applied equally to all similarly-situated people. The Court

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114. Dinner, supra note 98, at 498 (explaining that some anti-abortion activists did not see pregnancy benefits as inconsistent with an anti-abortion position).
115. Id. at 513.
118. Infra Part II.A.3.
120. The first such case was Barbier v. Connolly, a case about a facially neutral ordinance in San Francisco that discriminated against the city’s large population of Chinese laun-
continued to use the phrase in *Lochner*-era Equal Protection cases, emphasizing that state legislatures could enact class-based legislation, but that “[t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” Then, in the 1970s, the Court began to use the phrase in cases challenging legislation that affected men and women differently; the Court insisted that there were many ways that men and women—particularly mothers—were not similarly-situated, before upholding statutes that affected men and women differently and thus reinforced the stereotype of women as primary caregivers.

The legislative history of the PDA contains no evidence that anyone contested the use of the “same treatment” language in the final text of the Act. Rather, the inclusion of the phrase is in accord with liberal individualism’s influence on the PDA. As discussed above, liberal individualism “emphasized principles of same treatment, private choice, and neutrality under law.” Because the PDA was established under Title VII, a plaintiff who brings a suit under the PDA must show that her employer treated her less favorably than “similarly situated” individuals outside of her protected class. But in the years following the passage of the PDA...
of the PDA, courts failed to clarify what the similarly situated requirement meant in practice. Early signs from the Supreme Court’s initial PDA decisions were promising. In *Guerra*, the Court explained that Congress intended the PDA to be a “floor beneath which pregnancy benefits may not drop” rather than “a ceiling above which they may not rise.”127 Then, in *Johnson Controls*, the Court held that a company policy preventing women of child-bearing age from work that might involve exposure to lead violated the PDA because the company policy did not apply to men.128

While these cases offered some hope that the PDA would lead to an objective minimum standard for how employers treated pregnant workers, the Court failed to specify what the PDA “floor” actually meant. In the years following *Johnson Controls* and *Guerra*, federal courts “nearly invariably sided with employers in cases brought by pregnant workers alleging failure to accommodate pregnancy.”129 In these cases, courts interpreted the “similarly-situated” requirement to mean that employers could treat pregnant workers as poorly as they treated nonpregnant workers with disabilities.130 Even though Title VII does not make demonstrating favorable treatment of a comparator the exclusive method for proving disparate treatment in non-pregnancy contexts, courts tended to require plaintiffs to do exactly that in pregnancy discrimination cases.131

The Court finally clarified the law under the PDA in 2015 in *Young v. United Postal Service*.132 In *Young*, the issue was whether UPS was required to accommodate Peggy Young’s doctor-recommended request for light-duty throughout her pregnancy when UPS only made light-duty assignments available to individuals with work-related tempo-

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129. Katherine Shaw, ’Similar in Their Ability or Inability to Work’: Young v. UPS and the Meaning of Pregnancy Discrimination in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 212 (Katherine Shaw, Reva B. Siegel & Melissa Murray eds. 2019).
130. *I d.* at 212-13.
The Court’s 6-3 decision came out in favor of Peggy Young, with the Court holding that “an individual pregnant worker” such as Young “who seeks to show disparate treatment through indirect evidence may do so through application of the McDonnell Douglas framework.” Thus, unless a plaintiff has direct evidence of discrimination, a plaintiff alleging a PDA violation after a denial of reasonable accommodations must show that (1) she is a member of a protected class, (2) she sought an accommodation, (3) she was denied the accommodation, and (4) the employer provided similar accommodations to other workers similarly situated in their ability or inability to work. The Court explained that its standard was “not intended to be an inflexible rule” and that “an individual plaintiff may establish a prima facie case by ‘showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under’ Title VII.”

The Court’s holding represents a middle ground between UPS’s desired interpretation of the PDA and Young’s. Young argued that the second clause of the PDA required employers to “provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work.” In response, UPS argued that the second clause of the PDA only asked courts to “compare the accommodations an employer provides to pregnant women with the accommodations it provides to others within a facially neutral category to determine whether the employer has violated [the PDA].” The Court agreed that Young’s interpretation of the PDA would grant “pregnant workers a ‘most-favored-nation’ status,” but the Court also rejected UPS’s limited reading of the PDA because it “would fail to carry out [the] important congressional objective” of overturning Gilbert.

The similarly-situated litigation requirement imposes an unreasonable burden on women who sue under the PDA because it forces pregnant women to identify a comparator that may not exist. As written by Betty Friedman, the similarly situated requirement often leaves women “trying to twist pregnancy into something that’s like a hernia,” which in turn rein-

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133. Young, 575 U.S. at 211.
134. Young, 575 U.S. at 229.
135. Young, 575 U.S. at 229.
136. Young, 575 U.S. at 229.
139. Young, 575 U.S. at 18.
140. As written by Betty Friedman, the similarly situated requirement often leaves women “trying to twist pregnancy into something that’s like a hernia,” which in turn rein-
quirement might ensure a level playing field if pregnant workers and non-pregnant workers were already on a level playing field, but pregnancy is a singular event without comparison. The requirement thus renders the PDA woefully unprepared to address the full range of obstacles that only pregnant women face. For example, courts have refused to “expand the PDA’s scope to include discrimination related to lactation, breastfeeding, or breast milk expression”—all things that only pregnant women will experience. Courts have also refused to interpret the PDA so that it prohibits discrimination against a woman because of her need to care for a newborn. Furthermore, the PDA does not address many of the more subtle ways women experience pregnancy discrimination, such as difficulty in obtaining promotions or important assignments at work.

2. The Similarly-Situated Same Benefit Requirement

The similarly-situated requirement extends to the provision of benefits, too: the PDA requires employers to provide women “affected by pregnancy, childbirth, or related medical conditions” the “same” benefits as the employer provides other workers. This provision represents a relatively low bar for employers to clear and primarily implicates employers’ provision of maternity leave, child care leave, and health insurance plans. Regarding maternity leave, the PDA precludes employers from forcing women to take pregnancy leave only if they are willing and

forces the “ideal worker” stereotype because it expresses that the proper reference point for how an employee should be treated is someone other than a pregnant woman. Samuel R. Bagenstos, Nevada Department of Human Resources v. Hibbs: Universalism and Reproductive Justice in Reproductive Rights and Justice Stories 212 (Katherine Shaw, Reva B. Siegel & Melissa Murray eds. 2019).

