Leveraging the Courts to Protect Women's Fundamental Rights at the Intersection of Family-Wage Work Structures and Women's Role as Wage Earner and Primary Caregiver

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INTRODUCTION

The gap between men's and women's labor force participation steadily narrowed for over two decades until progress slowed in the mid-1990s.[1] Before the mid-1990s, "[w]omen, especially married mothers with young children, continued to enter the labor force in ever-growing numbers. They integrated previously male occupations, especially middle-class occupations, and narrowed the earnings gap with men more in the 1980s than in any other decade . . . ."[2] Women's labor force participation peaked at sixty percent in 1999 and has plateaued, and even declined, since then.[3] The plateau in progress that has characterized the pattern of gender workplace equality since the mid-1990s cannot be explained as "structural or broadly ideological."[4] It is most likely the result of a "specifically antifeminist backlash in the popular culture."[5] This anti-feminist backlash co-opted the feminist rhetoric of choice and equality by describing career mothers who leave the workplace as "opting" for full-time motherhood, even if the "choice" was prompted "by unsupportive work

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1. BUREAU OF LABOR STATISTICS, CHANGES IN MENS AND WOMENS LABOR FORCE PARTICIPATION RATES (2007) [hereinafter MEN AND WOMEN IN THE LABOR FORCE] *available at* http://www.bls.gov/opub/ted/2007/jan/wk2/art03.htm; BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE, 1970–2009 (2011) [hereinafter WOMEN IN THE LABOR FORCE] *available at* http://bls.gov/opub/ted/2011/ted_20110105.htm (stating that women's employment peaked in 1999).

2. David Cotter, Joan M. Hermsen & Reeve Vanneman, *End of Gender Revolution? Gender Role Attitudes from 1977 to 2008*, 117 AM. J. SOC. 259, 283 (2011);. *see also id.* at 265 fig.2 (comparing employment rates of married fathers and married mothers with a spouse present and at least one own-child in the household); BUREAU OF LABOR STATISTICS, SHARE OF MARRIED-COUPLE FAMILIES WITH AN EMPLOYED MOTHER AT ITS LOWEST, 1994–2010 (2011) [hereinafter EMPLOYED MOTHERS] *available at* http://bls.gov/opub/ted/2011/ted_20110506.htm; BUREAU OF LABOR STATISTICS, LABOR FORCE PARTICIPATION RATES AMONG MOTHERS (2010) [hereinafter LABOR FORCE] *available at* http://bls.gov/opub/ted/2010/ted_20100507.htm.

3. WOMEN IN THE LABOR FORCE, *supra* note 1.

4. Cotter et al., *supra* note 2, at 260–61.

5. *Id.* at 260.

environments or increased job demands."[6] By using a feminist rhetoric of "choice" to describe the pattern of women's departure from the workplace in favor of full-time caregiving, the rhetoric remains insulated from broad criticism, perpetuates an inaccurate image of women's complicated life reality as wageworker and caregiver, and maintains a status quo workplace structure that is inherently discriminatory against women.

As this article highlights through statistics and anecdotes, a woman's "choice" to leave the workplace—if the option exists at all—is not as simple as popular culture would let us believe. Rather, most women, including married women, need to work to support their families.[7] But women are also society's primary caregivers of children and the elderly, whether out of necessity,[8] conformance to traditional gender roles,[9] or choice.[10] Because the American workplace structure remains rooted in the family-wage ideal,[11] in which a male breadwinner and a female homemaker comprise each household, women must fit their family caregiving responsibilities into a workplace structure defined around the ideal worker, who does not have such responsibilities.[12] The result is the marginalization and exclusion of women from work and stagnant progress towards workplace equality.[13] Although women comprise close to half of the workforce, they lag behind men in wages and leadership positions,[14] and continue to be discriminated against because of their caregiver status.[15] And, although popular culture focuses on women in higher-income jobs and households, women in low- and middle-income jobs—those with the least flexible jobs and the most need for the income—carry the heaviest burden.[16]

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6. *Id.* at 283–84.

7. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 6 (2007) [hereinafter DISPARATE TREATMENT] *available at* http://www.eeoc.gov/policy/docs/caregiving.html (last visited Oct. 4, 2012) (stating "[i]ncome from women's employment is important to the economic security of many families, particularly among lower-paid workers, and accounts for over one-third of the income in families where both parents work"); LABOR FORCE, *supra* note 2; MADELEINE M. KUNIN, THE NEW FEMINIST AGENDA: DEFINING THE NEXT REVOLUTION FOR WOMEN, WORK, AND FAMILY 138 (2012).

8. Over nineteen percent of family households (defined as persons living together and related to each other by birth, marriage, or adoption) are headed by women with no husband present. *See* U.S. CENSUS BUREAU, 2010 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, table B11001 (2010), *available at* http://factfinder2.census.gov. While other unrelated individuals may live in some of these households and contribute to caregiving, there is no available data about how much these individuals contribute. It is likely that single mother heads of households are the only available caregivers in at least some of these households. *See also* KUNIN, *supra* note 7, at 138 (stating that "in many households, mothers *have* to do everything because they are single parents").

9. SHARON LERNER, WAR ON MOMS 49–50 (2010).

10. Lisa Belkin, *The Opt-out Revolution*, N.Y. TIMES MAGAZINE, Oct. 26, 2003, at 44.

11. *See infra* notes 23–24 and accompanying text.

12. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822 (1989) (adopting the term "ideal worker" to describe a worker without childcare responsibilities).

13. Cotter et al., *supra* note 2, at 265.

14. Joan Williams & Rachel Dempsey, *And the Oscar Goes to . . . a Man: Gender Bias at the Top*, HUFFINGTON POST, (Jan. 27, 2012, 11:35 AM), http://www.huffingtonpost.com/joan-williams/and-the-oscar-goes-toa-ma_b_1235169.html?ref=tw.

15. DISPARATE TREATMENT, *supra* note 7, at 6.

16. *See id.* at 5.

This article argues that the stagnant progress in workplace equality results in part from the persistence of family-wage barriers. Family-wage barriers arise at the intersection of a workplace designed around a worker without family caregiving responsibilities and women's role as primary caregivers.[17] These barriers manifest as work structures that favor a worker without caregiving responsibilities,[18] and as policies and practices that penalize caregivers directly or indirectly, including strict adherences to work structures designed around the ideal worker.[19] Courts recognize mistaken gender stereotype-based assumptions about a caregiver's job performance as sex discrimination.[20] But they have had few opportunities and been reluctant to recognize that family-wage barriers implicate and infringe on women's fundamental constitutional rights, regardless of the evidence of stereotyped assumptions.[21] Focusing on mothers,[22] this article highlights the equal protection and substantive due process rights at stake for working women subjected to unfavorable treatment because of their status as caregivers, as distinguished from unfavorable treatment because of gender-stereotyped assumptions based on that status. Unaddressed violations of these rights that result from a state's maintenance of family-wage barriers explain, in part, the stagnant progress of women in the workplace since the mid-1990s[23] and reinforce gender stereotypes. Equal protection jurisprudence has fallen short of recognizing that family-wage barriers are an issue of equality and, therefore, helps perpetuate employment inequality between men and women. This article explores the role that impact litigation and the courts can have in breaking down family-wage barriers with prophylactic remedies that change the workplace structure.[24]

Section I discusses the social construction of the workplace structure around the family-wage ideal, in which each household has a male devoted exclusively to paid wage work and a female devoted exclusively to family and household caretaking. It discusses the way in which the law maintains and challenges the work/home dichotomy, paving the way for women's presence in the workplace, but falling short of affecting full equality. Although women entered the workforce in recent decades, inflexible work structures persist. As a result, the

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17. Caregiving responsibilities refer to informal, unpaid, family caregiving responsibilities, as distinguished from formal, paid caregiving arrangements.

18. Williams, *supra* note 12, at 822–23.

19. DISPARATE TREATMENT, *supra* note 7, at 5.

20. Chadwick v. WellPoint, Inc., 561 F.3d 38, 44 (1st Cir. 2009).

21. Walsh v. Nat'l Computer Sys., 332 F.3d 1150, 1159–61 (8th Cir. 2003).

22. This article focuses on working mothers, but uses the broad term "caregiver" as a reminder that women's caregiving is not limited to their role as mothers. Many of the principles and strategies discussed could inform claims on behalf of caregivers generally. Although the focus is on women and women plaintiffs because this is an issue of women's equality, parallel arguments might be made on behalf of male caregivers that challenge the same deficiency in the law.

23. Cotter et al., *supra* note 2, at 265.

24. This article focuses specifically on the family-wage barriers to women's workplace attachment in light of the stagnant progress of women's equal employment opportunity in recent decades. Undeniably, when men conform to the stereotypical role of a woman by becoming caregivers, their constitutional rights are also implicated. Nevertheless, discrimination against workers with caregiving responsibilities remains an issue of gender equality because in either case—a male or female caregiver—employees are penalized for assuming the stereotypical female role.

promise of equal employment opportunity can only be realized by women without caregiving responsibilities, women who are able to fit their caregiving responsibilities into inflexible work structures, or women whose professions afford them flexibility.[25]

Section II explores women's continued role as primary caregivers, despite their increased presence in the workplace. It highlights the way in which women's role as primary caregiver and the inflexible workplace structure perpetuates family-wage barriers. Section II discusses the particular vulnerability of women in low- and middle-income jobs.

Section III addresses the role of impact litigation in breaking down family-wage barriers. It argues that, impact litigation, regardless of the risks involved, has a significant place in law and social change movements. Without impact litigation to educate the courts, legislation and grassroots organizing result in limited progress. In addition to educating the courts about an issue, litigation can spark and support legislation. Section III argues that litigation strategies must accompany any efforts to eliminate family-wage barriers.

Section IV discusses the fundamental constitutional rights implicated by family-wage barriers and the litigation strategies that raise these constitutional claims. It begins by arguing that Title VII and the Family Medical Leave Act do not fully protect and are no substitute for the rights guaranteed by the Constitution. Section IV(A) focuses on the equal protection right to equal employment opportunity. It argues that the Supreme Court has already laid a foundation for recognizing family-wage barriers to women's workplace attachment as an issue of gender equality. And it proposes a modified framework for courts to use in analyzing these claims to effectively address the allegations of rights violations that arise from a state's maintenance of family-wage barriers. Section IV(B) highlights the substantive due process rights to pursue an occupation and to bear and raise children. Although these rights have not been recognized in the family responsibilities discrimination context and might be difficult to establish, raising these claims helps frame family-wage barriers as an issue of constitutional liberty.

Section V discusses the power of federal courts to impose prophylactic remedies for fundamental rights violations, and proposes that the courts require changes to workplace structures that eliminate family-wage barriers and prevent continued violations.[26] In addition to increasing women's access to employment by decreasing disparate treatment and harassment of caregivers, the elimination of family-wage barriers challenges the family-wage ideal. The notion of an "ideal worker" will be re-conceptualized without reference to caregiving responsibilities, and traditional gender roles will start to be dismantled at home.

As discussed below, equal protection clause jurisprudence evolved in response to the feminist critique of the 1960s and 1970s and led to women's increased workforce participation. Jurisprudence must continue to evolve in

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25. *See, e.g.*, Anne-Marie Slaughter, *Why Women Still Can't Have It All*, THE ATLANTIC (July/Aug. 2012), at 85.

26. In addition to workplace structure, which is the focus of this article, other factors contribute to the lag in progress towards women's workplace equality, including reproductive freedom and affordable childcare.

order to fully protect women's constitutional rights now that women's role has changed to that of caregiver *and* wage earner. A next step in that evolution is acknowledging that family-wage barriers implicate fundamental rights and remedying rights violations resulting from family-wage barriers. Impact litigation puts these issues before the courts and gives them the opportunity to take this step.

I. THE FAMILY-WAGE IDEAL AND THE SOCIAL CONSTRUCTION OF THE WORKPLACE STRUCTURE

American workplace structure is rooted in and shaped around the family-wage ideal: a conception "that the nuclear family should consist of an independent male breadwinner, a dependent female caregiver, and children . . . ."[27] As Catherine Albiston chronicles, the family-wage ideal originated during the age of industrialization in the eighteenth and nineteenth centuries, when some productive activities shifted out of the home.[28] "This shift created two separate spheres of activity: the workplace," based on a wage labor system, and the home, defined by task-oriented work.[29] Prior to this shift, caregiving responsibilities were interwoven with all other productive activities, which could be performed at any pace.[30] Notably, work was defined by the particular task, rather than the hours spent performing a task. When productive activities shifted to outside the home, these activities became organized in workplaces and based on regular work patterns controlled by time, rather than tasks.[31] The meaning of "work" became closely associated with the time-disciplined workplace.[32] The norm of standardized, full-time wage labor outside the home ultimately came to define work itself.[33]

Although women performed wage labor, their work was increasingly low-wage, unskilled, temporary, or part-time, and socially unacceptable for them to do.[34] As a result, women became associated with the private home, rather than the public workplace, and their labor became task-oriented, non-wage labor such as childcare, cooking, and cleaning.[35] Task-oriented labor performed at home became excluded from the definition of "work."[36] This emerging pattern of the

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27. Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 419 (2011); *See also* Joan C. Williams & Heather Boushey, *The Three Faces of Work-Family Conflict: The Poor, the Professionals, and the Missing Middle* 3–4 (2010), *available at* http://www.worklifelaw.org/pubs/ThreeFacesofWork-FamilyConflict.pdf ("In 1960 only 20 percent of mothers worked and only 18.5 were unmarried. Because the most common family was comprised of a male breadwinner and stay-at-home mother, employers were able to shape jobs around that ideal, with the expectation that the breadwinner was available for work anytime, anywhere, and for as long as his employer needed him.").

28. Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1109 (2009).

29. *Id.*

30. *Id.*

31. *Id.* at 1109–10.

32. *See id.* at 1110–11.

33. *See id.* at 1111.

34. *Id.*

35. *Id.* at 1109, 1111.

36. *See id.* at 1111.

gendered division of labor was considered the morally appropriate arrangement.[37]

The law further contributed to the gradual disassociation of task-oriented labor performed at home from the concept of work.[38] For example, work that gave rise to property rights only included labor performed outside the home.[39] Furthermore, the law perpetuated the family-wage system in the nineteenth and early twentieth centuries by upholding restrictions on women's participation in work outside the home. These restrictions were based on an idea of the "constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, [and] indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . ."[40] In upholding these laws, the Supreme Court opined that "nature" was "repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."[41] The Supreme Court adopted, endorsed, and perpetuated the gender segregated work/home dichotomy.

State laws, such as those restricting women's working hours, were upheld based on women's status as present or future mothers.[42] These laws reinforced and were socially accepted because of the cultural expectation of the male breadwinner-female caregiver norm.[43] They contributed to the establishment of work as a fundamental element of men's identity and domesticity as the fundamental element of women's identity.[44]

In response to this historical division of work, legal feminists developed a critique of the family-wage system in the 1960s and 1970s.[45] The feminist critique led to antidiscrimination legislation and the evolution of constitutional jurisprudence recognizing women's rights to social and economic independence.[46] Constitutional law began to "place[] a spotlight on the burdensome nature of legislation that confined women to a separate sphere" and

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37. *See id.* at 1119. As Albiston points out, not only was the gendered division of labor a result of an ideology that associated women with domesticity, but it also resulted from the exclusion of women from many forms of wage labor as a means to control competition between workers as opportunities for economic support, such as land ownership, diminished.

38. Justice Ruth B. Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 266 (1997).

39. Albiston, *supra* note 28, at 1109, 1118.

40. Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (stating "civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender.").

41. *Id.*

42. The first of such laws was enacted in Massachusetts in 1874 and limited the amount of time that women could work per day to ten hours. By 1900 fourteen states had enacted similar laws and by the mid-1960s all states had some type of legislation restricting women from working. Jo Freeman, *Revolution for Women in Law and Public Policy*, *in* WOMEN: A FEMINIST PERSPECTIVE, 365–404 (Jo Freeman ed., 1995); *see also* Muller v. Oregon, 208 U.S. 412, 422 (1908) (upholding an Oregon law which restricted the employment of women in factories, laundries, or other "mechanical establishments" to ten hours per day).

43. Albiston, *supra* note 28, at 1120.

44. *Id.* at 1121.

45. Dinner, *supra* note 27, at 419.

46. Ginsburg, *supra* note 38, at 268–70.

to recognize how the "state impeded both men and women from pursuit of the very opportunities and styles of life that could enable them to break away from traditional patterns and develop their full, human capacities."[47]

These developments paved the way for women to enter the workforce in the last half of the twentieth century. Since the 1970s, there has been a steep rise in women's workforce participation, including the participation of women with children.[48] Today, women make up almost half (forty-eight percent) of the workforce[49] and "the proportion of families that fit the traditional breadwinner model has declined substantially."[50] In seventy percent of households with children, both parents work, and nearly a quarter of Americans care for elders.[51]

Nonetheless, the workplace structure remains inflexible and designed around an ideal worker without caregiving responsibilities.[52] For working parents, shouldering caregiving and work responsibilities presents a heavy and exacting burden. One survey revealed that thirty percent of those surveyed had to cut down on work for at least one day each week in order to address family care needs.[53] Over sixty-four percent of American families with children work more than eighty hours per week.[54] Almost "three-quarters of working adults say they have little or no control over their schedule."[55] Moreover, lower-income workers have the least control over their schedule.[56] One study found that one-third of working-class workers cannot decide when to take breaks, almost sixty percent cannot choose the start and endtimes of their workdays, and fifty-three percent cannot take time off to care for sick children.[57] Sixty-eight percent of working-class families are entitled to less than two weeks of vacation and sick time combined.[58]

These inflexible workplace structures can ultimately mean unemployment or part-time and temporary employment for workers with caregiving responsibilities.[59] Inflexible hours are also associated with higher stress levels and poorer health, further contributing to the threat of economic insecurity.[60] The

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47. *Id.* at 270.

48. Albiston, *supra* note 28, at 1124–25.

49. DISPARATE TREATMENT, *supra* note 7, at 1.

50. Albiston, *supra* note 28, at 1125.

51. Williams & Boushey, *supra* note 27, at 4, 36. Indeed, having all adults in a household employed is an economic necessity for most families.

52. *Id.* at 3–4.

53. CENTER FOR WORKLIFE LAW, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING OUT" IS NOT AN OPTION 11 [hereinafter ONE SICK CHILD] (2006).

54. *Id.* at 8.

55. *Id.*; *see also* NEW AM. FOUND., THE WAY WOMEN WORK (2004), *available at* http://www.newamerica.net/files/archive/Doc_File_1504_1.pdf (stating that fifty-three percent of working women caregivers say they cannot take time off from work to care for a child; forty-nine percent say they lack flexibility in starting and ending times at work).

56. ONE SICK CHILD, *supra* note 53, at 8.

57. *Id.*

58. *Id.*

59. LERNER, *supra* note 9, at 6–15 (telling the story of Devorah Gartner, discussed *infra* Section III(A)(2); *see also* ONE SICK CHILD, *supra* note 53, at 9–10.

60. Kristina Fiore, *Employees Healthier When Boss is Flexible*, MEDPAGE TODAY (Feb. 17, 2010), http://www.medpagetoday.com/PublicHealthPolicy/WorkForce/18529.

difficulties that most workers have in balancing caregiving responsibilities with work illustrate the burdens imposed by family-wage barriers. As discussed in the following section, women bear a disproportionate share of the burden because they remain society's primary caregivers. As a result, family-wage barriers raise issues of women's employment equality and liberty. Impact litigation strategies should be used to raise these issues before the courts so that they can be recognized as implicating the constitutional rights of women.

II. THE DISPROPORTIONATE IMPACT OF AN INFLEXIBLE WORKPLACE STRUCTURE ON WOMEN

Despite the progress in employment equality since the 1970s, as women's presence has expanded into the work sphere, men's presence has not proportionally expanded into the home sphere. Women remain society's primary caregivers[61] and perform the vast majority of domestic chores.[62] The division of domestic labor in heterosexual couples has not kept pace with changes in women's lives outside the home; women continue to do the vast majority of the housework and caregiving.[63] As women head the majority of single-parent households,[64] the burden on working parents that results from an inflexible workplace falls disproportionately on women and limits their employment opportunities. The limitation on women's employment opportunities subsequently affects their economic security.[65]

Despite the steep increase in women's labor force participation until the mid-1990s, women remain at the margins of the workplace. Women, particularly those with children, continue to face significant barriers to employment because of inflexible workplace structures based on an outdated ideal.[66] Women fill fewer leadership and management positions than men.[67] Full-time working women's median weekly wages are about eighty percent of full-time working men's wages.[68] Annually, a full-time working woman earns seventy-seven cents to every dollar a man earns.[69] Twenty-seven percent of working women work part-time, compared to thirteen percent of men.[70]

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61. DISPARATE TREATMENT, *supra* note 7, at 2.

62. LERNER, *supra* note 9, at 39.

63. *Id.* at 38.

64. *See* U.S. CENSUS BUREAU, MORE YOUNG ADULTS ARE LIVING IN THEIR PARENTS' HOME, CENSUS BUREAU REPORTS (2011) *available at* http://www.census.gov/newsroom/releases/archives/families_households/cb11-183.html (indicating that eighty-seven percent of children who live with one parent live with their mother); U.S. CENSUS BUREAU, AMERICAN FAMILIES AND LIVING ARRANGEMENTS: 2011 Table C3 (2011), *available at* http://www.census.gov/hhes/families/data/cps2011.html.

65. *See* DISPARATE TREATMENT, *supra* note 7, at 3–4.

66. Williams & Boushey, *supra* note 27, at 1126.

67. Williams & Dempsey, *supra* note 14.

68. BUREAU OF LABOR STATISTICS, WOMEN'S EARNINGS AS A PERCENT OF MEN'S IN 2010 (2012) *available at* http://www.bls.gov/opub/ted/2012/ted_20120110.htm; *see* Albiston, *supra* note 28, at 1126.

69. ARIANE HEGEWISCH & ANGELA EDWARDS, INSTITUTE FOR WOMEN'S POLICY, THE GENDER WAGE GAP: 2011 (Sept. 2012), *available at* http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2011-1/at_download/file.

70. U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK Table 20 (2011) [hereinafter

Furthermore, when women become mothers they are increasingly marginalized in the workplace.[71] Motherhood causes their earnings to flatten or decrease.[72] If mothers remain in the workforce, they are relegated into lower-paying positions or part-time positions with little opportunity for advancement.[73] Women are more likely than men to work part-time for reasons related to child care problems, family or personal obligations, or school; forty-five percent of women who work part-time say that the reason is related to work-life balance, as compared to twelve percent of men.[74] Working mothers are held to higher performance standards in terms of attendance and punctuality, and working mothers who take advantage of leave policies are evaluated more negatively than workers who do not take advantage of leave policies.[75] As discussed more fully below, employers harass and retaliate against workers because of their caregiving responsibilities.[76]

Women are more likely than men to be alienated from the workplace after having children. When childcare fails, women are more likely than men to take time off work.[77] In general, women's careers are more likely than men's to be scaled back or abandoned entirely in favor of caregiving responsibilities.[78] Although this might result from personal (or household) preference, considering the fact that many women want and need to work to support themselves and their families it is more likely the combination of several factors. Inflexible workplace structures and discrimination[79] make working simply not possible for women. Indeed, eighty-seven percent of highly educated women cite inflexible work schedules as a key reason for why they left the workforce.[80]

Existing laws have made progress in opening up employment opportunities to those who are able to operate within a workplace structure developed around a male breadwinner norm. But judicial precedent interpreting Title VII and the Equal Protection Clause ignores the extent to which work structures are based on

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2011 DATABOOK]; Albiston, *supra* note 28, at 1126.

71. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 90–91 (2003).

72. LERNER, *supra* note 9, at 18.

73. Albiston, *supra* note 28, at 1126.

74. THE WAY WOMEN WORK, *supra* note 55.

75. Albiston, *supra* note 28, at 1126–27.

76. *See, e.g.*, Williams & Boushey, *supra* note 27, at 45 (stating "[a]mong low-income women, this kind of discrimination is often triggered when a woman announces her pregnancy at work; women in the middle are more likely to face bias when they return to work after the baby is born").

77. ONE SICK CHILD, *supra* note 53, at 11 (highlighting that when a tag-teaming arrangement fails, almost one-quarter of men compared to over one-third of women had to take time off from work).

78. LERNER, *supra* note 9, at 52; *see also* AMERICAN ASSOC. OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 9 (2010) (stating that ten years after college graduation, twenty-three percent of mothers verses one percent of fathers were out of the workforce; seventeen percent of mothers verses two percent of fathers working part-time).

79. These are the barriers to women's workplace attachment that are the focus of this article. Nevertheless, several other factors prevent women from accessing employment opportunities equal to men, including lack of affordable childcare and reproductive choice, both of which are related to women's status as primary caregiver.

80. Williams & Boushey, *supra* note 27, at 54.

outdated conceptions of family, gender, and work.[81] Women's limited access to employment opportunities equal to those of their male counterparts threatens women's economic security.[82]

Furthermore, women already account for the majority of low-wage workers and poor people.[83] The women in lower- and middle-income groups, who hold some of the least flexible jobs and rely heavily on income from consistent work,[84] have the most limited access to quality, affordable, and dependable childcare, and face the most precarious circumstances.[85] Low-income working families account for more than half of working parents.[86] Single mothers head about one-quarter of households; the median income of single-mother households is only one-third of that for married-couple families, and the majority of poor children live in single-mother households.[87] Low- and middle-income women are more likely than their higher-income counterparts to miss work because their childcare arrangements fail, presumably because they are less likely to rely on childcare centers than their higher-income counterparts.[88] Missing work jeopardizes their employment.[89]

Additionally, in contrast "to highly paid workers, keeping less-well-paid workers is less likely to be a money-saving endeavor" for employers.[90] This makes low- and middle-income workers less likely to be granted flexibility in their work structure and more likely to be fired.[91] Without being required to offer flexible work structures, employers have little incentive to change the workplace structure for any worker.[92] Employers have the least incentive to make changes for the workers who need them the most.

Judicial precedent treats strict, inflexible work schedules and employment policies based on an ideal worker without caregiving responsibilities—a male worker—as inherent to the nature of work, rather than the result of social constructions.[93] By requiring all workers to operate within an inherently discriminatory work structure, the law perpetuates the male breadwinner-female

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81. Albiston, *supra* note 28, at 1153–54.

82. THE WAY WOMEN WORK, *supra* note 55.

83. LERNER, *supra* note 9, at 71.

84. Low-income women are the least likely women, across income groups, to be employed. They tend to have access to better childcare than middle-income families because it is subsidized. Williams & Boushey, *supra* note 27, at 36.

85. "Women with high-paying jobs are far more likely to get flextime, paid vacations, paid maternity leave, and sick days than are women with lower-paying ones, despite the fact that lower-income workers can least afford to be docked pay or lose a job." LERNER, *supra* note 9, at 62–63.

86. *Id.* at 71.

87. THE WOMEN'S LEGAL DEF. & EDUC. FUND, SINGLE MOTHERHOOD IN THE U.S. – A SNAPSHOT (2012), *available at* http://www.legalmomentum.org/our-work/women-and-poverty/resources--publications/single-mothers-snapshot.pdf.

88. ONE SICK CHILD, *supra* note 53, at 10–11; Williams & Boushey, *supra* note 27, at 8 (stating that thirty percent of low- and middle-income families rely on childcare facilities; thirty-seven percent of professional-managerial families rely on childcare facilities).

89. ONE SICK CHILD, *supra* note 53, at 11.

90. LERNER, *supra* note 9, at 66.

91. *Id.* at 66–67.

92. *See id.* at 67.

93. Albiston, *supra* note 28, at 1153–54.

caregiver model and the exclusion of women from employment opportunities.[94] Comments based on stereotypes about the roles of men and women continue to appear in judicial opinions and undoubtedly cloud the lens through which family-wage barriers are viewed.[95] The discussion that follows reveals the extent to which rights relating to work developed irrespective of those rights relating to caregiving, illustrating how the law maintains the dichotomy between work and family. That one remedy simultaneously protects these rights undermines judicial precedent's treatment of these spheres as separate from, and opposed to, one another.[96] Impact litigation can educate courts, legislatures, and the public about the fundamental rights at stake at the intersection of outdated, inflexible work structures, women's workforce participation, and caregiving responsibilities.

III. USING IMPACT LITIGATION TO ELIMINATE FAMILY-WAGE BARRIERS TO WOMEN'S WORKPLACE ATTACHMENT

This article's focus on constitutional impact litigation strategies supplements the existing family responsibilities discrimination scholarship, which predominately proposes legislation, consensus-building strategies and organizing for removing family-wage barriers to women's workplace attachment.[97] Undoubtedly, constraints accompany constitutional impact litigation. Impact litigation can be costly, time-consuming, and risky.[98] But courts inevitably have a role in any law and social change agenda; strategically leveraging that role is essential to eliminating family-wage barriers.[99] As Douglas NeJaime argues, "sophisticated social movement lawyers engage in

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94. *See, e.g.*, Idhardt v. Sara Lee Corp., 118 F.3d 1151, 1154 (7th Cir. 1997) (holding that there was no Title VII violation where a pregnant part-time employee is terminated instead of less senior full-time employees); Armstrong v. Flowers Hosp. Inc., 33 F.3d 1308, 1316–17 (11th Cir. 1994) (holding that an employer was not obligated to change assignments of a pregnant employee to accommodate her pregnancy); Gee-Thomas v. Cingular Wireless, 324 F. Supp. 2d 875, 880–81 (M.D. Tenn. 2004) (granting summary judgment to defendant in a case where plaintiff was a mother of five and alleged she was not considered for a promotion because of her status as a mother when there was evidence that the man who received the position was a father); Bass v. Chem. Banking Corp., No. 94 Civ. 8833, 1996 WL 374151, *5 (S.D.N.Y. July 2, 1996) (granting summary judgment to defendant on plaintiff's failure to promote her claim that she was on track to be promoted before becoming a mother and was passed over for promotions after having children because of plaintiff's lack of a male comparator).