142. Id. at 168 (“Similarly, individual circumstances of the fourth trimester can create profound inequalities in the quality of recovery and transition. The working mother who must return to employment immediately will have different fourth trimester challenges related to breastfeeding and fatigue than the working mother on maternity leave or the stay-at-home mother. While those women may struggle and experience a lack of [sleep], the working mother’s additional responsibilities, combined with a lack of time to rest and recover, will create different challenges.”).
143. Id. at 207.
144. Id.
145. Id.
146. Id.
able to work and if the employer would not have forced a temporarily-disabled nonpregnant employee to take leave.\textsuperscript{148} And although employers may not “exclude the provision of pregnancy benefits for either female employees or the spouses of male employees from an otherwise inclusive benefits plan,” the PDA explicitly says that employers are not required to provide abortion benefits.\textsuperscript{149}

In some ways, courts have interpreted the PDA’s same benefit protections broadly. For example, employers may not provide fewer benefits for pregnancy than they do for other hospital stays.\textsuperscript{150} But plaintiffs have not been able to convince federal courts to expand the scope of the PDA beyond a limited construction of pregnancy.\textsuperscript{151} Finally, like the similarly-situated litigation requirement, the floor beneath which employer-provided benefits may not drop is only relative to similarly-situated men.\textsuperscript{152} The lack of an objective floor again disproportionately harms women because cisgender men cannot get pregnant. A minimal benefits package would thus result in a woman receiving less benefits relative to the conditions for which she may require coverage.

3. Reinforcing the Idea that Pregnancy is a Private Economic Responsibility

The third “preservation through transformation” mechanism of the PDA is the way the Act reinforces the idea that pregnancy and childbirth are private economic responsibilities rather than a cost that the government should bear.\textsuperscript{153}

Costs stayed private primarily because of the business lobby’s opposition to the PDA. As legislators drafted the PDA, the business lobby argued that it was not the job of businesses to subsidize pregnancy and childbirth because families were supposed to shoulder those costs themselves.\textsuperscript{154} In the eyes of the business lobby, pregnancy was voluntary, and it was unfair to force employers to pay for a choice individual wom-

\textsuperscript{148.} Ray & Bell, supra note 3, at 632.
\textsuperscript{149.} Id. at 636.
\textsuperscript{150.} Matambanadzo, supra note 141, at 207.
\textsuperscript{151.} Id.
\textsuperscript{153.} Dinner, supra note 98, at 515 (“Although the PDA further spread the costs of pregnancy and childbirth across society, however, it also preserved market libertarian commitments to keeping those costs private. The PDA did not socialize the costs of reproduction.”).
\textsuperscript{154.} Id. at 496.
One member of the business lobby even made the debate’s subtext explicit when he argued that “[d]isability benefits are supposed to pay the lost wages of the family provider” rather than the lost wages of a woman.\textsuperscript{156} As it happened, the PDA would not include any provisions that challenged the presupposition that women are the default caretakers and not the family provider. Instead, the costs of pregnancy remained with women while the ultimate decision on whether to transfer those costs to employers in PDA claims rested with the predominantly male judiciary.\textsuperscript{157}

4. Conclusion

The PDA has not done enough to change the pre-PDA \textit{Geduldig} and \textit{Gilbert} world. Because of the similarly-situated litigation requirement, the PDA grants significant deference in remedying pregnancy discrimination to the judiciary, an institution influenced by the same sex-based stereotypes the PDA is supposed to remedy.\textsuperscript{158} It should hardly come as a surprise, then, when courts adopt narrow conceptions of pregnancy in PDA cases. Likewise, the similarly-situated same benefit requirement gives the job of determining the benefits “floor” to private businesses, most of which are run by men.\textsuperscript{159} Finally, the PDA’s failure is as much about its ineffective remedies as it is about what the PDA does not do: define in substantive terms the benefits that pregnant women should receive in the private and public sectors. In sum, when the judiciary and the private sector fail to provide the necessary backstops for pregnancy discrimination, women are left to rely on existing family structures to find the support necessary to stay in the workplace just like they were before the PDA.

While there is no single statistic that can measure the true success or failing of the PDA, Equal Employment Opportunity Commission (EEOC) data shows that pregnancy discrimination claims are hovering

\begin{footnotes}
\item[155] \textit{Id.} at 505.
\item[156] \textit{Id.}
\item[157] Jasmine Mithani, \textit{See Just How Much White Men Have Dominated the Federal Judiciary, The 19}\textsuperscript{th} (Mar. 21, 2022), [perma.cc/Z2Y2-C5CG] (showing that about 66\% of Article III judges are male and 71\% are white).
\item[159] Andrew W. Hait, \textit{Women Business Ownership On the Rise: Number of Women-Owned Employer Firms Increased 0.6\% from 2017 to 2018, U.S. Census Bureau} (Mar. 29, 2021), [perma.cc/X9JM-TSU6].
\end{footnotes}
near an all-time high. And while the practice of pregnancy discrimination is most obvious in physically demanding jobs, where “[p]regnant women risk losing their jobs when they ask to carry water bottles or take rest breaks,” pregnancy discrimination can be too subtle for the current PDA to remedy. In corporate office jobs, for example, “Pregnant women . . . are often perceived as less committed, steered away from prestigious assignments, excluded from client meetings and slighted at bonus season.” Bias against pregnant women also has a clear impact on women’s earnings—one study found that while “[M]en’s earnings increase by 6 percent when they become fathers . . . [e]ach child chops 4 percent off a woman’s hourly wages.” The bottom line is that “whether women work at Walmart or on Wall Street, getting pregnant is often the moment they are knocked off the professional ladder.” Ultimately, the Pregnancy Discrimination Act has provided an adequate remedy for blatant pregnancy discrimination, but the Act strands women who are subject to the subtle pregnancy discrimination that plague contemporary workplaces.