95. *See, e.g.*, Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004) (holding that a reasonable jury could find sex discrimination in the case of an employee who was passed over for a promotion because of her childcare responsibilities, but also stating that "[r]ealism requires acknowledgement that the average mother is more sensitive than the average father to the possibly disruptive effect on children of moving to another city . . .").

96. *See* Ginsburg, *supra* note 38, at 269–70.

97. Joan C. Williams and Elizabeth S. Westfall propose Title VII litigation strategies for overcoming the maternal wall. Joan C. Williams & Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Carers" in the Workplace*, 13 DUKE J. GENDER L. & POL'Y 31, 37–39 (2006).

98. *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 965–66, 955 (2011).

99. *See id.* at 965–66, 968–69 (describing litigation loss as a means of raising awareness and describing how social movement lawyers strategically leverage the court as an element of a social change agenda).

multidimensional advocacy that moves beyond, but not without, litigation."[100]

Litigation helps educate the Supreme Court and lower federal courts about a changing cultural landscape and can make them more receptive to progressive legislation or to broader interpretations of preexisting statutes, such as Title VII and the Family Medical Leave Act.[101] The judiciary and Congress share a symbiotic relationship in remedying constitutional violations. Full protection against gender discrimination will only progress as far as the narrowest definition of a rights violation.[102] Courts need help to implement and enforce their decisions; the legislature can supply that help.[103] Conversely, when faced with the application of a statute intended to have broad-sweeping remedies, a court not adequately versed in the cultural climate of the era might not apply the statute as intended. Indeed, the Supreme Court tends towards narrow interpretations of employment discrimination laws. Two examples, discussed shortly, are the Supreme Court's failure to recognize Title VII claims of pregnancy discrimination[104] and equal pay.[105] Additionally, the Supreme Court defines the scope of constitutional rights and appropriate remedies to protect those rights. Judicial interpretation is the driving force in the evolution of the Constitution's protections.[106] For example, in 1873, the Supreme Court held that women could be legally excluded from the practice of law in Illinois;[107] in 1996 the Supreme Court held that Virginia could not exclude qualified women from the Virginia Military Institute.[108] Claims of constitutional rights violations give the Supreme Court an opportunity to recognize a fundamental right in a particular context unique to the era. Such claims also give the Supreme Court an opportunity to change a cumbersome, widely criticized analytical framework, such as *McDonnell Douglas*.[109] These claims have the potential to reform the law

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100. *Id.* at 990.

101. *See* Williams & Westfall, *supra* note 97.

102. *See* Ginsburg, *supra* note 38, at 270.

103. *See* Scott L. Cummings, *Litigation at Work: Defending Day Laborers in Los Angeles*, 58 UCLA L. REV. 1617, 1675–76 (2011).

104. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 138 (1976).

105. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 628–29 (2007).

106. *See* Ginsburg, *supra* note 38, at 268–69; Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. LAW & SOC. CHANGE 567, 580 (1993–1995).

107. Bradwell v. Illinois, 16 U.S. 130, 142 (1873).

108. United States v. Virginia, 518 U.S. 515, 555–56 (1996).

109. *See* U.S. Postal Serv. Bd. of Governors v. Aiken, 460 U.S. 711, 715–716 (1983) (adopting a flexible interpretation of the *McDonnell Douglas* requirements). In *Aiken*, the Court held "[a]ll courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern the allocation of burdens and order of presentation of proof, in deciding this ultimate question." *Id.* (internal quotations omitted); *see also* Tex. Dep't of Comm. Affairs v. Burdine, 450 U.S. 248, 254–60 (1981) (explaining some of the difficulties encountered by courts while interpreting the burden-shifting requirements of the *McDonnell Douglas* framework); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 703–05 (1995) (explaining various

as well as spark new legislation.[110]

Regardless of the ultimate success of a particular case, constitutional litigation educates the courts about the cultural frame of the era, which can in turn inform and spark legislative remedies for rights violations. Impact litigation thus clarifies the scope of constitutional rights in specific contexts and creates a public record that can encourage grassroots organization and bolster consensus-building.[111] Therefore, even failed litigation can be a necessary predecessor to later litigation successes by beginning to transform the claim from something seemingly impossible to something possible.[112] The "sex-plus" theory of employment discrimination under Title VII, for example, was unrecognized by the Supreme Court in several cases before it was finally accepted.[113]

A litigation loss can also spur legislation that responds to and attempts to rectify an unjust outcome. Litigation can emphasize the urgency of legislative action.[114] Congress passed the Pregnancy Discrimination Act ("PDA")[115] after women's rights activists failed to convince the Supreme Court to treat pregnancy discrimination as a sex-equality issue. In passing the PDA, Congress relied on the same arguments advanced in the Supreme Court.[116] Similarly, the Fair Pay Act[117] was enacted to remedy the Supreme Court's rejection of an equal pay claim under Title VII. In enacting the Fair Pay Act, Congress relied on Justice Ginsburg's dissent articulating the discrimination against women and the need for a legislative response.[118]

Additionally, courts are public forums; litigation creates a public record of personal experiences and tells an individual story.[119] Even if litigation is unsuccessful, or perhaps especially if litigation is unsuccessful,[120] these personal stories document a broader social reality. The record of personal stories in individual cases can garnish public interest in and support for the issue, mobilizing grassroots or political organizations.[121] Again, the Fair Pay Act

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criticisms and difficulties courts have encountered while implementing the *McDonnell Douglas* framework).

110. Ginsburg, *supra* note 38, at 270.

111. *See, e.g.*, Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1317–18 (2010) (describing the role of litigation in the fight for marriage equality in California).

112. NeJaime, *supra* note 98, at 964.

113. Heather M. Kolinsky, *Taking Away An Employer's Free Pass: Making the Case For a More Sophisticated Sex-Plus Analysis in Employment Discrimination Cases*, 36 VT. L. REV. 327, 340–41 (2011).

114. NeJaime, *supra* note 98, at 998–99.

115. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978).

116. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589, 641 (1986).

117. Lily Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000(e)(5) (2009).

118. NeJaime, *supra* note 98, at 999.

119. *See id.* at 1000.

120. *Id.* at 985 (arguing that "litigation loss may raise consciousness and mobilize constituents, but it may do so most effectively by inspiring outrage, strengthening resolve, and building a more fervent feeling of entitlement . . .").

121. Cummings, *supra* note 103, at 1622–23 (opining that "litigation may be useful in framing grievances in justice terms, conferring legitimacy on a movement's claims, generating favorable publicity, raising consciousness among a movement's constituency, and fostering empowerment").

exemplifies this. Lilly Ledbetter sued her employer for paying her significantly less than her male counterparts over the course of her almost twenty-year career. Her claim was ultimately rejected by the Supreme Court based on the statute of limitations. But her efforts, which included testifying before Congress, garnered enough support to amend the law to loosen the statute of limitations for equal pay claims.

The litigation strategy proposed below asks courts to recognize rights violations in new contexts and adopt a modified analytical framework that better allows violations to be remedied. This strategy is inevitably risky because it encourages courts to recognize constitutional protections in a new context. But any potential difficulties in bringing these claims, and the possibility that they might initially fail, do not justify not pursuing them in court. At the very least, bringing these claims empowers individual women who are forced to choose between work and caring for their children. These claims bring the complexity of this choice to the fore.

Ensuring that the most marginalized and vulnerable are entitled to protections requires establishing that family-wage barriers are an issue of gender equality and implicate fundamental constitutional rights. Only the Court can recognize constitutional rights and it can only do so through the cases and controversies before it. Thus, impact litigation must be used to break down family-wage barriers and change the status quo.

IV. FUNDAMENTAL RIGHTS IMPLICATED BY FAMILY-WAGE BARRIERS TO WOMEN'S WORKPLACE ATTACHMENT

The presence of family-wage barriers is an issue of constitutional importance, implicating rights guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[122] This section argues that the state's perpetuation of family-wage barriers violates women's right to equal employment opportunity—as guaranteed by the Equal Protection Clause ("EPC")[123]—and infringes on women's fundamental right to bear and raise children and pursue a career of one's choice—as guaranteed by the Due Process Clause.[124]

Highlighting the continued violations of these rights reveals the limits of federal statutes such as Title VII and the Family Medical Leave Act ("FMLA")[125] in fully ensuring women's ultimate freedom and equality as guaranteed by the Constitution. Passed pursuant to Congress' power to remedy widespread violations of the EPC, these statutes provide a floor, not a ceiling, in protecting against and remedying constitutional rights violations. Because it is the body

122. U.S. CONST. amend. XIV, § 1.

123. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726–27, 729–30 (2003) (noting that Congress retains the power to enact legislation addressing employment discrimination on the basis of gender both remedially and prophylactically on constitutional grounds).

124. *See* Roe v. Wade, 410 U.S. 113, 152–53 (observing that an individual sphere of privacy can be found in the guarantee of individual liberty under the Due Process Clause of the Fourteenth Amendment).

125. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1991); Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2006).

charged with defining the scope of the Constitution's guarantees, the Court can protect constitutional rights without relying on federal statutes. To the extent that courts rely on these statutes instead of recognizing constitutional guarantees, framing women's workplace attachment as a constitutional issue resets the appropriate balance of powers between the Supreme Court and the Legislature.

Recognizing that family-wage barriers implicate constitutional rights ensures that if and when Congress passes laws affording greater remedies to family-wage barriers, the laws would be upheld by the Court as valid exercises of Congress' Section 5 power.[126] Additionally, the laws would have a solid foundation in EPC rights recognition. In emphasizing the scope of these rights, this article proposes impact litigation strategies to challenge the discriminatory workplace structures that courts treat as inherent to work and to urge the courts to remedy these fundamental rights violations through exercise of their Article III powers.[127]

Because women's workplace attachment is primarily an issue of equality, this section begins with a discussion of the equal protection rights at stake and proposes a new framework through which to analyze these equal protection claims. Following the discussion of possible claims for a violation of the EPC, this article discusses claims based on the Substantive Due Process Clause.

A. Equal Protection Right to Equal Employment Opportunity

Family-wage barriers to women's workplace attachment implicate fundamental rights protected by the EPC of the Fourteenth Amendment. The EPC states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[128] It is well established that the EPC guarantees freedom from gender discrimination and protects the right to equal employment opportunity regardless of gender.[129] Indeed, Title VII and the FMLA[130] were enacted to enforce this Constitutional right.[131] But, while Title VII and the FMLA have helped change the composition of the workforce, these laws have not significantly changed the structure of the workplace to incorporate women's experience as the primary caregivers.[132] In addition to a claim based on impermissible sex stereotypes, a "sex-plus"[133] theory of liability is the primary

126. U.S. CONST. amend. XIV, § 5.

127. *See* U.S. CONST. art. II, § 2.

128. U.S. CONST. amend. XIV, § 1.

129. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 117 (2d Cir. 2004).

130. 42 U.S.C. § 2000e; 29 U.S.C. § 2601.

131. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726–27 (2003) (acknowledging that the FMLA was enacted pursuant to Congress' Section 5 power to enforce the Equal Protection Clause of the Fourteenth Amendment); Ussery v. Louisiana *ex rel.* Dep't of Health and Hosps., 150 F.3d 431, 437 (5th Cir. 1998) (indicating that Congress relied on its Section 5 power to abrogate state immunity from claims under Title VII as the substantive provisions of the Fourteenth Amendment prohibit states from discriminating on the basis of gender); *see* United States v. Virginia, 518 U.S. 515, 532 (1996) (analyzing an equal protection right to be free from gender discrimination).

132. *See supra* Sections I–II.

133. "Sex-plus" refers to a policy or practice by which an employer classifies an individual on the basis of sex plus another characteristic. The employer does not discriminate against an entire class of

theory through which Title VII protects against disparate treatment of working mothers.[134] But the complainants must allege that they are being treated differently than a comparable subclass of the opposite sex. This requirement places significant limitations on the effectiveness of Title VII in achieving full equality[135] because, as the statistics above[136] evidence, male caregiver comparators are not always available.[137] As a result, many claims based on this theory do not survive the initial litigation stages.[138]

Likewise, EPC gender discrimination jurisprudence targeting sex stereotypes seeks to, and to some degree does, prevent a state from reinforcing or forcing individuals into traditional sex roles.[139] But the EPC jurisprudence reinforces time norms and work structures that evolved based on a male worker without caregiving responsibilities.[140] It is, therefore, of limited use in remedying discrimination against mothers. The EPC jurisprudence focuses on whether an employer assumed, based on traditional sex-role stereotypes, that a working mother would not or should not be as dedicated or as good a worker as a man or a woman without children.[141] In this analysis, a "dedicated" or "good" worker is viewed in the context of a workplace structure designed around a man or a woman without children.[142] Therefore, the sex-stereotype jurisprudence does not protect a woman who does not conform to the traditional sex-role stereotype of a working mother, insofar as she is simultaneously a dedicated and good worker and caregiver, yet cannot fit her caregiving responsibilities into a work structure designed around workers without such responsibilities. As a result, when women are faced with the impossible choice between work and family, the equal employment opportunity ideal succumbs to the male breadwinner-female caregiver model.[143]

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men or women, but against a subclass of men or women. *Back*, 365 F.3d at 118–19 nn.7–9.

134. The Supreme Court first recognized that Title VII protects against "sex-plus" discrimination in 1971. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam). Although the Supreme Court reversed summary judgment in favor of the defendant-employer, alleged to have discriminated because of its policy not to hire women with children but permitting the hiring of men with children, the Court did so because an issue of fact remained as to whether the condition in question was "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.* at 544. Marshall's concurrence disagreed that a bona fide qualification "could be established by a showing that some women, even the vast majority, with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities." *Id.* (Marshall, J., concurring). Marshall's concurrence more accurately captures the law as it has evolved to prohibit sex-stereotyped assumptions about caregivers as workers.

135. Kolinsky, *supra* note 113, at 344–47.

136. *See supra* Section II.

137. Kolinsky, *supra* note 113, at 345.

138. *See, e.g.*, *id.* at 344–50.

139. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736–38 (2003).

140. Albiston, *supra* note 28, at 1154 (arguing that "stereotype theories also run the risk of reifying time norms and work structures. These theories emphasize that employers may not presume that pregnant women will take time off work, but they also suggest that if a pregnant woman needs time off or an accommodation, that would be a different situation and outcome.").

141. *Id.* at 1154–55.

142. Williams, *supra* note 12, at 822.

143. *See supra* Sections I–II.

Thus, EPC gender discrimination jurisprudence perpetuates the reification of sex-stereotyped roles, and in turn perpetuates the stereotypes that it seeks to eradicate. By failing to adequately address discrimination against mothers, EPC jurisprudence also tolerates intra-class preferences by allowing discrimination against those within the protected class of women who conform to the stereotype of that class. While it is a violation of the EPC to make an employment decision based on a candidate's gender, it is not a violation to make a decision based on her caregiving responsibilities. Employers are permitted to evaluate candidates based on characteristics that set them apart from their class.[144] For this reason, EPC jurisprudence must evolve to respond to the ways in which family-wage barriers exclude women from the workforce.

1. Discrimination Against Caregivers is an Issue of Gender Equality

Whether she suffers an outright denial of work or a more subtle form of discrimination, if a woman faces discrimination because she is a mother or caregiver, it should be recognized as sex discrimination in violation of the EPC. After all, "[a] mother is still a woman. And if she is denied work outright because she is a mother, it is because she is a woman."[145] The Court already laid the foundation to recognize that family-wage barriers are an issue of women's equality.[146] In *Nevada Department of Human Resources v. Hibbs*, the Court acknowledged that discrimination against women in the workplace can manifest itself under a guise of practices targeting caregivers, and that discrimination against caregivers is an issue of gender equality.[147] In *Hibbs*, the Court addressed whether Congress' enactment of the FMLA was a valid exercise of Congress' Section 5 power to enforce the equal protection right to be free from gender discrimination in the workplace.[148] In upholding the FMLA, the Court determined that the scope of the EPC right to be free from gender discrimination protects against a state's "unconstitutional participation in, and fostering of, gender-based discrimination"[149] through the discriminatory application of facially neutral state laws and policies.[150]

In *Hibbs*, the Court reiterated that "[i]t can hardly be doubted that . . . women still face pervasive, although at times more subtle, discrimination . . . in the job market."[151] The Congressional findings endorsed by the Court support the conclusion that adverse action against caregivers is, in fact, adverse action against women.[152] Those findings reveal that "the lack of employment policies to

144. Kolinsky, *supra* note 113, at 351.

145. AT&T Corp. v. Hulteen, 556 U.S. 701, 727 (2009) (Ginsburg, J., dissenting) (quoting Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1262 (5th Cir, 1969) (Brown, C. J., dissenting)).

146. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 734 (2003).

147. *Id.* at 736–37; *see also* Williams & Segal, *supra* note 71, at 85–86.

148. *Hibbs*, 538 U.S. at 738–39.

149. *Id.* at 735.

150. *Id.* at 732.

151. *Id.* at 730 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)); *see* Chadwick v. WellPoint, Inc., 561 F.3d 38, 44 (1st Cir. 2009) (describing the *Hibbs* opinion as an opinion where "the Supreme Court took judicial notice of the stereotype that women, not men, are responsible for family caregiving").

152. *See Hibbs*, 538 U.S. at 730 (describing discriminatory leave policies).

accommodate working parents can force individuals to choose between job security and parenting" and, "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."[153] Taken together, "the lack of employment policies to accommodate" parents affects the working lives of women more than men.[154] The result is the marginalization of women into part-time, lower-paid, or lower-positioned jobs.[155] A state's refusal to provide leave is like its maintenance of family-wage barriers when it takes employment actions based on caregiving—such as assigning caregivers to undesirable shifts,[156] not considering them for promotions,[157] or firing them[158]—and does not offer alternative work arrangements for people with caregiving responsibilities. Maintenance of family-wage barriers "exclude[s] far more women than men from the workplace."[159] And it "do[es] little to combat the stereotypes about the roles of male and female employees."[160] Relying on *Hibbs*, courts can use similar statistics presented to them in individual cases to recognize an EPC violation based on the state's maintenance of family-wage barriers.

An EPC claim based on caregiver status shares the same foundation with, and is a necessary counterpart to and an extension of, existing jurisprudence that targets state conduct based on sex stereotypes. The claim based on caregiver status challenges a state's reinforcement of traditional sex roles. Until courts recognize such claims, and for as long as women remain society's primary caregivers, women and men alike will be forced into their traditional roles as caregiver and breadwinner. Women will continue to be marginalized in the workplace. And, as a result, the EPC's guarantee of equal employment opportunity regardless of gender will not be fully realized for women—or for men who assume roles that are stereotypically those of women.

2. Equal Protection Claim Based on Caregiver Status as a Proxy for Gender

To establish a claim for gender discrimination in violation of the EPC, a plaintiff must prove that she suffered purposeful or intentional discrimination on the basis of gender.[161] Discrimination based on gender, once proven, is only

153. Family Medical Leave Act of 1993, 29 U.S.C.A. § 2601(a)(3), (5) (2006).

154. *Id.* at § 2601(a)(3).

155. *See supra* Section II.

156. *See* Parker v. Delaware Dep't of Pub. Safety, 11 F. Supp. 2d 467, 471 (D. Del. 1998) (relating that the plaintiff, who requested not to be given rotating shifts because she could not coordinate daycare, was placed on rotating shifts as punishment for complaints she made about sex discrimination).

157. *See* Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004) (imparting that a female sales representative was passed over for a promotion because she had children and her supervisor did not think that she would want to relocate).

158. *See* Bailey v. Scott-Gallaher, Inc., 480 S.E.2d. 502, 503 (Va. 1997) (finding that working mother was terminated after giving birth because her employer considered her unreliable as a result of having a newborn).

159. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003).

160. *Id.* at 734.

161. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107,118 (2d Cir. 2004) (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977)).

permissible if the state provides an "exceedingly persuasive" justification for the rule or practice (i.e., that the classification serves "important government objectives and that the discriminatory means employed are substantially related to the achievement of those objectives").[162] Two EPC analytical frameworks might be used to establish a violation of a right to equal employment opportunity when an employer strictly adheres to workplace norms that maintain family-wage barriers or takes other adverse employment action against caregivers. The first is a claim for employment discrimination in violation of the EPC. The second is a direct challenge to a state policy that maintains family-wage barriers.

a. A Theory of Employment Discrimination Based on Caregiver Status

One way to challenge the sex discrimination that results from family-wage barriers is through a claim of employment discrimination in violation of the EPC.[163] In the absence of direct evidence of intent, EPC employment discrimination claims are analyzed under the *McDonnell Douglas* three-prong burden-shifting framework.[164] However, courts and scholars have criticized the *McDonnell Douglas* framework as overly cumbersome and "actually invit[ing] juries and courts to lose sight of the ultimate issue in an employment discrimination case."[165] This framework encourages a piecemeal approach to assessing evidence and prevents a fact finder from considering everything before deciding whether it is more likely than not that the employer was motivated, at least in part, by a discriminatory animus.[166]

The inadequacies of *McDonnell Douglas*, and the way in which it limits full and fair protection of the rights guaranteed by the EPC, are apparent in a

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162. United States v. Virginia, 518 U.S. 513, 533 (1996) (internal quotations and citations omitted).

163. This article focuses on fundamental rights violations of caregivers due to discriminatory work structures based on the family-wage ideal. Title VII may be an additional source for a cause of action based on the failure to accommodate caregiving responsibilities. However, without evidence that a similarly situated male employee was granted a caregiving accommodation, courts have been reluctant to entertain such claims. *See, e.g.*, Fralin v. C & D Sec., Inc., No. 06-2421, 2007 WL 1576464, at *6–8 (E.D. Pa. May 30, 2007) (stating that Title VII does not protect against discrimination based on "child rearing" because child rearing is a gender neutral trait); Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1492 (D. Colo. 1997). *See also* Albiston, *supra* note 28, at 1154–55 (agreeing that Title VII offers limited protection for those who need accommodations).

164. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973). The first prong of *McDonnell Douglas* requires the plaintiff to set forth a prima facie case by establishing (a) she belongs to a protected class, (b) she is qualified for the position that she held, (c) she suffered an adverse employment action, and (d) the adverse employment action gives rise to an inference of discrimination. If a plaintiff sets forth the prima facie case, a presumption of intentional discrimination arises. *Id.* at 802. Under the second prong of *McDonnell Douglas*, the defendant must articulate a legitimate non-discriminatory reason for the action. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981). Under the final prong of *McDonnell Douglas*, the plaintiff must establish that the defendant's proffered reason is a pretext for discrimination. *Burdine*, 450 U.S. at 253.

165. Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas*: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 671 (1998) (internal quotations and citations omitted).

166. *Id.* at 675 n.82.

challenge to an adverse employment action based on caregiver status.[167] Although such a case presents an issue of sex equality that denies women—at least those who conform to the stereotype of the group—employment opportunities equal to men, the rigidity of *McDonnell Douglas* makes it difficult for a plaintiff to meet even the first two elements of a prima facie case. A prima facie *McDonnell Douglas* case requires the plaintiff to establish that she is in a protected class.[168] In these cases, a court might characterize the plaintiff's class as a caregiver, rather than as a woman, despite the fact that caregivers are, statistically, a subset of women.[169] "Caregiver" has not been identified as a protected class.[170] Nor should it need to be for a claim based on caregiver status; the already-recognized protected class of sex should be sufficient to satisfy this prong.[171]

The second element of the *McDonnell Douglas* prima facie case is also an obstacle in fully and fairly adjudicating claims based on family-wage barriers. The second element of the *McDonnell Douglas* prima facie case is whether the plaintiff is qualified for the job. Courts have been persuaded by the argument that a plaintiff is not qualified for the job if she cannot conform to the workplace structure (developed around a male breadwinner-female caregiver ideal).[172] By imposing such a requirement, courts hold plaintiffs to the very standards they allege are discriminatory. Ultimately, the *McDonnell Douglas* framework allows legitimate violations of women's rights to equal employment opportunity to persist.

When the Court first announced the analytical framework in *McDonnell Douglas*, it acknowledged that the framework might need modification to accommodate different employment discrimination contexts.[173] Without losing sight of the plaintiff's ultimate burden in an employment discrimination case, and using *McDonnell Douglas* as a guideline and starting point,[174] this article

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167. Walsh v. Nat'l Computer Sys., 332 F.3d 1150, 1159–61 (8th Cir. 2003).

168. *Burdine*, 450 U.S. at 254.

169. Chadwick v. WellPoint, Inc., 561 F.3d 38, 46 (1st Cir. 2009).

170. *Walsh*, 332 F.3d at 1160.

171. *Id.* (finding that the discrimination was based on pregnancy and that the plaintiff's ability to become pregnant, as a woman, was sufficient to support a claim of gender discrimination).

172. Pregnancy discrimination cases, in particular, have been unsuccessful for this reason. *See* Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 34–35 (2009); *see also* Lacoparra v. Pergament Home Ctrs., 982 F. Supp. 213, 227 (S.D.N.Y. 1997) (attempting to characterize pregnancy as a disability warranting discrimination protection). Within the male breadwinner-female caregiver norm, the court inquired: "the question is whether the [pregnancy] complication itself (i.e., the 'impairment,' or physiological disorder) is substantial enough to qualify as a 'disability . . . .'" *Id.*

173. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973). *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (stating that the *McDonnell Douglas* standard was "never intended to be rigid, mechanized, or ritualistic"). Furthermore, some courts of appeals interpreted the Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100–102 (2003) as modifying the final prong of the *McDonnell Douglas* analysis, even though the Court did not expressly state so. *See* White v. Baxter Healthcare Corp., 533 F.3d 381, 398–402 (6th Cir. 2008) (discussing the various ways in which circuit courts have interpreted *Desert Palace*'s effect on the *McDonnell Douglas* framework).

174. Indeed, the Court has recognized that "[t]he importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any [] plaintiff must carry the initial burden of offering evidence adequate to create an

proposes a modified framework for analyzing a claim for discrimination based on caregiver status. This proposal draws from the framework that courts use to analyze claims for a failure to accommodate disabilities under the Americans with Disabilities Act ("ADA").[175] Under the proposed framework, the plaintiff would have to show that (1) she has caregiving responsibilities, (2) she suffered an adverse employment action because of her caregiving responsibilities, and (3) she is able to perform the essential functions of the job, with or without a reasonable alternative work arrangement ("AWA").[176] A defendant would then have the opportunity to show that all alternatives were unduly burdensome (if relevant), the reason for the adverse action was not based on plaintiff's caregiver status and not negated by an AWA, or an inference of sex discrimination from action based on caregiving responsibilities is absent.[177]

This proposed framework alleviates two obstacles imposed by the *McDonnell Douglas* framework that prevent a court from substantively addressing the EPC violations resulting from family-wage barriers. First, this framework presumes that adverse actions against people with caregiving responsibilities constitute actions based on sex. Statistically and socially, as recognized by the Supreme Court in *Hibbs* and supported by the statistics cited above,[178] caregivers are a subset of women.[179] This caregiver subset, as discussed by Joan C. Williams and Nancy Segal, is more susceptible and vulnerable to sex role stereotypes and more likely to be discriminated against than women generally.[180] Therefore, adverse actions based on caregiver status should be considered presumptively based on gender for purposes of addressing these claims. A presumption that caregiver status discrimination is discrimination based on gender avoids protracted litigation about whether the plaintiff is a member of a protected class and the necessity for courts to determine what level of scrutiny a new class would receive. Nevertheless, under the framework, the presumption is rebuttable; the burden is on the party with the best access to statistics and data showing that patterns in a particular place of employment are

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inference that an employment decision was based on a discriminatory criterion . . . ." Int'l. Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977). Courts have been amenable to departing from the strict "mixed motive" or *McDonnell Douglas* framework. *See Chadwick*, 561 F.3d at 45–46.

175. Americans with Disabilities Act, 29 C.F.R. § 1630 (1991).

176. This proposed framework incorporates several elements of the *McDonnell Douglas* prima facie case: that the plaintiff is in a protected class, she suffered an adverse action, and is qualified for the position. Borrowing from the reasonable disability accommodations context, this framework defines "qualified" with reference to an AWA. *See, e.g.*, Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 20 (1st Cir. 2004) (requiring a plaintiff alleging an ADA claim for failure to accommodate to show (1) she was or is disabled, (2) the defendant is aware of the disability, and (3) she satisfies the prerequisites of the position and can perform the essential functions of the job either with or without a reasonable accommodation).

177. Mindful of the fact that the Supreme Court would be reluctant to depart from the *McDonnell Douglas* framework, this proposed framework is a compromise meant to efficiently address the ultimate issues relevant to this claim, not an ideal framework for plaintiffs in employment discrimination claims.

178. *See supra* Section II.

179. To the extent that male caregivers might pursue these claims, the adverse action is also based on sex because it is based on the male assuming the stereotypical role of a woman.

180. Williams & Segal, *supra* note 71, at 80.

inconsistent with the broader social reality.[181]

Placing this burden on the defendant dilutes the importance of a comparator to the plaintiff's case.[182] Courts sometimes rely too heavily on comparator evidence, the absence of which creates a negative inference for the plaintiff.[183] Relying on a comparator in the context of a caregiver case ignores the reality that male caregivers are rare. If a male caregiver comparator is present and treated similarly as the plaintiff, relying on the comparator ignores the likely possibility that the negative treatment was due to the male caregiver not conforming to sex role stereotypes, and, therefore, based on sex and actionable under a sex-stereotyping theory.[184]

Additionally, the proposed framework eliminates a second fundamental problem of *McDonnell Douglas*, which defines whether a woman is qualified based on her ability to conform to an inherently discriminatory work structure.[185] Instead, this framework mirrors ADA accommodations jurisprudence by allowing the caregiver to demonstrate that she is qualified for the position if an AWA is made.[186] A defendant, in turn, cannot simply say that the plaintiff was unqualified for the position because of her inability to conform to the workplace structure.

b. Application of the Modified Framework

Satisfying the first element of the plaintiff's case should be relatively easy for the plaintiff to accomplish; she need only demonstrate that she has caregiving responsibilities.[187] Nevertheless, this first element is a necessary component of an EPC gender discrimination claim because it links the challenged action to the basis of a protected class: sex.[188] To argue that caregivers are a subset of women, advocates should rely on *Hibbs* and statistics establishing that caregivers are a

181. *See* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118–22 (2d Cir. 2004).