B. The Family and Medical Leave Act of 1993 (FMLA)

Before the passage of the Family & Medical Leave Act, the federal government left family leave policy entirely to the states and the private sector. Because the states tended to offer sparse leave policies, women were frequently forced to leave the workforce to care for newborns or sick family members. Congress passed the FMLA with the dual goals of “encouraging stability in the family as well as productivity in the work place.” Congress’ five stated purposes in enacting the FMLA were to (1) achieve work-life balance while “preserving family integrity,” (2) allow male and female employees to take “reasonable leave for medical reasons,” (3) accomplish the first two purposes without hurting employers, (4) accomplish the first two purposes without violating the Equal Protection Clause of the Fourteenth Amendment and minimize sex-based discrimination, and (5) “promote the goal of equal emplo-

160. EEOC, PREGNANCY DISCRIMINATION CHARGES FY 2010 - FY 2021, [https://perma.cc/2CG2-DESP].
161. Id.
162. Id.
164. Id.
166. McDonald Garrison et al., supra note 11, at 338.
ment opportunity for women and men.” The FMLA was passed—at least in part—to fill in the gaps left by the PDA, and hopes were high after its passage: President Bill Clinton made the FMLA the first bill he signed, declaring that American employees would “no longer need to choose between the job they need and the family they love.”

But asymmetry in Congress’ findings for the FMLA portended its shortcomings. On one hand, Congress found 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.” But Congress also found that “employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.” It remains unclear how the FMLA can remedy an issue that primarily affects women without tailoring the bill to women.

Part II.B of this note argues that the FMLA represents another example of “preservation through transformation” because of three mechanisms: (1) its failure to affirmatively address imbalances in who does the majority of caretaking and housework, (2) the brevity of the maximum leave allowed, and (3) the FMLA’s provision of only unpaid leave.

1. The FMLA Fails to Affirmatively Address Gender Imbalances in Caretaking and Housework

The primary reason for the FMLA’s lack of success stems from its failure to affirmatively address the fact that women, more than men, are responsible for domestic work. As the foremost family leave legislation in the United States, the onus was on the FMLA to attack the root causes of gender and sex inequality in the workplace. But even as the FMLA was supposed to fill in the gaps left by the PDA, the FMLA relied on the exact same principles of formal equality that made the PDA ineffective. Congress designed the FMLA to apply only to “eligible employees,” defined as employees who have worked for at least twelve months...

168. McDonald Garrison et al., supra note 11, at 337-38.
169. Id. at 338 (quoting Paul Richter & Gebe Martinez, Clinton Signs Family Leave Bill into Law Legislation, L.A. TIMES (Feb. 6, 1993)).
172. See supra Section III.B.
and 1,250 hours for the same employer during the preceding year. In fact, the FMLA’s definitions section does not reference gender or pregnancy at all. For Laura Kessler, “the gender neutrality of the Act perpetuates the myth that women and men share equally in the burdens of caregiving.”

The FMLA’s commitment to a formal vision of equality should come as no surprise: by the time legislators began drafting the FMLA, formal equality was the dominant theory of equality used by feminist lawyers. Feminist lawyers believed that granting “special treatment” to women was harmful because (1) it reinforced the idea that taking care of children was a job for women and (2) it encouraged hiring discrimination against women because it made women more expensive to employ. However, the decision to forgo any kind of “special treatment” did do some good. For example, the formal equality approach “created a standard of ‘gender equality’ in leave policies that resulted in coverage not just for women, and for more than just childbirth.”

But legislation cannot bring about the vision it hopes to achieve if it ignores the root causes necessitating the legislation in the first place, and the FMLA’s failure to address caretaking patterns is reflected in the bill’s utilization data. While women take leave under the FMLA at similar rates to men for the same reasons, women take leave for significantly longer periods of time, and are more likely to request and take leave for a sick family member than for themselves. Women also remain far more likely to take leave after the birth of a newborn. Meanwhile, men on average take longer leaves for their own illnesses (twenty-five business days) than they do for the birth of a new child (eighteen busi-

174. Id.
175. Kessler, supra note 92, at 420.
176. See, e.g., Bagenstos, supra note 140, at 188-90.
177. Id. at 189.
178. Id. at 190.
179. Anthony, supra note 26, at 472.
180. Id. at 473, 492 (“A law that refuses to take gender into account is effective only if the private social structure does not itself perpetuate women’s inequality, regardless of what the law says . . . . The FMLA is a prime example of existing law merely being extended to women as if they were already citizens in the same right as men.”).
ness days). One 2019 study found that 96% of employed fathers maintained full-time employment after the birth of a new child, compared with 78% of employed mothers. This data shows that the FMLA has not significantly affected the gendered nature of domestic work, which means that women often remain less desirable in the eyes of employers for hiring and promotions.

FMLA utilization data obscures one of the FMLA’s primary failings: many women do not even qualify for coverage in part because women are more likely to be responsible for caregiving and domestic work. According to 2020 Department of Labor statistics, only 56% of the U.S. workforce is eligible for the FMLA, a figure that has been largely steady since 1995, and disparities in FMLA access appear across race, gender, and class. In addition to limiting “eligible employees” to those who have worked for at least twelve months and 1,250 hours for an employer, the FMLA excludes employees who work for employers that employ fewer than fifty employees. This means that the FMLA is only available to employees who work for larger employers and can manage a full-time workload. Women, people of color, and single parents are less likely to occupy these jobs, which leads to discrepancies in which demographics are eligible for FMLA leave. While 58% of white people are eligible for the FMLA, only 52% of Hispanic people and 53% of Asian people are eligible. And although the FMLA covers white people and Black people at similar rates, Black people are 6% more likely to be excluded due to insufficient hours worked, whereas white people are more likely to be excluded due to employer size be-