182. *See id.* (stating that stereotyping about the qualities of mothers is a form of sex discrimination and can be determined without reference to father comparators); Tingley-Kelley v. Trustees of Univ. of Pa., 677 F. Supp. 2d 764, 778 (E.D. Pa. 2010) (holding that no comparator is necessary to determine whether a woman was discriminated against based on her caregiver status, stating "the ultimate issue in any discrimination case is whether the plaintiff, *as an individual*, is discriminated against" and recognizing the difficulty that a plaintiff might have in obtaining evidence of how similarly situated men were treated).

183. For a brief discussion on problems with the comparator analysis, *see* Grossman & Thomas, *supra* note 172, at 34–35. In any event, the proper comparison would be men and single women without caregiving responsibilities. Men are not presumed to have caregiving responsibilities that might interfere with their jobs. Single women without caregiving responsibilities are viewed by employers to be like the ideal male breadwinner and are treated better than women with caregiving responsibilities.

184. Bass v. Chem. Banking Corp., No. 94 Civ. 8833, 1996 WL 374151, at *5 (S.D.N.Y. July 2, 1996) (inferring no evidence of discrimination based on the lack of evidence that married men or men with children were treated differently).

185. *See* Williams & Segal, *supra* note 71, at 93–94 (discussing the ways in which women and caregivers have difficulty conforming to the male-designed workplace).

186. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 23 (1st Cir. 2004).

187. *See id.* (stating that, in order for a plaintiff to bring an ADA claim, an individual must prove he or she is disabled).

188. Tingley-Kelley v. Trustees of Univ. of Pa., 677 F. Supp. 2d 764, 778 (E.D. Pa. 2010) (recognizing that stereotypes based on mothers are linked to the protected gender class).

subset of women. As discussed above, in upholding the FMLA as a proper exercise of Congress' power to remedy gender discrimination, the Court acknowledged that because women are society's primary caregivers, discrimination against caregivers disproportionately affects women.[189] *Hibbs* laid a foundation for courts to recognize that discrimination based on caregiver status is discrimination based on gender.

The second prong that a plaintiff would have to demonstrate under the proposed framework is the existence of an adverse employment action. An adverse employment action produces a "material employment disadvantage."[190] "Termination, cuts in pay or benefits, and changes that affect an employee's future career prospects are significant enough to meet the standard . . . as would circumstances amounting to a constructive discharge."[191] The creation of a hostile environment might also constitute or result in an adverse action and is an actionable claim.[192]

Consider Shireen Walsh, a "top performer" in her job as a customer service account representative who prevailed on her constructive discharge, hostile environment, and retaliation claims against her employer.[193] After returning from maternity leave following the birth of her son, Walsh immediately experienced hostility from her supervisor.[194] The Eighth Circuit's summary of the facts developed in the district court evidence disparate treatment and harassment based on caregiver status. An example of disparate treatment included an instance when, "as a reward for having covered Walsh's workload while she was on leave," Walsh's coworkers got the afternoon off, "but Walsh was told to stay in the office and watch the phones."[195] Additionally, the Eighth Circuit noted that "[w]hen Walsh asked if she could change her schedule to leave work at 4:30 p.m. instead of 5:00 because her son's daycare closed at 5:00, [Walsh's boss] told Walsh that her territory needed coverage until 5:00 and that 'maybe she should look for another job.'"[196]

This contrasted with treatment of "[o]ther account representatives [who] left work at 3:45 on a regular basis."[197] Further, Walsh's boss "testified at trial that Walsh's territory did not need to be covered through 5:00."[198] Additionally, Walsh had to "make up 'every minute' that she spent away from the office for doctors appointments for herself or her son and time spent caring for her son. No other employee was required to make up work for time missed due to

189. *See* Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2006) (acknowledging that caretaking responsibilities often fall to women, impacting the lives of working women more than the lives of working men).

190. Cross v. Cleaver, 142 F.3d 1059, 1073 (8th Cir. 1998) (internal quotations and citations omitted).

191. Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1016 (8th Cir. 1999).

192. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66–67 (1986).

193. Walsh v. Nat'l Computer Sys., 332 F.3d 1150, 1159–61 (8th Cir. 2003).

194. *Id.* at 1154.

195. *Id.* at 1155.

196. *Id.*

197. *Id.*

198. *Id.*

appointments and other personal matters."[199]

The Eighth Circuit's summary also included examples of harassment based on caregiver status: "[w]hen Walsh was showing co-workers pictures of her son on her first day back to work, [Walsh's boss] told her to stop disrupting the office and to get back to work."[200] Walsh's boss also "attached signs ('Out—Sick Child') to Walsh's cubicle when Walsh had to care for her son."[201] The Eighth Circuit noted that "notes typically were not placed on other absent employees' cubicles."[202] Further examples of harassment included the boss's reference "to Walsh's son as 'the sickling'" and her demand that Walsh "find a pediatrician who was open after hours" after "thr[owing] a phone book on Walsh's desk."[203] And "[w]hen Walsh told [her boss] she needed to pick her son up from daycare because he was ill, [her boss] replied, 'Is this an April Fool's joke? If so, it's not at all funny.'"[204] As a result of the stress, Walsh fainted at work and was brought to the hospital. "The next day, [Walsh's boss] stopped at Walsh's cubicle and told her, 'you better not be pregnant again.'"[205] Walsh attempted to find a solution for the tension between her and the supervisor, but eventually quit her job.[206]

The defendant's motion for partial summary judgment was denied, demonstrating that the district court believed that the facts, if viewed in favor of the plaintiff, could support liability based on several theories.[207] Ultimately, the jury found in favor of Walsh on the charges of constructive discharge, retaliation, pregnancy discrimination, and hostile environment.[208] On appeal to the Eighth Circuit, the jury's verdict was affirmed based on the evidence supporting pregnancy discrimination on a hostile environment theory. The circuit court held that Walsh's potential to become pregnant meant that she fell within the protection afforded by the statute.[209] The circuit did not address whether the evidence supported a cause of action based on Walsh's status as a caregiver. By avoiding the discrimination against Walsh that was based on her caregiver status, the precedent falls short of establishing that discrimination against caregivers is discrimination against women in violation of federal statute, despite the circuit's opportunity to acknowledge such.

Although the Eighth Circuit ultimately avoided the issue of whether Walsh's caregiver status could support liability under Title VII, Walsh's case demonstrates the several types of adverse actions that women with caregiving responsibilities might be subjected to, including hostile environment and constructive discharge. The examples of discrimination discussed in Section IV(B), such as Joann Trezza,[210] who was passed over for a promotion, or Patricia

199. *Id.*
200. *Id.* at 1154–55.
201. *Id.* at 1155.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 1154–55.
206. *Id.* at 1155–56.
207. *Id.* at 1156.
208. *See id.* at 1158–61.
209. *Id.* at 1160.
210. Trezza v. Hartford, Inc., No. 98 CIV. 2205, 1998 U.S. Dist. LEXIS 20206, at *4 (S.D.N.Y. Dec.

Leahy, who was terminated, highlight additional adverse actions that employers might take based on a woman's status as caregiver.[211]

In addition, a plaintiff like Walsh who requests and is denied a reasonable AWA might suffer an adverse employment action on that basis alone. If a plaintiff can establish the first and third elements of the proposed framework—that she has caregiving responsibilities and is qualified for the job, with or without an AWA—she might pursue a claim based on the employer's failure to give an AWA for caregiving responsibilities. An AWA is a change in the work structure that would allow a caregiver to do her job without sacrificing her responsibilities as worker or caregiver.[212] An employer's failure to grant an AWA for caregiving responsibilities can cause a "material employment disadvantage,"[213] constituting an adverse employment action. [214] It can mean that a woman is excluded altogether from employment or forced to forgo advancement opportunities.[215]

Recognizing a claim based on the failure to give an AWA would not require the court to recognize an entirely new adverse employment action.[216] Adverse actions based on a failure to make reasonable accommodations in the disability and religious discrimination contexts are firmly recognized by precedent.[217] In those contexts, statutes—the ADA and Title VII—make it an unlawful employment practice for an employer not to make reasonable accommodations, short of undue hardship, for the disabilities or religious practices of its employees.[218] In creating a cause of action based on the failure to accommodate, Congress implicitly recognized a need to change the work structure to fully realize the guarantees of the EPC to be free from discrimination on the basis of disability or religion.[219] At least one court has held, in the context of the Rehabilitation Act, that childcare leave is a potential accommodation because it

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30, 1998).

211. Leahy v. Gap, Inc., No. 07-2008, 2008 WL 2946007, at *5 (E.D.N.Y. July 29, 2008).

212. *See* Calero-Cerezo v. U.S. Dep't. of Justice, 355 F.3d 6, 20 (1st Cir. 2004) (stating that, under the ADA, employers are required to make "reasonable accommodations to disabled employees").

213. Cross v. Cleaver, 142 F.3d 1059, 1073 (8th Cir. 1998).

214. *See id.* at 1073 (stating that employers would be liable for retaliatory actions characterized as "material employment disadvantages").

215. *See, e.g.*, *Leahy*, 2008 WL 2946007, at *5; *Trezza*, 1998 U.S. Dist. LEXIS 20206, at* 4.

216. *See Calero-Cerezo*, 355 F.3d 6 at 20.

217. *See id.*; Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993).

218. Americans with Disabilities Act, 42 U.S.C.A. § 12112(5) (1990) (defining discrimination as "not making reasonable accommodations" in the absence of undue hardship); Title VII, 42 U.S.C.A. 2000e(j) (1991) (making it unlawful to discriminate on the basis of religion and defining religion to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate" a religious observance "without undue hardship"); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 72 (1977) (opining that the intent and effect of the definition of "religion" was to make it an unlawful employment practice for an employer not to make reasonable accommodation, short of undue hardship).

219. *But see* Holmes v. Marion Co. Office of Family & Children, 349 F.3d 914, 921–922 (7th Cir. 2003) (holding that the defendant was entitled to Eleventh Amendment immunity because the religious accommodations provision of Title VII was enacted pursuant to Congress' power under the Commerce Clause, not the EPC, and, thus cannot be used to compel a state to accommodate religious practices).

permits the plaintiff to lead a normal life.[220] Greater protections are afforded for sex than for disability,[221] so courts should be receptive to the argument that a failure to give an AWA constitutes an adverse employment action in the gender discrimination context.

Although courts should be reminded that greater constitutional protections are afforded to women than people with disabilities, reference to the ADA framework might make a court more apt to recognize a claim based on a failure to grant an AWA. If the court refers to the ADA accommodation analysis, the plaintiff's request for a proposed reasonable alternative would trigger an employer's duty to provide an AWA, and the plaintiff would have to show that she requested an AWA to establish an adverse employment action.[222] If a plaintiff would be able to perform her job with an AWA and does not receive one, an employer who does not engage in an interactive process to provide an AWA should be held liable for failing to engage in the interactive process, as well as the failure to provide an AWA.[223]

ADA jurisprudence provides guidance on what types of accommodations are reasonable in the employment context.[224] Under the ADA, "[t]he employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work."[225] Reasonable accommodations may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position . . . and other similar accommodations."[226]

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220. McWright v. Alexander, 982 F.2d 222, 227 (7th Cir. 1992).

221. Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 735–36 (2003) (applying rational basis review to disability discrimination).

222. *See* Freadman v. Metro. Prop. and Cas. Ins. Co., 484 F.3d 91, 102–103 (1st Cir. 2007) (holding that plaintiff's ADA claim failed in part because the duty to accommodate was not triggered); *Calero-Cerezo*, 355 F.3d 6 at 24 (denying summary judgment to defendant on plaintiff's ADA claim because the plaintiff requested an accommodation and triggered the duty to accommodate).

223. 29 C.F.R. 1630.2(o)(3) (2011); Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 218–19 (2d Cir. 2001); Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 157 (3d Cir. 1999).

224. Precedent interpreting the ADA obligation to accommodate is more amenable to plaintiffs' positions than precedent interpreting the Title VII's obligation to accommodate religious practice, and is more firmly rooted in the EPC. In a Title VII religious accommodations case, the employee must establish a prima facie case by proving that (1) she has a bona fide religious belief, the practice of which conflicted with an employment duty, (2) she informed the employer of the belief and conflict, and (3) the employer threatened her with or subjected her to discriminatory treatment, including discharge, because of her inability to fulfill the job requirements. Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993). Although an employer has an obligation to make a good faith effort to accommodate a religious practice, any reasonable accommodation fulfills this obligation. Ansonia Bd. Educ. v. Philbrook, 479 U.S. 60, 68 (1986). Furthermore, undue hardship to the employer results when the religious practices accommodation results in "more than a *de minimus* cost" to the employer. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). *See also* Johnson v. Siemens Bldg. Technologies, No. 05 C. 3836, 2007 WL. 1017850, at *19–20 (N.D. Ill. Mar. 20, 2007) (analyzing a failure to accommodate caregiving responsibilities using the ADA's framework).

225. Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995).

226. Americans with Disabilities Act, 42 U.S.C.A. § 12111(9)(B) (1990); Colwell v. Rite Aid Corp., 602 F.3d 495, 505–06 (3d Cir. 2010) (holding that changing an employee's shift from nighttime to daytime because the employee could not commute to work at night due to blindness in one eye was a reasonable accommodation); Langon v. Dep't of Health and Human Servs., 959 F.2d 1053, 1060–61 (D.C. Cir. 1992) (holding that working from home is a reasonable accommodation under the

Although the analysis is fact-intensive, in light of the accommodations deemed "reasonable" in ADA cases, the statistics and stories discussed throughout this article make it easy to imagine the AWAs that a caregiver can request.[227] Alternatives to work structures might include any of the following: 1) a set work schedule for an hourly employee who must plan child care in advance, 2) a shifted schedule that allows for the caregiver to either come in to work later or leave earlier while still working a full day, 3) a part-time schedule, or 4) allowance to work from home a few days per week. Workers might also have the option to take time off for emergency caregiving needs, with the promise to make up this time later. Fully realizing the EPC right to be free from gender discrimination in the workplace requires changes to the work structure. Without the court's recognition of an EPC claim based solely on the failure to grant AWAs, employment discrimination against women in its most subtle forms will persist.

An employee might also have a claim for constructive discharge if she quit her job, like Shireen Walsh did, as a result of the type of adverse actions just described.[228] Constructive discharge is another type of an adverse employment action.[229] "[T]he purpose of the constructive discharge doctrine [is] to protect employees from conditions so unreasonably harsh that a reasonable person would feel compelled to leave the job."[230] This doctrine remedies a situation in which "an employer . . . subjectively desires an employee to remain, so long as the employee is willing to accept unreasonable, oppressive conditions."[231] To establish a constructive discharge claim, a plaintiff must demonstrate that a reasonable person would have found the conditions of employment intolerable.[232] An employee who "quits without giving [her] employer a reasonable chance to work out a problem" is not constructively discharged.[233] A minority of circuit courts also require that the employer intended to force the employee to resign.[234]

Rehabilitation Act).