183. Herr et al., supra note 181, at 1, 3 (reporting that women take an average of thirty-two business days of leave for their own illnesses and fifty-four days of leave for the birth of a new child).
185. Dinner, supra note 182, at 442.
186. Scott Brown, Jane Herr, Radha Roy & Jacob Alex Klerman, Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys, ABT ASSOCIATES, 6 (Jul. 2020), [http://perma.cc/9ZMC-JY9E] [hereinafter Brown et al.].
187. Id. at 8.
190. Brown et al., supra note 186, at 8.
cause white people are more likely to have access to family-run small businesses. 191

Most glaringly, 63% of dual parents are eligible for FMLA coverage, compared to only 43% of single parents. 192 Consider, for example, a low-income single mother of color who must work multiple part-time jobs to support her family while maintaining flexibility necessary to care for her children. The FMLA’s barriers to coverage mean that she would not be covered even though she arguably represents the exact type of person that the FMLA should have been written for. Nearly thirty years after the passage of the FMLA, it continues to be the case that “[w]omen’s homemaking role allows men to fulfill their employment responsibilities without many impositions or competing priorities, and to measure up to and reinforce the masculine nature of work structures.” 193

2. Twelve Weeks of Leave is Not Enough

The second “preservation through transformation” of the FMLA is its provision for only twelve weeks of leave per year. 194 Employees covered by the FMLA may take leave for several reasons, including (A) “the birth of a [child] and in order to care for such [child],” (B) the “placement of a [child] with the employee for adoption or foster care,” (C) to care for a qualifying family member if the family member has a “serious health condition,” or (D) if the employee has their own “serious health condition that makes the employee unable to perform the functions of such employee.” 195 Put simply, employees may take FMLA leave when they become new parents or when they need to care for themselves or a family member suffering from a serious illness. However, these reasons often require more time and care than the FMLA allows.

Pregnancy is one of the most common reasons for which employees require FMLA leave, 196 and while many women are able to return to work soon after childbirth, mothers often need more than twelve weeks

192. Id.
193. Anthony, supra note 26, at 491.
to recover from pregnancy and childbirth.\(^{197}\) The time after childbirth, which is now known by many as “the fourth trimester,”\(^ {198}\) has three “distinct but continuous phases”: (1) the initial or acute period involving the first six to twelve hours postpartum, (2) the “subacute postpartum period, which lasts 2-6 weeks,” and finally, (3) the “delayed postpartum period, which can last up to 6 months.”\(^ {199}\) Some experts believe that recovery from pregnancy may continue from six months to a full year after childbirth.\(^ {200}\) In addition, many women struggle with their mental health after childbirth—one study found that about one in seven women experience postpartum depression, which can appear “days or even months after delivering a baby” and “can last for many weeks or months if left untreated.”\(^ {201}\)

The FMLA’s provision for only twelve weeks of leave per year is woefully insufficient for pregnancy. A pregnant woman cannot take leave during the pregnancy itself unless she has medical proof that her pregnancy is both abnormal and incapacitating, which exemplifies the FMLA’s narrow conception of pregnancy.\(^ {202}\) In addition, a study published by the National Bureau of Economic research found that new mothers who took fewer than the twelve weeks of leave allowed by the FMLA were more likely to experience depression.\(^ {203}\) In contrast, another study reported that “an increase in leave duration is associated with a decrease in depressive symptoms until six months postpartum.”\(^ {204}\)

Twelve weeks is also insufficient leave for the daily caregiving tasks that require employees to take leave. First, the FMLA does not allow

\(^{197}\) Allison Yarrow, What No One Tells New Moms About What Childbirth Can Do to Their Bodies, Vox (May 4, 2018), [http://perma.cc/K4S-A27F].

\(^{198}\) See generally, UNC School of Medicine: Pediatrics, Obstetrics, and Gynecology, 4th Trimester Project, MomBaby.org, [http://perma.cc/7DVW-VXEL].


\(^{200}\) American Pregnancy Association, Postpartum Recovery: How to Ease and Speed Your Recovery, [https://perma.cc/MYJ2-WZXT].

\(^{201}\) American Psychological Association, Postpartum Depression: Causes, Symptoms, Risk Factors, and Treatment Options, (Nov. 2, 2022), [http://perma.cc/BEN7-NXBV] (noting that PPD can make it hard for you to get through the day, and it can affect your ability to take care of your baby, or yourself).

\(^{202}\) Kessler, supra note 92, at 424.

\(^{203}\) Alana Romain, These Studies Show Going Back to Work Too Soon is Bad for Moms’ Health, Romper (Aug. 21, 2017), [https://perma.cc/2PNQ-E6MQ].

parents to stay home to care for infants older than one year old. In addition, the Department of Labor (DOL) instructs that the FMLA only applies to conditions requiring three or more calendar days and that the FMLA does not cover common illnesses unless “complications arise.” Instead, the FMLA only covers “serious illnesses,” leaving uncovered many of the short-term illnesses and issues that require a parent’s attention. This means, for example, that a parent may not use FMLA leave to care for a toddler with a one-to-two-day illness. This disproportionately harms women because women are more likely than men to perform daily caregiving tasks that require time off from work but do not qualify for FMLA coverage.

Second, the FMLA does not allow employees to take leave to care for anyone outside of the employee’s nuclear family, a provision that excludes grandparents. This, again, disproportionately harms women because it is primarily women who care for seriously ill family members. This harm is even more disruptive for women of color because non-white families are far more likely to live with extended family members than white families.

Third, because the FMLA only grants twelve weeks of leave per year total, women who must use most or all of the twelve weeks to care for a newborn are left with no remaining leave time for other issues, including those discussed above. Because cisgender men do not give birth, this means that men are more likely to have FMLA leave available when they need it.

In summary, the FMLA’s litany of restrictions mean that women are disproportionately forced to return to work too early or left without the ability to stay home for everyday needs.

206. Kessler, supra note 92, at 424, citing FMLA, 29 C.F.R. § 825.114(c).
207. FMLA, 29 C.F.R. § 825.102.
208. Kessler, supra note 92, at 425.
209. FMLA, 29 C.F.R. § 825.102.
212. Kessler, supra note 92, at 424 n.293.
3. Unpaid Leave Disproportionately Harms Women

The FMLA would still fail women and primary caregivers even if it provided for longer and more flexible leave because the FMLA only provides for unpaid leave.\(^{213}\) This mechanism negatively affects primary caregivers in two ways. First, the unpaid nature of the FMLA leave prevents some women from taking leave at all. Second, when women do take leave, they are dependent on a spouse or other family members for money during their leave.

Taking time off from work without pay is not an option for many primary caregivers. According to a 2018 U.S. Department of Labor Report, about 7% of U.S. employees reported an “unmet need for leave for a qualifying FMLA reason,” which is when an employee covered by the FMLA cannot take leave for a reason unrelated to the FMLA.\(^{214}\) The most common reason (about two-thirds) given for reporting an unmet leave was that they could not afford unpaid leave.\(^{215}\) Meanwhile, about 45% of respondents reported an unmet need for leave due to fear of losing their job.\(^{216}\) But these statistics do not tell the whole story. The 7% of employees reporting an unmet need for leave would likely be several multiples higher if the statistic only accounted for employees who did not already have paid leave through their employer.\(^{217}\) In other words, there are likely many workers that do not report an unmet need because their private employers provide them with sufficient leave.

And when employees do take leave, about two-thirds of employees who did not receive full pay while on leave said that they experienced financial hardship during the leave.\(^{218}\) This financial hardship often forces families to limit spending or dip into savings.\(^{219}\) In addition, “the unpaid nature of FMLA leave forces parents to either leave a child with another caretaker . . . which could result in [Department of Children and Family Services] targeting, or go on leave without pay and suffer the material consequences.”\(^{220}\)

\(^{213}\) FMLA, 29 U.S.C. § 2612(c).
\(^{214}\) Brown et al., supra note 186, at iv.
\(^{215}\) Id.
\(^{216}\) Id.
\(^{217}\) See Paid Leave, NAT’L P’SHIP FOR WOMEN & FAMS. (last visited Dec. 16, 2022), [https://perma.cc/8FLP-RJ2M].
\(^{218}\) Brown et al., supra note 186, at iv.
\(^{219}\) Id. (reporting that 43% dip into savings and 76% limit spending).
\(^{220}\) McDonald Garrison et al., supra note 11, at 355.
4. Conclusion

The FMLA’s three “preservation through transformation” mechanisms mean that private businesses and family structures still control the contours of family leave policy as much as they did before the FMLA’s passage. This creates several problems. First, the combination of insufficient family leave policies offered by private businesses and the failure of existing family structures to enable women to stay in the workplace was the reason the FMLA was necessary in the first place. While both families and private businesses have improved with regard to family care—leave packages offered by private businesses have become incrementally better over time, and more men are taking family leave than ever before—sex-based stereotypes continue to permeate both entities. By relying on the very structures that necessitated federal leave legislation in the first place, the FMLA replicates the status quo.

Second, similar to the PDA, the existence of the FMLA allows the federal government to maintain the illusory separation between public and private support. Neither private businesses nor family structures are free from government influence. Rather, the government maintains an arsenal of supports and incentives that exert significant influence over both entities. In the arena of family care, the government has declined to provide, incentivize, or require the necessary supports.

While the constitutive rules around family leave policy appear to have undergone wholesale changes because of the FMLA, in reality, not enough has changed. The FMLA’s failure to address imbalances in who does a majority of the housework and its provision of only twelve weeks of unpaid leave means that the FMLA has not reached the people who need it most. Indeed, the FMLA has not come close to realizing Congress’ vision for the Act. The labor force participation rate for women ages twenty-five to fifty-four has fluctuated between 73% and 77% since 1993, while the rate for men of the same age has decreased from 92% to about 89%. Without effective work-family policies, women “often fall behind in their careers due to taking time off of work for reasons related to pregnancy and childcare,” and the “losses women experi-

223. U.S. BUREAU OF LAB. STATS., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2021), [https://perma.cc/7MDB-AT6M].
224. Id.
ence from taking [unpaid] family leave can last a lifetime, even affecting their social security payments, not to mention their career advancement prospects.” One study even found that more than four in ten “highly qualified women with children are leaving careers or off-ramping for a period of time.” And not all women who leave careers or off-ramp rejoin the workforce. Of the 43% of women who leave their jobs after having children, only 74% of professional women rejoin the workforce in any capacity, and only 40% return to full time jobs.

III. REFORM PROPOSALS

There is no silver bullet to address the gaps left in the U.S.’s family leave policy. Rather, true transformation of the status quo will require significant changes at all levels and branches of government, including federal, state, and local legislatures, courts, and, where applicable, agencies. Legislatures should seek to promote anti-stereotyping principles while enacting neomaternalist policies. Generally, the modern anti-stereotyping doctrine provides that sex-based government actions are unconstitutional when they perpetuate the separate spheres tradition, regardless of whether the action is based on “real” differences. Applying this doctrine would allow legislatures to tailor policies to the unique needs of pregnant women, working mothers, and primary caregivers while ensuring that employers do not use such tailoring as an excuse to avoid hiring women.

One risk of neomaternalism—particularly regarding gender-specific reform proposals—is that the framework may elevate motherhood over other roles a woman might choose and thus create its own stereotyping problems. Policies could address this concern in a number of ways. First, family leave policies should be broadly inclusive regarding the needs of all workers, not just pregnant women. In this regard, a

225. McDonald Garrison et al., supra note 11, at 336.
227. Id.
228. See Cary Franklin, The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law, 85 N.Y.U. L. REV. 83, 120 (2010) (explaining that the anti-stereotyping principle developed because legal feminists in the 1960s “needed an approach that would direct courts’ attention to the particular institutions and social practices that had perpetuated inequality in the context of sex and counteract the widespread perception that sex discrimination redounded to women’s benefit”).
229. Id. at 146.
comprehensive family leave bill would not create a new neomaternalist stereotyping issue where a family leave bill that only considers pregnancy would. Second, legislatures should be careful to tailor policies to the purpose of making motherhood a feasible choice for working women, as opposed to making motherhood appear to be the best choice. For example, an overly-generous child tax credit could make motherhood more financially attractive than the alternative, whereas government-subsidized child care would not.