227. *See* Sections II, IV.

228. *See* Walsh v. Nat'l Computer Sys., 332 F.3d 1150, 1156 (8th Cir. 2003).

229. Pa. State Police v. Suders, 542 U.S. 129, 148 (2004).

230. Ramos v. Davis & Geck, Inc., 167 F.3d 727, 732 (1st Cir. 1999).

231. *Id.*

232. Poland v. Chertoff, 494 F.3d 1174, 1184 (9th Cir. 2007) (quoting Brooks v. City of San Mateo, 229 F.3d 917, 930 (9th Cir. 2000)); *Davis & Geck, Inc.*, 167 F.3d at 732, n.4 (citing cases indicating that the Third, Fifth, Seventh, Eighth, Tenth and D.C. Circuits do not require proof of an employer's subjective intent; the Second and Fourth Circuits require proof of employer intent); *but see* Sanchez v. Denver Pub. Sch., 164 F.3d 527, 534 (10th Cir. 1998); Gartman v. Gencorp Inc., 120 F.3d 127, 130 (8th Cir. 1997) (requiring an employee to show employer's intent to force employee to quit); Konstantopoulos v. Westvaco Corp., 112 F.3d 710, 718 (3d Cir. 1997) (applying an objective standard); Derr v. Gulf Oil Corp, 796 F.2d 340, 344 (10th Cir. 1986) (stating that "proof of constructive discharge depends upon whether a reasonable [person] would view the working conditions as intolerable") (internal quotations omitted).

233. Brenneman v. Famous Dave's of America, Inc., 507 F.3d 1139, 1144 (8th Cir. 2007) .

234. *See* Trierweiler v. Wells Fargo Bank, 639 F.3d 456, 459–61 (8th Cir. 2011) (affirming a grant of summary judgment for defendant where plaintiff, who alleged pregnancy discrimination on the basis of a constructive discharge, failed to meet the "substantial burden" to show that the conditions were intolerable or that the employer intended to force her to quit); Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996); Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985).

A variety of employment actions might give rise to a constructive discharge claim; the inquiry is case-specific.[235] One court held that a jury could conclude that a change in cubicle location, work title, duties, and a requirement to work on vacation time were factors that could make a workplace intolerable to a reasonable person.[236] Similarly, reassignment from a lucrative sales territory with the option to accept reassignment or resign is considered a constructive discharge.[237] At least two circuits recognize that a complete failure to accommodate a disability, in the face of repeated requests, evidences the deliberateness necessary for a constructive discharge.[238] Because sex discrimination triggers greater constitutional protection than disability discrimination,[239] a similar holding should be reached in the context of a woman who quits her job because of an employer's failure to grant an AWA, or a hostile environment based on caregiver status.

The adverse actions described above make working conditions intolerable. For example, the harassment and disparate treatment endured by Shireen Walsh forced her to leave her job.[240] The lack of an AWA for Devorah Gartner, described below, required her to quit.[241] For these women, the treatment is akin to a mandatory discharge policy.[242] Poor women are punished because they are threatened with destitution; an inability to fit caregiving responsibilities into the family-wage work structure can mean that they are forced to quit their jobs, or work insufficient hours to support themselves and their families. Wealthier women, who might not need to work in order to support their families, are adversely affected because this treatment reinforces societal pressure to relinquish career aspirations.

The final element that a plaintiff must demonstrate to meet her burden of production under the proposed framework is that she is qualified for the position, with an AWA if she needs one, or without an AWA if she does not.[243]

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235. Carter v. Town of Benton, 827 F.2d 700, 705 (W.D. La. 2010) (denying defendant's motion for summary judgment on plaintiff's parallel Title VII and Section 1983 claims, which alleged that she was constructively discharged when given the option to quit or be fired after complaining about sexual harassment).

236. *Davis & Geck, Inc*., 167 F.3d at 731–32.

237. Goss v. Exxon Office Sys., Co., 747 F.2d 885, 888–89 (3d Cir. 1984).

238. *Compare* Crabhill v. Charlotte Mecklenburg Bd. Of Educ., 423 Fed. Appx. 314, 324 (4th Cir. 2011), *with Trierweiler*, 639 F.3d at 460 (leaving open the possibility that a failure to accommodate could suffice as evidence of constructive discharge, but holding that evidence of an intent to provide an accommodation undermined a constructive discharge claim where the plaintiff needs to prove employer's intent to force her to quit), *and* Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099, 1109 (6th Cir. 2008) (joining the Fourth Circuit in recognizing that a jury may conclude that an employee's resignation was both intended and foreseeable when an employee makes a repeated request for an accommodation and that request is denied and no reasonable alternative is offered).

239. *Compar*e Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 247 (1995) (iterating that courts review cases of gender discrimination using an "intermediate scrutiny" standard), *with* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366 (2001) (applying a rational basis standard of review to allegations of constitutional violations on the basis of disability).

240. Walsh v. Nat'l Computer Sys., 332 F.3d 1150, 1156 (8th Cir. 2003).

241. LERNER, *supra* note 9, at 13.

242. *See* Ramos v. Davis & Geck, Inc., 167 F.3d 727, 732 (1st Cir. 1999).

243. *See* Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 22 (1st Cir. 2004) (describing the plaintiff's requirement to show she is qualified for the position in question).

Unlike the traditional *McDonnell Douglas* framework, by defining whether a woman is qualified with reference to how she can perform the job if given a needed AWA, the proposed framework allows a plaintiff to demonstrate that she meets essential job functions without reference to an inherently discriminatory workplace structure. A defendant cannot defeat this claim by arguing that an employee is not qualified for a job because of her inability to meet job requirements that would not exist if she was granted an AWA. Under this analysis, conditions such as an employee's inability to put in "face time" at the office, the need for a set weekly schedule, or the need for an emergency leave allowance will not generally be considered to undermine "essential job functions."[244] Plaintiffs should focus on the specific job functions and duties to argue that the employee can meet those requirements, even with minor modifications to the traditional work structure of the place of employment. Plaintiffs can argue, as highlighted above, that defining whether a woman is "qualified" by referring to her ability to meet the essential jobs functions, rather than whether she can conform to an outdated work structure, is more consistent with EPC jurisprudence that seeks to eliminate sex-role stereotypes.[245]

Under this proposed framework, the defendant would have the opportunity to demonstrate one of three defenses to defeat the plaintiff's claim: 1) the employee was not qualified, even with an AWA, or no reasonable AWA existed; 2) the adverse action was not based on caregiver status; or 3) the inference of discrimination is absent.[246] The first of these defenses borrows directly from analysis of the reasonableness of an ADA accommodation, in which the employer must show that any accommodation for a disability imposes an undue hardship.[247] An accommodation that creates only "some difficulty" for an employer does not impose an undue burden.[248] Under the ADA, an employer is not required to create a new position for the plaintiff or reallocate essential job functions,[249] but advocates might argue that the greater protection afforded to sex classifications warrants types of AWAs not necessarily required by the ADA to eliminate family-wage barriers. At most, only "some difficulty" results from

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244. *See id.* at 23 (confirming that if an accommodation is reasonable and feasible an employer should make the accommodation).

245. *See* Ginsburg, *supra* note 38, at 268–70 (arguing that defining whether an employee is qualified with reference to an available AWA does not fully remedy the problems posed by a discriminatory workplace, but it acknowledges that the work structure is itself discriminatory and has been accepted by the courts as a way to analyze whether a plaintiff is qualified in the disability context).

246. *See Calero-Cerezo*, 355 F.3d at 23.

247. *Id.*

248. *See* Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91, 103 (1st Cir. 2007) (holding that an accommodation that creates only "some difficulty" for an employer does not impose an undue burden); Heaser v. Toro Co., 247 F.3d 826, 832 (8th Cir. 2001) (affirming summary judgment in favor of defendant, holding that the employer was not required to make an overall change in the way it conducted business to accommodate plaintiff and finding that plaintiff could not perform the essential functions of her job from home); Langon v. Dep't of Health & Human Servs., 959 F.2d 1053, 1060 (D.C. Cir. 1992) (finding that an employer is not required to create a new position or reallocate essential functions of a job).

249. *Heaser*, 247 F.3d at 832.

restructuring work to accommodate caregiving responsibilities.[250]

An employer may also defeat a claim by showing that the adverse action was not based on caregiver status; this is analogous to an employer's opportunity in any discrimination claim to demonstrate that the adverse action was not based on the employee's membership in a protected class.[251] Here, however, an employer cannot defeat a claim simply by highlighting another basis for the adverse action if that basis is negated by the implementation of an AWA.[252] For example, if the employer claims that the adverse action occurred because the woman leaves early, that justification would be insufficient if the employee completed all assignments on time and leaving early does not harm the employer. If the stated reason for termination is repeated tardiness to a morning shift because a woman needs to drop her child off at school, and moving the shift a half hour later is an alternative to the adverse action, an employer cannot defeat the action by offering tardiness as a non-discriminatory reason for the action. If, on the other hand, such an alternative was offered or implemented and the woman was still late to her shift, tardiness constitutes a non-discriminatory reason.

Finally, an employer can defeat a claim by challenging the presumption that caregiver status is a proxy for gender.[253] A defendant would most likely seek to do so by comparing how the plaintiff was treated with how other employees were treated. Statistics might also demonstrate that the defendant's workplace does not conform to average workplaces in regards to retention of women and women who hold upper level positions. When making comparisons to defeat the presumption of caregiver status as a proxy for gender, courts and advocates should make comparisons between men and women workers that include the retention rates, the reasons why women leave verses why men leave, the rates of promotions, and the gender and caretaking status of those holding the higher level positions to determine if there is a pattern at the particular workplace consistent with the broader society. These comparisons should help account for the state of equality between the genders at the place of employment in order to undermine the presumption that the discrimination based on caregiver status was based on gender. To that extent, the inquiry is more nuanced than a comparator analysis. An employer should not be able to simply point to one male caregiver who suffered an adverse action, when that male caregiver was an anomaly. This is particularly true because the male caregiver might have been discriminated against based on his non-conformance to sex-role stereotypes. If so, the discrimination is still based on sex. Indeed, the proper comparison would be a man or a woman with no caregiving responsibilities—workers who conform to the ideal male breadwinner model.

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250. *See Freadman*, 484 F.3d at 103.

251. *See* Bass v. Chem. Banking Corp., No. 94 Civ. 8833, 1996 WL 374151, at *5 (S.D.N.Y. July 2, 1996) (holding that the employer successfully showed that the plaintiff was not treated differently than others in her class).

252. *See generally,* Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 23 (1st Cir. 2004) (analyzing whether a reasonable fact finder could conclude that the plaintiff was qualified for the position and examining whether she could perform her essential job functions with or without an accommodation).

253. *See Bass*, 1996 WL 374151, at *5 (denying that caregiver status is a proxy for gender).

An employment discrimination claim for a violation of the EPC due to adverse actions because of caregiving status would require the court to recognize that caregiver status is presumptively a class based on gender.[254] Since the current analytical framework used for employment discrimination allows violations of the EPC to go unchallenged,[255] the court should adopt a new framework that fully protects these rights. In some cases, the claim will require the court to recognize that a failure to grant an AWA is an adverse employment action. Nevertheless, this claim follows from rights guaranteed by the EPC, which provides the constitutional foundation for Title VII, the FMLA, and the ADA, including those statutes' provisions for claims based on failures to accommodate in the disability and religious contexts.

c. A Challenge to Irrational State Policy that Maintains Family-Wage Barriers

A direct challenge to an irrational state policy or action that maintains family-wage barriers might arise if a state has a policy not to offer AWAs to people with caregiving responsibilities, or penalizes individuals for working with an AWA. For example, the female police officers in *Prater v. Detroit Police Department* alleged that they were forced to take sick leave while pregnant, regardless of whether they could perform their job functions.[256] The police department determined promotions based in part on the use of sick leave; so the mandatory sick leave for pregnancy detrimentally affected their career advancement.[257] A parallel policy that indirectly penalizes people who, for example, use their sick days or telecommute, should be challenged as a violation of the EPC, because these policies result in disparate treatment of the caregivers who are most likely to take advantage of the policies.

Work assignment procedures also might disproportionately and negatively impact caregivers. Consider Deanna Tipler, a correctional officer who was reassigned to a work shift that caused her to spend less time with her children and more money on childcare.[258] The employer reassigned Tipler pursuant to a procedure accounting for the numbers of men and women on each shift, seniority, and employee preference.[259] The court ultimately held that the procedure did not violate Title VII or the EPC. The court noted that pursuant to Eighth Circuit precedent, a policy of staffing female-only wards only with female guards is reasonable. Based on that precedent, the circuit concluded that the County's shift reassignment policy was reasonable to adequately staff female wards, even though the prison allowed male guards to cover for female guards when they took breaks. Because Tipler "showed only that her reassignment caused her some personal inconvenience and expense" and "[a]ny restriction on

254. Grossman & Thomas, *supra* note 172, at 34–35.

255. Although Title VII might allow some claims to succeed, the violations that go unchallenged are where family-wage barriers prevent women from doing their jobs.

256. Prater v. Detroit Police Dep't, No. 08-14339, 2009 WL 4576039 at *1 (E.D. Mich. Dec. 3, 2009).

257. CENTER FOR WORKLIFE LAW, FAMILY RESPONSIBILITY DISCRIMINATION: LITIGATION UPDATE 2010, 13–14.

258. Tipler v. Douglas Cnty., Neb., 483 F.3d 1023, 1024 (8th Cir. 2007).

259. *Id.*

Tipler's employment was minimal," the court affirmed dismissal of the claim.[260] As Tipler's situation demonstrates, policies that do not account for caregiving responsibilities of workers adversely affect women more than men. These policies should be challenged as violations of the EPC.

The Supreme Court uses a two-prong analysis when determining whether a facially neutral state policy violates the EPC's guarantee to be free from gender discrimination.[261] The Court first determines if the policy is "neutral in the sense that it is not gender based."[262] If the classification is not based on gender, the second step is to determine whether the "adverse effect reflects invidious gender-based discrimination."[263] However, a state policy or action with adverse effects is only unconstitutional under the EPC if the discriminatory impact can be traced to a discriminatory purpose.[264]

Although a policy against offering AWAs for caregivers or penalizing those who work under arrangements more likely to be used by caregivers might be couched as inherently non-neutral because caregivers are a subset of women, it is difficult to predict how a court might receive this argument.[265] The Court rejected a similar argument in *Personnel Administrator of Massachusetts v. Feeney*.[266] *Feeney* involved a gender discrimination challenge to a state statute granting an absolute lifetime preference to veterans.[267] The Court concluded that the statute was facially neutral because, although only two percent of women were veterans, the statute's preference for veterans disadvantaged male and female nonveterans alike.[268] Similarly, a policy against AWAs or a policy that penalizes employees for using AWAs disfavors male and female caregivers equally.