With these principles in mind, Part III.A analyzes Congress’s recent legislative proposals around family leave policy and Part III.B proposes several ideas for reform, including gender-specific legislation (III.B.1), legislation aimed at supporting primary caretakers (III.B.2), and legislation that seeks to promote anti-stereotyping principles (III.B.3).

A. Analysis of Proposed Legislation in the U.S.

Although the Biden Administration has endorsed the Family and Medical Insurance Leave Act (the “FAMILY” Act) to replace the FMLA, the Act appears unlikely to pass anytime soon. Still, while the FAMILY Act would represent a significant improvement over the FMLA, it would still fail to realize the initial promises of the FMLA. The FAMILY Act would cover workers at all companies regardless of size. However, while the FAMILY Act would offer paid leave, the pay would be capped at 66% of the worker’s monthly wages and the leave would not increase the FMLA’s current provision of twelve weeks.

The FAMILY Act would also not address the PDA’s weaknesses, nor would it contain any provisions designed to address imbalances in who does a majority of the housework.

231. “Actions Overview,” S.248, 117th Congress (2021-2022), [https://perma.cc/V6WP-4YSK] (The FAMILY Act has been reintroduced several times over the past years, and was most recently reintroduced in 2021, but the Congressional actions docket shows that nothing has happened since it was first introduced.).
233. Id.
B. Reform

1. Gender-Specific Protections: *Hibbs* and Affirmative Policies

*Nevada v. Hibbs* may offer some hope that affirmative, gender-based policies could survive potential legal challenges. In *Hibbs*, Hibbs, an employee of the Nevada Department of Human Resources, asked for and received twelve weeks of FMLA leave to care for his sick wife. When Hibbs did not return to work after the twelfth week, the Department fired him. Hibbs then sued the Department for violating his FMLA rights, and the Supreme Court eventually granted certiorari to determine "whether an individual may sue a State for money damages in federal court" for violating the FMLA. In deciding the case in favor of Hibbs, the Court noted that the FMLA was enacted in light of a long history of workplace sex discrimination to "protect the right to be free from gender-based discrimination in the workplace." The Court then explained that Congress was "not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment," but may prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text." First, the PDA should be amended so that plaintiffs no longer need to identify a similarly-situated comparator to proceed to trial. This would mean that a plaintiff who does not have direct evidence of discrimination would only have to prove three elements to establish a prima facie case of discrimination: (1) she is part of a protected class, (2) she sought an accommodation, and (3) the employer denied the accommodation. Without the need to analyze the validity of a comparator that may or may not exist, courts could then focus on the reasonableness of the accommodation requested. Lowering the bar to PDA litigation would put PDA plaintiffs on equal footing with workers with other disabilities and help ensure that pregnant women are less likely to leave the workforce because of pregnancy discrimination, thus avoiding issues with the anti-stereotyping doctrine.

236. *Hibbs*, 538 U.S. at 725.
239. *Hibbs*, 538 U.S. at 737.
240. Such an amendment would make PDA litigation more like litigation under the American Disabilities Act. Currently, the ADA only applies to pregnant women who
Second, legislatures should also consider implementing mandatory parental leave similar to the program Sweden established in 1995. In 1974, Sweden replaced their maternity leave program with parental leave so that both men and women could take leave to care for newborns.241 But making parental leave available to men did not change leave-taking patterns—in the year after Sweden introduced the program, “men took only 0.5% of all paid parental leave,” and the men who did take leave were derisively called “velvet dads.”242 The Swedish government responded by passing a mandatory parental leave program (nicknamed the “daddy quota”) that (1) gave new fathers thirty days of paid leave at 80% of their salary and (2) made it so that fathers who did not use the leave lost that month’s paid leave.243

The policy worked. After the legislation was passed, the percentage of eligible fathers taking paternity leave increased to 77%.244 Sweden has incrementally increased the length of the leave to ninety days.245 Swedish men now take about a quarter of all parental leave in Sweden (up from about 10% in 1995),246 more women remain in the workforce after the birth of a new child,247 and in 2021, 90% of Swedish fathers took paternity leave.248 Sweden’s experience with “daddy quotas” shows how policies that both acknowledge and affirmatively target gender-based disparities in domestic work can chip away at, rather than reinforce, the underlying values of the separate spheres doctrine.

Other countries have had success with programs similar to Sweden’s. In Norway, for example, a 1993 quota similar to Sweden’s increased the rate at which men took paternity leave from 2.4% in 1992 to over 70% by 1997.249 In 2012, Norway reported that 83% of women with small children participate in the labor force, a similar rate to women suffering from pregnancy-related disabilities. Courts have not interpreted the ADA to cover pregnancy alone.

241. Katrin Benhold, In Sweden, Men Can Have it All, N.Y. TIMES (June 9, 2010), [https://perma.cc/4AL9-7B48].
244. Id.
245. Id.
249. Anna Louie Sussman, Norway’s “Daddy Quota” Means 90% of Fathers Take Parental Leave, APOLITICAL (Sept. 17, 2018), [https://perma.cc/8UQH-2KHQ].
en without children.\textsuperscript{250} While some countries may fret over the cost of implementing such programs, the Norway’s Ministry of Finance notes that “the retention of women in the [labor] force has contributed as much to Norway’s national wealth as the massive sovereign wealth fund built off its oil resources.”\textsuperscript{251}

While Norway and Sweden are unique in their use of mandatory paid parental leave programs, all thirty-six Organization for Economic Co-operation and Development (OECD) countries except for the U.S. have some version of a national paid parental leave policy.\textsuperscript{252} As of 2020, the average OECD country made available 44.86 weeks of parental leave, with Mexico providing the fewest weeks at thirteen.\textsuperscript{253} OECD countries provide paid leave at a range of 55% to 100% of a worker’s pay, with most countries falling between two-thirds and three-quarters.\textsuperscript{254}