Assuming that the Court will view such policies as facially neutral, a plaintiff must establish discriminatory purpose or intent.[269] Discriminatory intent is the selection or pursuit of a course of action at least in part because of the adverse effect on a particular group.[270] The disproportionate impact on a particular group can be a starting point towards the evidence demonstrating a discriminatory intent.[271] Additional evidence might be gleaned from the historical background of an employment decision and the procedural or

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260. *Id.* at 1027–28.

261. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (explaining that if the policy is not facially neutral, it is subject to intermediate scrutiny, and must be substantially related to an important government interest and must not intentionally discriminate against women).

262. *Id.*

263. *Id.*

264. *Id.* at 272.

265. *See, e.g.*, *id.* at 275 (explaining that although a law favoring veteran status primarily benefits men, the nonveterans disadvantaged by the law are men and women so the law is not grounded in a gender-based classification).

266. *See id.* (rejecting the argument that laws favoring primarily male veterans classify based on gender).

267. *Id.* at 259.

268. *Id.* at 275.

269. *Id.* at 274.

270. *Id.* at 279.

271. *See* Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 563 (3d Cir. 2002) (stating that analyzing a facially neutral policy for race discrimination begins with a study of the impact of the policy on different racial groups).

substantive departures from the employer's normal practices.[272] To bolster her claim, a plaintiff might highlight the development of the family-wage ideal as a response to the shift of productive activity from the home to workplaces outside of the home, establishing that the nature of work has been socially constructed to exclude people with caregiving responsibilities. Using the evidence provided in this article and its references, a plaintiff could establish that the majority of people with caregiving responsibilities are women. Furthermore, supervisors' or managers' remarks based on stereotypes about working women and motherhood could provide direct evidence of discriminatory intent. For example, one plaintiff alleging an EPC violation for a discriminatory firing was told that her job as a school administrator "was perhaps not the job or the school district for her if she had 'little ones,' and that it was 'not possible for [her] to be a good mother and have this job.'"[273] These types of comments might be present in cases where a state policy causes adverse treatment of caregivers and should be highlighted as evidence of discriminatory animus.

If a plaintiff can establish discriminatory intent, the state must show that the practice serves important government objectives and is substantially related to these objectives.[274] Although the state might articulate an important objective, such as efficiency or economic productivity, the fact that workplace structures are primarily socially constructed[275] undermines the substantial relation of family-wage barriers to the government's objective. Indeed, workplace structures that are considered inherent to work are in fact arbitrary and have little if any relation to the government's objective in many cases. One example, mentioned previously, is the requirement that Walsh work until five and her boss's trial admission that this was not actually necessary to do the job. As a result, the state's policy violates women's equal protection right to equal employment opportunity.

Challenges to facially neutral policies have succeeded in the context of pregnancy discrimination, providing encouragement that claims on behalf of caregivers are possible. A jury found that a police department's facially neutral policy of excluding from light-duty status any officer who suffered an off-the-job injury, condition, or illness violated the Pregnancy Discrimination Act.[276] The plaintiffs succeeded on their disparate treatment and disparate impact theories of

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272. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977).

273. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 115 (2d Cir. 2004); *see also* Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 57 (1st Cir. 2000) (holding that, in a Title VII case, the fact that plaintiff's boss specifically questioned whether plaintiff would be able to manage her work and family responsibilities after she told him that she was planning on having a second child and fired her shortly thereafter, constituted evidence of discriminatory animus); Sheehan v. Donlen Corp., 173 F.3d 1039, 1044 (7th Cir. 1999) (holding that, in a Title VII case, the fact that at the time plaintiff, who was known to be pregnant, was fired, her supervisor said that she would be happier at home with her children, was direct evidence of discrimination).

274. If the policy is not facially neutral, is it subject to intermediate scrutiny: it must be substantially related to an important government interest. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979).

275. *See supra* Section I.

276. Docket at 7–8, Lochren v. Cnty. of Suffolk, No. CV 01-03925 (E.D.N.Y. July 14, 2006), Doc. 156-2; *see also* Lochren v. Cnty. of Suffolk, No. CV 01-3925, 2008 WL 2039458, at *1 (E.D.N.Y. May 9, 2008).

liability and, in addition to a damage award, the police department changed its policy for pregnant women.[277] Similar policies that place a disproportionate burden on caregivers should be challenged as violations of equal protection.

Equal protection claims challenging adverse employment actions against caregivers and irrational state policies that lead to adverse treatment of caregivers is a natural trajectory of existing EPC jurisprudence, which established that state regulations that maintain the traditional male breadwinner-female caregiver model are unconstitutional.[278] Overt regulations based on sex stereotypes may be all but obsolete, but a work structure that maintains these roles persists. Challenging actions taken because of an employee's caregiver status, failures to make AWAs for those with caregiving responsibilities, and policies that maintain family-wage barriers or penalize caregivers, is the next step in fully eradicating gender stereotypes and employment inequality. This step acknowledges that women are primary caregivers. When faced with family-wage barriers, evolving EPC jurisprudence to recognize claims of caregiver discrimination keeps developments in law at pace with developments in society. Furthermore, the EPC's protection against gender discrimination in the workplace maintains a meaning that is not merely duplicative of Title VII.[279] The rights guaranteed by the EPC are broader than those protected by Title VII. Limiting the EPC by deferring to legislation disrupts the proper role of the Court as the branch of government responsible for defining the scope of constitutional rights.

B. Substantive Due Process Rights

Family-wage barriers also jeopardize rights guaranteed by the Substantive Due Process Clause of the Fourteenth Amendment, underscoring the idea that the issue of women's workforce attachment has constitutional liberty dimensions. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ."[280] Due process of law includes a substantive due process right "that provides heightened protection against government interference with certain fundamental rights and liberty interests."[281] One such liberty interest is the fundamental right to privacy.[282] The Court recognizes the right to privacy in a variety of contexts, at least three of which are implicated in addressing family-

277. Docket at 7–8, Lochren v. Cnty. of Suffolk, No. CV 01-03925 (E.D.N.Y. July 14, 2006), Doc. 152.

278. *See supra* Section I.

279. Johnson v. Transp. Agency, Santa Clara, Cnty., 480 U.S. 616, 627 n.6 (1987) (rejecting the notion that the obligation of a public employer under Title VII must be identical to its obligations under the Constitution, stating "[t]he fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must consent was not intended to extend as far as that of the Constitution").

280. U.S. CONST. amend. XIV. This section addresses one of two theories under which a plaintiff can bring a substantive due process claim, the deprivation of a protected liberty or property interest protected by the Fourteenth Amendment.

281. Troxel v. Granville, 530 U.S. 57, 65 (2000) (quotations omitted).

282. Roe v. Wade, 410 U.S. 113, 152–53 (1973) (explaining that the right to individual privacy is contained in a variety of clauses throughout the Constitution).

wage barriers: the right to pursue a career of one's choosing[283] and the rights to bear[284] and rear one's children.[285] Women might forgo or delay having children to pursue their career because of the state's failure to offer AWAs or might be forced out of the workplace after having children. Working mothers might also be forced to choose between personally rearing their children and working.[286] They might be forced to rear their children in a different way than they would choose without discriminatory work structures. Family-wage barriers simultaneously compromise a woman's right to pursue a career of her choosing and her rights to bear and rear her children.

Even if a violation of a fundamental liberty interest is not ultimately recognized in the context of family-wage barriers, raising the liberty interest implicated will inform the EPC analysis. The Court has considered the liberty interest at stake when examining a classification for equal protection purposes.[287] Including a claim for a violation of substantive due process in a potential lawsuit helps to educate the court about the social reality faced by working women with caregiving responsibilities and the severe consequences of family-wage barriers for women's economic security, ultimately informing the equal protection analysis. Further, the tension between the liberty interests implicated more broadly demonstrates how the law excludes women's experiences and treats work as separate from caregiving.

The Supreme Court has clearly stated that strict scrutiny applies to violations of substantive due process; the infringement must be narrowly tailored to serve a compelling state interest.[288] Applying the strict scrutiny standard, and assuming that the Court would recognize an infringement of a

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283. Conn v. Gabbert, 526 U.S. 286, 291–92 (1999) (stating "the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment"); Engquist v. Or. Dep't of Agric., 478 F.3d 985, 997–98 (9th Cir. 2007) (holding that there is substantive due process protection against government employer actions that foreclose access to a particular profession to the same degree as government regulation).

284. Women's right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), is rooted in the body of reproductive rights precedent establishing a fundamental right to procreation, Skinner v. Oklahoma, 316 U.S. 535 541 (1942), use contraception, Griswald v. Connecticut, 381 U.S. 479, 485 (1965), and terminate a pregnancy, *Roe*, 410 U.S. at 153. "[*Griswald v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade*] were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child." Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

285. *Troxel*, 530 U.S. at 65 (opining that "perhaps the oldest of the fundamental liberty interests recognized" by the Supreme Court is "the right of parents to direct the upbringing of their children"); *see* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118, 118 n.6 (2d Cir. 2004) (suggesting that a claim for a violation of one's right to bear and rear children might be present in caregiver discrimination cases).

286. *See* Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991) (stating "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job"); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647–48 (1975) (striking state regulation forcing pregnant teachers out of their jobs because the policy "unduly penalize[d] a female teacher for deciding to bear a child").

287. *See, e.g.*, Skinner v. Okla., 316 U.S. 535, 541 (1942) (relying on the fundamental nature of the rights to marry and procreate to inform the EPC analysis).

288. *See* Reno v. Flores, 507 U.S. 292, 301–02 (1993) (considering liberty interests when evaluating a claim relying on the Fourteenth Amendment's due process guarantee).

substantive due process right, a state's maintenance of an inflexible work structure would not be narrowly tailored to serve a compelling state interest—presumably optimum economic productivity—particularly if reasonable alternatives existed. But courts do not always apply strict scrutiny to substantive due process claims.[289] Indeed, one difficulty in gauging the success of these claims is the inconsistency with which courts apply any particular standard. Nevertheless, even if a lower level of scrutiny applies, a viable argument is that the infringement is unjustified if reasonable alternatives exist that are only mildly burdensome for the state to adopt. Consequently, convincing a court that an infringement of a substantive due process right has occurred is the greatest obstacle to a substantive due process claim. Not only would recognition of the rights violations in the context of women's workplace attachment establish a new claim, but courts' analyses of whether there is an infringement are extremely contextual, amorphous and conflated with a balancing of the state's interest. Therefore, it is difficult to predict how a court would receive such claims.

1. Right to Pursue an Occupation

A plaintiff will have the most difficulty establishing a violation of the right to pursue a career of one's choice, where infringement is limited to "extreme cases" in which state action "effectively banned a person from a profession . . . ."[290] Only state regulations that affect a "complete prohibition of the right to engage in a calling, and not [a] . . . brief interruption" have been held unconstitutional in violation of the right to pursue a career.[291] Family-wage barriers do not overtly operate as a complete bar to employment or a profession, making it difficult to establish a claim for an infringement of this right. However, there are Title VII cases in which employers' actions based on caregiver status implicated the right to pursue an occupation

Consider Joann Trezza, whose claim for discriminatory failure to promote based on her status as a mother survived summary judgment because her employer failed to present evidence that men with children were also passed over for a promotion.[292] Trezza was twice passed over for a promotion in favor of an unmarried woman without children and a married man with children.[293] After not being promoted the first time around, Trezza asked her employer why she did not get the job and was told "because she had a family they assumed she would not be interested in the position."[294] The second time, Trezza urged a Senior Vice President to review her employment record and provide her with a

289. Connecticut v. Gabbert, 526 U.S. 286, 291–92 (1999) (informing that the right to choose one's field of private employment is subject to reasonable government regulation); *LaFleur*, 414 U.S. at 640 (stating that government action interfering with the right to bear children cannot be needless, arbitrary, or capricious); Hutchins v. D.C., 188 F.3d 531, 541 (D.C. Cir. 1999) (applying intermediate scrutiny, in which the challenged regulation must be substantially related to an important government interest, to a challenge based on parental rights).

290. Engquist v. Or. Dep't of Agric., 479 F.3d 985, 997–98 (7th Cir. 2007).

291. *Gabbert*, 526 U.S. 286 at 292.

292. Trezza v. Hartford, Inc., No. 98-CIV-2205, 1998 WL 912101, at *7–8 (S.D.N.Y. Dec. 30, 1998).

293. *Id.* at *1.

294. *Id.*

reason for not being promoted.[295] Two months later, Trezza was promoted.[296]

Several years later, Trezza requested to be considered for the Managing Attorney position, after the previous Managing Attorney retired.[297] For a third time, she was not considered for the promotion, despite having the highest performance evaluations of those with comparable seniority status.[298] The position remained open for an indefinite period, and was ultimately filled by a woman without children and with "considerably less legal experience" than Trezza.[299] The discrimination Trezza faced based on her status as a mother impeded her right to pursue her occupation.

Sometimes, employers rely on mistaken assumptions based on sex stereotypes, which prevent caregivers from advancing in their careers. Laurie Chadwick worked as a "Recovery Specialist" for an insurance company.[300] She had young children and was not promoted, despite being the presumed frontrunner because of her greater years of experience and higher performance reviews, and because she had already taken on some of the responsibilities of the new position. [301] When a woman with older children was offered the job instead, the hiring decision maker told Chadwick, "you're going to school, you have the kids and you just have a lot on your plate right now."[302] Chadwick was told that the decision maker and other supervisors would feel "'overwhelmed' in the same circumstances."[303] In reality, Chadwick's husband was the primary caregiver of their children, and he worked nights and weekends.[304] The court noted that Title VII does not protect against caregiving responsibilities. Without deciding whether Chadwick could recover based on a "sex plus [caregiving]" theory of liability, the court reversed summary judgment for the defendant by relying on Chadwick's claim of sex discrimination based on sex stereotyping, which was established as sex discrimination by *Price Waterhouse*.[305]

Trezza's and Chadwick's cases demonstrate how employers' decisions based on an employee's caregiver status and sex stereotypes about that status jeopardize the right to pursue an occupation. Although these cases rely on a sex-stereotyping theory of liability, employer actions based solely on caregiver status also jeopardize a woman's right to pursue an occupation.[306] Establishing a claim based on the right to occupation may be difficult because, even if the state's

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295. *Id.*

296. *Id.*

297. *Id.* at *2.

298. *Id.*

299. *Id.*

300. Chadwick v. WellPoint, Inc., 561 F.3d 38, 41 (1st Cir. 2009).

301. *See id.* at 41–42 (comparing the candidate who was offered the promotion and the plaintiff, noting that the chosen candidate received lower performance reviews than the plaintiff, and had worked fewer years than the plaintiff).

302. *Id.* at 42.

303. *Id.*

304. *Id.*

305. *Chadwick*, 561 F.3d at 46–47; *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 235–36 (1989) (stating that comments based on gender norms were evidence of sex-based stereotyping and could indicate sex discrimination).

306. *See, e.g.*, *Chadwick*, 561 F.3d at 46.

inflexible work structures and policies prevent a woman with caregiving responsibilities from pursuing her state employment, or limit her career advancement generally, the work structure maintained by the state action does not permanently bar her employment. Regardless, asserting such a claim is useful for framing the issue as one that has liberty dimensions, even if the court ultimately decides that they are not encompassed by the constitution.