2. Supporting Primary Caretakers

i. Paid Family Leave

As discussed above, the United States is the only wealthy country without a paid family leave program.\textsuperscript{255} Even if it stops short of implementing the kinds of mandatory or quota-based paid leave programs seen in Nordic countries, Congress should replace the FMLA with a comprehensive paid family leave program that prioritizes the workers who need the plan most, including low-income workers, women, and people of color. Several policy think tanks, newspapers, \textsuperscript{256} and federal legislators\textsuperscript{257} have proposed a range of paid family leave programs. Recent paid family leave proposals put forth by conservatives would force employees to cut into their own retirement benefits to fund paid leave, which would only succeed in delaying the issues workers face or creating

\begin{itemize}
\item \textsuperscript{250} Id.
\item \textsuperscript{251} Id.
\item \textsuperscript{252} Bipartisan Pol’y Ctr., Paid Family Leave Across OECD Countries (2020), [https://perma.cc/QC3R-CSFB].
\item \textsuperscript{253} Id.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} Id.
\item \textsuperscript{256} Claire Cain Miller, How to Build a Paid Family Leave Plan that Doesn’t Backfire, N.Y. Times: The Upshot (Nov. 3, 2021), [https://perma.cc/3LL5-X3RY].
\item \textsuperscript{257} Diana Boesch, Rhetoric vs. Reality: Not All Paid Leave Proposals Are Equal, Ctr. for Am. Progress (Oct. 10, 2019), [https://perma.cc/4QS6-TM85].
\end{itemize}
new issues upon retirement.258 Instead, Congress should consider adopting a comprehensive, flexible plan generally based on the one proposed by the Center on Budget and Policy Priorities (CBPP) in 2021.259

The CBPP proposes a public social insurance program that would provide for universal coverage with no restrictions on employer size or type, including coverage for independent contractors, gig workers, and part-time workers.260 Universal coverage would “[reduce] the cost per worker by spreading the cost among the widest risk pool” and pool the costs of family leave among employers nationwide.261 Such a plan could adopt coverage rules from the Social Security Disability Insurance framework that covers 94% of workers or the Medicare Hospital Insurance framework that covers nearly 97% of workers.262 The CBPP plan would also do away with tenure requirements and make benefits “portable across employers.”263 This would allow workers with lower earnings and career interruptions to maintain eligibility. In addition, the CBPP plan advocates for making paid leave available for a comprehensive set of reasons and implementing a more inclusive definition of family.264 This could enable parents to care for children or family members of all ages without regard for the length of the illness or leave required and allow leave for a range of short-term alternatives.265

Crucially, workers should receive paid leave at 100% of their salary rather than the 66% or less that states like Rhode Island and New Jersey provide.266 One possibility would be for the lowest wage workers to receive 100% of their pay while the percentage of pay decreases as earnings grow. For example, Oregon’s program covers 100 percent of wages for workers earning less than 65 percent of the statewide average weekly

258. Id. (“Two recent proposals to provide paid leave only for parents of new children are funded, as the bill sponsors describe, by individuals ‘pulling forward,’ or borrowing from, their own Social Security retirement benefits. These proposals are the New Parents Act of 2019, introduced by Sens. Marco Rubio (R-FL) and Mitt Romney (R-UT) and Reps. Ann Wagner (R-MO) and Dan Crenshaw (R-TX), as well as a similar proposal, the CRADLE Act, introduced by Sens. Joni Ernst (R-IA) and Mike Lee (R-UT). But this ‘pulling forward’ rhetoric disguises the harm these bills cause to workers’ retirement security.”).


260. Id.

261. Id.

262. Id.

263. Id.

264. Id. These changes would be more expansive than what the FMLA provides.

265. Id.

266. Id.
wage, with the wage replacement rate decreasing as earnings grow,” while Washington, D.C.'s program covers 90% of wages for workers who earn 150% of D.C.'s minimum wage or less.267

Leave should also be longer than the twelve weeks allowed by the FMLA, but evidence from European countries that offer more than one year of leave shows that women who take more than one year of leave are “less likely to achieve senior roles than women in the United States [and] more likely to work part time.”268 Thus, some paid leave advocates suggest a middle ground of three to six months of paid leave.269 With regard to the unique nature of pregnancy, one solution could be to offer three to six months as a baseline for all family leave reasons but make an additional three months available for new parents in case of complications. Alternatively, a federal paid leave program could follow Washington D.C.'s lead and provide separate paid leave for different qualifying reasons rather than a single lump of time. In D.C., an employee may take two weeks to care for pregnancies, twelve weeks to care for a new child, twelve weeks to care for a family member with a serious health condition, and twelve weeks to care for their own serious health condition. Either framework would ensure that women and primary caretakers retain sufficient leave for the everyday reasons that require leave.

The CBPP plan also advocates for job and anti-retaliation protections to ensure that workers—particularly low-wage workers and workers of color—do not need to fear that they will lose their jobs when deciding whether to go on leave.270 A program of this size could be financed without cutting social security or other important benefits. The CBPP notes that existing state paid leave programs have been able to finance their programs with payroll taxes at about 1% or less.271

Finally, the CBPP plan emphasizes the importance of efficient and transparent outreach because poor administration can render even the

267. Id.
268. Cain Miller, supra note 256.
269. Id.
270. Romig & Bryant, supra note 259 (“Job and anti-retaliation protections are critical for ensuring that low-paid workers and workers of color can participate in paid leave programs. More than three times as many low-paid workers reported losing their jobs after taking leave, compared to higher-paid workers (18 percent and 5 percent, respectively), according to the Department of Labor’s 2018 survey on family and medical leave. Similarly, three times as many Black workers reported having leave requests denied, compared to white workers (28 percent and 9 percent, respectively). Inadequate job protection in Washington State’s program posed a major barrier to access for Black women, according to a 2019 study.”).
271. Id.
best-intentioned social programs ineffective. In California, for example, a full five years after the state created the U.S.’s first paid family leave program, “just under half of workers who experienced a qualifying event . . . were aware of the new benefits” and “[an] even smaller proportion of low-wage workers, immigrants, Latinos, and workers with less than a high school diploma knew about California’s paid leave program.” In other words, the Californians who most need paid family leave do not even know about its availability.

Because provisions that provide special consideration for pregnancy risk make women less desirable candidates for employers, the new plan would have to include anti-stereotyping measures. One solution could be for the new plan to include a requirement that all employers submit pay and executive demographics data by gender, race, and ethnicity to the federal government. Such a transparency measure would give employers prospective employees, and enforcement officials a better sense of which companies are engaging in discriminatory hiring and pay practices. A new plan should mandate that all new parents take leave to care for newborns, as discussed in Part III.B.1. As men and women would both take leave for the care of newborns, this could help prevent employers from discriminating against women during the hiring stage.

ii. Subsidized Child Care and Universal Pre-K

The U.S. should subsidize childcare for young children. The U.S. spends less per year on child care for toddlers (aged two and under) — just $500 — than nearly every other OECD country. The average OECD country spends an average of $14,436 per toddler, while the next lowest-spending country after the U.S., Israel, spends $3,327 per year. At the other end of the spectrum, some Nordic countries spend

272. Id.
274. Id. ("Reporting pay data based on job and demographic background can help uncover occupational segregation that employers may not be aware of.").
275. Id. ("Stender says the state agency will likely publish aggregate data for public awareness and accountability.").
277. Id.
upwards of $20,000 annually per toddler, including Norway at $29,726.278

Currently, the U.S. spends only 0.2% of its GDP on child care for children two and under, and it does so through an annual tax credit to parents.279 Only low-income working families qualify for federal subsidy pre-K programs for three-year-old children such as Early Head Start,280 and even then, only about 15% of eligible children actually received help from such programs.281 The U.S.’ low spending on child care has rendered child care unaffordable for many parents and left many parents struggling to find child care, a problem that has only worsened since the onset of the Covid-19 pandemic.282

The U.S. could model a subsidized child care system after Denmark, where all children ages 10 years or younger are guaranteed a child care spot and parents do not pay more than 25% of the cost.283 Denmark’s system is mostly composed of government-run child care centers but also “includes private centers and home-based care.”284 Additionally, in Denmark, parents of children ages two or younger receive $2,800 per year in child tax benefits.285 A subsidized child care system like Denmark’s would further anti-stereotyping principles because the subsidies would be based on whether parents have a child rather than whether an individual is a mother or father. In other words, the system would benefit both mothers and fathers without reinforcing gender-based stereotypes because the main condition for the subsidy would not be gender-based. Such a measure would also address the underlying societal views that reinforce inequality—in particular, the expectation that women should be the default social safety net when the government does not provide a given benefit—because it would reduce the frequency with which women are forced to stay home to care for their children.

Even if the U.S. is unlikely to pass such a progressive child care subsidy, there is bipartisan support from voters for higher government

278. Id.
279. Id.
280. Head Start and Early Head Start, CHILD.CARE.GOV (last visited Dec. 16, 2022), [https://perma.cc/3GQ6-HXU5] (“Early Head Start programs are free, federally funded programs designed to promote school readiness for children from low-income families.”).
281. Cain Miller, supra note 276.
282. Jason DeParle, When Child Care Costs Twice as Much as the Mortgage, N.Y. TIMES (Oct. 9, 2021), [https://perma.cc/Y6KD-P6UQ].
283. Cain Miller, supra note 276.
284. Id.
285. Id.
spending on child care and education of young children. While there is scant data on whether a federal child care subsidy would truly pay for itself, former Brookings author Grover Whitehurst argues that:

[empirically] grounded arguments can be made about economic returns to larger child care subsidies that rely not on what children learn in preschool that might make them more successful in later life but on the impacts on parents and all children in a family of the family having more disposable income as a result of having to pay less for child care.

Finally, the U.S. should invest in universal pre-kindergarten for three- and four-year-old children. According to a Center for American Progress study, “families with infants would need to pay nearly $16,000 per year on average to cover the true cost of child care.” This figure is prohibitive for most parents—in most states, $10,000 amounts to more than half of the annual income for a single parent on a minimum wage salary. 2020 Census data showed that just four in ten three- and four-year-old children enrolled in preschool in 2020, 14% lower than in 2019. Although the drop is related to the pandemic, the figure has hovered around 54% since 2010.

CONCLUSION

Congress changed the rules and rhetoric that supported sex-based workplace exclusions in response to reform efforts by feminists beginning in the mid-1900s, but Congress’s reliance on the very structures it was trying to change led to bills that failed to truly transform the status quo. To be sure, women comprise more of the U.S. workforce and earn more in wages than ever before, but too many women still face pregnancy discrimination and women’s careers are disproportionately harmed.

287. Id.
288. Simon Workman, The True Cost of High-Quality Child Care Across the United States, CTR. FOR AM. PROGRESS (June 28, 2021), [https://perma.cc/T43Y-JKBC].
291. Id.
by family care and the unequal distribution of domestic work. The
PDA’s similarly-situated requirement imposes too high a bar on women
who bring PDA suits, while the PDA’s deferral of responsibility to pri-
ivate businesses and the federal judiciary has reinforced the idea that
pregnancy is a private economic responsibility. U.S. courts no longer
endorse explicit sex-based workplace exclusions, but the cold formalism
that rules the day in PDA litigation often leads to effects that are similar
yet harder to detect. Meanwhile, the FMLA’s failure to affirmatively ad-
dress gender-based imbalances in domestic work and family caretaking
alongside its provision of only twelve weeks of unpaid leave have ren-
dered the FMLA largely ineffective. While there is no silver bullet, legis-
latures should explore gender-specific family leave policies and provide
more comprehensive support for primary caretakers, including longer,
paid family leave, subsidized child care, and universal preschool. In any
case, the current legislative and legal landscape of pregnancy discrimina-
tion and family leave requires meaningful, comprehensive change.