Assuming the state denied the right to pursue an occupation due to family-wage barriers, the state's maintenance of inflexible work structures would likely be subject to a reasonableness review.[307] The reasonableness of the state's interest in maintaining these barriers is questionable, particularly when alternative work arrangements can be made. If an AWA can be made, the employee can perform the job without hardship to the employer. Furthermore, the irrationality of maintaining the family-wage barriers is accentuated if the action is unrelated to the worker's performance and rather a result of animus towards caregivers.

Although a claim based on a right to pursue an occupation is unlikely to succeed, this discussion highlights the way in which family-wage barriers have liberty dimensions. Furthermore, it helps to bolster the unreasonableness of an employer's refusal, in many cases, to grant an AWA.

2. Right to Reproductive Freedom

Family-wage barriers might compel women to delay or forgo having children at all, or they might prevent a woman from returning to work after having a child,[308] which infringes on her reproductive freedom. Reproductive freedom jurisprudence primarily addresses the constitutionality of a state action, taken to protect the "potentiality of human life"[309] which incentivizes women to have children, or purports to protect women or unborn children.[310] In *Cleveland Board of Education. v. LaFleur*, the Supreme Court held that a statute prescribing mandatory maternity leave for pregnant women before and after the birth of a child was unconstitutional.[311] The Court stated that the mandatory leave policies

307. Connecticut v. Gabbert, 526 U.S. 286, 291–92 (1999) (indicating that the right to choose one's field of private employment is subject to reasonable government regulation).

308. As an example of how these fundamental rights collide in this context, the state's interest in women bearing children, deemed reasonable by the Court, and the policies implemented to further that interest, compel women to have children and, as a result, force them out of the workforce due to the inherently discriminatory work structure.

309. Gonzales v. Carhart, 550 U.S. 124 (2007).

310. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (identifying a state interest in protecting potential life); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 450–51 (1983) (holding that the state's interest in protecting maternal health was not served by a law that required a mandatory waiting period for abortions); Bellotti v. Baird, 443 U.S. 622, 651 (1979) (finding unconstitutional a parental consent requirement designed to ensure that minors contemplating abortion act in their best interest); Roe v. Wade, 410 U.S. 113, 152–53 (1973) (affirming the right to an abortion); Griswald v. Connecticut, 381 U.S. 479, 485 (1965) (finding unconstitutional a law prohibiting distribution of birth control).

311. *Compare* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647–48 (1975), *with* Sokol v. Smith, 671 F. Supp. 1243, 1246–47 (W.D. Mo. 1987) (relying on Maher v. Roe, 432 U.S. 464 (1977) to uphold a state regulation prohibiting Medicaid funding for abortions that were not medically necessary, even though funding for childbirth was provided, because the state has an interest in encouraging

placed a heavy burden on the exercise of the right to bear children and "needlessly, arbitrarily, or capriciously impinge[d] upon this vital area of a [woman's] constitutional liberty."[312]

Like the state regulations at issue in *LaFleur*, inflexible work structures place a heavy burden on women's reproductive freedom. One-fifth of women aged between forty and forty-four were childless in 2007; in 2001, "[n]early half of women with annual incomes above $100,000 had no children . . . ."[313] Certainly some of these women made a conscious choice not to have children. However, others end up without children because they cannot fit children into their work-life without sacrificing their professional accomplishments.[314] This "complicated calculus around the question of having children" defies the notion of reproductive choice.[315] When a choice of if and when to have a child is confined by unreasonable workplace structures and policies that favor non-caregivers, it becomes so limited that few or no options exist.

For example, a receptionist alleged that she was terminated for being pregnant.[316] Karen Rosales's employer told her that it "wasn't the best time" for her to have a second baby, and "to not have a baby at [this] time."[317] When she was fired while pregnant her employer explained, "maybe it's best if [you are] at home."[318] The court held that these comments created an issue of fact regarding the employer's true reason for terminating the receptionist.[319] The court also acknowledged that Rosales had a choice forced by her employer: keep her job or have a child. If these were Rosales's options, Rosales had almost no choice, and the limited choice she had was dictated by her employer—a third party—uninvolved in her pregnancy or the consequences that may arise from it.

Similarly, Patricia Leahy was fired from her position as a stock supervisor at an Old Navy retail store after more than seven years of employment with the company.[320] Shortly after Leahy advised her supervisors that she was pregnant with her second child, she was subjected to derogatory remarks about her work and work hours.[321] She submitted an accommodation request to her supervisor that stated she could perform all of her duties up until her maternity leave, with the exception of heavy lifting, climbing, and other strenuous activity.[322] Her supervisors harassed her to withdraw the letter, which Leahy refused to do.[323]

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childbirth, and finding no violation of a fundamental right to bear children resulting from unemployment compensation statute that provided unemployment compensation only to employees who left their employment because of the type of work or the employer, indicating that women did not have to choose between having a child and employment).

312. *LaFleur*, 414 U.S. at 640.
313. LERNER, *supra* note 9, at 90–91.
314. *Id.* at 91–92.
315. *Id.* at 92.
316. Rosales v. Keyes, No. 06-20471, 2007 WL 29245, at *2 (S.D. Fl. Jan. 3, 2007).
317. *Id.*
318. *Id.*
319. *Id.* at *6.
320. Leahy v. Gap, Inc., No. 07-2008, 2008 WL 2946007, at *1 (E.D.N.Y. July 29, 2008).
321. *Id.*
322. *Id.*
323. *Id.*

She was subsequently terminated.[324]

Women might also feel compelled to terminate a pregnancy because of an employer's policy. Yaire Lopez almost made such a choice after her employer fired her when her boss learned she was pregnant.[325] Lopez, already a single mother of two, was so desperate to keep her paycheck that she decided to have an abortion. She only changed her mind because, as she said, "they were twins and I didn't want to feel guilty for two lives. So my thought was like forget about my financial stuff. If I lose my house, if I lose everything I didn't care at that moment, I just wanted to continue with my pregnancy."[326] Her statement demonstrates her limited options, the difficult choice she faced, and her dire financial straits.

The animus expressed by employers in these cases extends beyond pregnancy, and tells women that they need to choose between having children and a career. As exemplified by the case of Shireen Walsh, women who become mothers are more likely to be the target of discrimination than women without children, and men.[327] Although inflexible work structures and policies might be necessary in some workplaces, many times they are based on the social construction of work as defined by strict time norms. These inflexible work structures "needlessly, arbitrarily, or capriciously impinge" on women's right to bear children.[328] When reasonable alternatives exist that allow a woman to remain a productive employee and freely choose whether and when to have children, a state's policy that maintains family-wage barriers infringes on a woman's substantive due process rights.

3. Right to Control One's Child's Upbringing

Finally, family-wage barriers might infringe on a parent's right to control her child's upbringing.[329] This right includes the responsibility to inculcate "moral standards, religious beliefs, and elements of good citizenship."[330] Although in "certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment,"[331] "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of family . . . ."[332] A state can act to guard the general well-being of a child by, for example, requiring vaccinations and school attendance or prohibiting

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324. *Id.*

325. Lopez v. Bimbo Bakeries USA, Inc., No. CGC 05445104, 2009 WL 1090375, at *5–6 (Cal. App. Dist. 1 Apr. 23, 2009).

326. LERNER, *supra* note 9, at 27–28; *Bimbo Bakeries*, 2009 WL 1090375 at *5.

327. *See, e.g.*, Walsh v. Nat'l Computer Sys., 332 F.3d 1150 (8th Cir. 2003); *see supra* Section IV(A)(2)(b).

328. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 (1975).

329. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

330. *Id.*

331. C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 182 (3d Cir. 2005).

332. Troxel v. Granville, 530 U.S. 57, 668 (2000) (plurality); *see also* Nunez v. City of San Diego, 114 F.3d 935, 952 (9th Cir. 1997) (finding a curfew law unconstitutional because it violated parents' right to raise their children without interference).

child labor.[333] But when a state seeks to impose "ideas of morality and gender roles" on a child,[334] alienates a child from the parent under circumstances that "shock the conscience,"[335] or fails to give deference to a parent's decision about the upbringing of her child, the state infringes on a parent's rights.[336] A state's maintenance of family-wage barriers infringes on a parent's right to control her children's upbringing when she is forced to leave work to rear children. Family-wage barriers might "coerce parents into permitting [the state] to impose on their children . . . ideas of morality and gender roles"[337] because they force mothers to set an example that reinforces stereotypes of gender roles when they might not otherwise choose to do so.

Perhaps that was not necessarily the case for Devorah Gartner, but she is a mother who was forced to quit her job to care for her disabled newborn in the way she and her husband felt was most appropriate for their family.[338] Prior to having their daughter, Devorah and Bob Gartner worked full-time.[339] They made a combined household income of over $100,000, owned their home, took regular vacations, and generally lived comfortably.[340] Devorah had a complicated pregnancy and needed bed rest, which ultimately forced the Gartners into medical debt.[341] After their daughter was born, Devorah and Bob continued to work full-time, hoping that they would be able to pay off their debt.[342] Devorah worked nights and Bob worked days; they handed off their newborn in the midst of their commutes to and from work.[343] But they soon found out that their daughter had likely suffered a stroke in the uterus and would require a physical therapy routine six times per day, in addition to usual infant care.[344]

To meet the needs of their daughter in the limited window of time that they had to ensure her best chance for progress, Devorah, who loved her job and

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333. Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

334. *Compare* Miller v. Mitchell, 598 F.3d 139, 151 (3d Cir. 2010) (holding that plaintiff was likely to succeed on the merits of her substantive due process claims for a violation of parental rights based on the District Attorney's requirement that her daughter' attend a program about the morality of her behavior at issue), *with* Anspach *ex rel.* Anspach v. City of Phila. Dep't of Health, 503 F.3d 256, 262–63 (3d Cir. 2007) (finding no violation of parental rights when parents were not notified of their daughters possible pregnancy after she sought advice from a health center counselor because the daughter had a privacy interest and there was no coercive behavior that interfered with the parent-child relationship: the daughter could have told her parents and was not discouraged from doing so).

335. Rosenbaum v. Washoe Cnty., 663 F.3d 1071, 1079–80 (9th Cir. 2011) (finding no violation of substantive due process where a parent was separated from his children for a short time during his arrest).

336. *Troxel*, 530 U.S. at 68. *See also*, Hernandez *ex rel.* Hernandez v. Foster, 657 F.3d 463, 480–81 (7th Cir. 2011) (holding there was "a genuine dispute of fact about whether a reasonable person . . . would have understood that continuing to hold [a minor] in protective custody violated the [parent's] clearly established constitutional rights").

337. Miller v. Mitchell, 598 F.3d 139, 150–51 (3d Cir. 2010).

338. LERNER, *supra* note 9, at 13.

339. *Id.* at 7.

340. *Id.*

341. *Id.* at 8–10.

342. *Id.* at 11.

343. *Id.*

344. *Id.* at 11–12.

earned almost twice what Bob earned at the time, asked to take a month off of work.[345] She was flatly refused; she had already used her sick and vacation time.[346] When again she requested time off and was denied, Devorah had no choice but to quit her job, accruing even more debt.[347]

Additionally, when women attempt to fit their child caregiving responsibilities into inflexible work structures, an employer might force them to sacrifice their preferred child rearing styles or methods. Women may be forced to place children in non-preferred care, or forego doctors' appointments to preserve employment. Consider Betty Jones, a low-income single mother who found herself in a bind when her car broke down and she could not afford to fix it.[348] Because Jones could not jeopardize her employment as a custodian for a hospital, her eleven-year old son became responsible for getting himself and his younger sister to school on a city bus, and then to their grandmother's house after school.[349] The grandmother took the kids to her evening job and dropped them off at home at ten or eleven at night.[350] The lack of flexibility of Jones' job ultimately forced her to risk her children's safety.

If the plaintiff demonstrates an infringement of her rights, a court is likely to apply intermediate scrutiny, which requires the government (i.e., the employer) to show that the infringement is substantially related to an important government interest.[351] Again, the existence of reasonable alternatives attenuates the substantial relation between the family-wage barriers and the state's interest.

A claim for a violation of any of these rights has several obstacles, including the analysis of balancing the state's interest and that the challenges to state action have mostly been to an overt act, usually a statute, which makes it easily distinguishable from a state's seemingly passive maintenance of family-wage barriers. In light of the difficulty of establishing a claim for these liberty interest violations, the true value of asserting them lies in further contextualization of the issue of family-wage barriers as one of constitutional importance. Furthermore, the assertion of these claims encourages courts to consider the state interests involved in maintaining a work structure that is discriminatory against women, particularly when reasonable alternatives exist. Even if a substantive due process violation is not ultimately established, the analysis can help highlight the unreasonableness of a state's interest in maintaining an inflexible work structure and the importance of the rights at issue. By raising these claims, a court can begin to contextualize the way in which family-wage barriers infringe on women's liberty. This context thereby informs the court's equal protection analysis.[352]

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345. *Id.* at 12.

346. *Id.* at 12–13.

347. *Id.* at 13.

348. Williams & Boushey, *supr*a note 27, at 19.

349. *Id.*

350. *Id.*

351. *See, e.g.*, Hutchins v. D.C., 188 F.3d 531, 541 (D.C. Cir. 1999) (applying intermediate scrutiny, in which the challenged regulation must be substantially related to an important government interest, to a challenge based on parental rights).

352. *See supra* Section IV(A).

In *Hibbs,* the Supreme Court acknowledged that women's role as primary caregivers implicates women's right to equal employment opportunity as guaranteed by the Constitution. By challenging violations of this right caused by family-wage barriers, the Court can begin to reconceptualize existing EPC jurisprudence. Doing so will allow the Court to keep EPC jurisprudence in line with women's changed role as wage earner and caregiver. It will also help to eradicate employment discrimination and gender stereotypes in the more subtle forms as they exist today.

V. JUDICIAL REMEDIES TO ELIMINATE FAMILY-WAGE BARRIERS

A variety of remedies may be available to a plaintiff who establishes a constitutional claim for a violation of her equal protection or substantive due process rights. This section focuses on the judicial prophylactic remedy that requires an employer to eliminate family-wage barriers for employees with caregiving responsibilities. Prophylactic remedies are a subset of equitable relief aimed at directing conduct affiliated with, rather than directly causing, a harm.[353] As a result, these remedies affect a broader range of conduct than that targeted by injunctive relief. The elimination of family-wage barriers might mean that employers are required to offer AWAs or revise policies and practices that penalize caregivers. For women who are only able to do their job with an AWA, such a remedy would provide the structural change they need to work and fulfill their caregiving responsibilities. This remedy also challenges society's assumptions about the inherent nature of the work structure and characteristics of an ideal worker.[354] By directing employers' conduct, a prophylactic remedy can help change the way that employers perceive employees with caregiving responsibilities and alleviate adverse employment actions based on caregiver status, such as the hostile environment and disparate treatment exemplified above.[355] Changes to the work structure will also allow families to further control how working adults in a household divide caregiving responsibilities. Consequently, men might begin to shoulder more caregiving responsibilities and the division of labor between genders at home could change, better supporting women's workplace attachment.

The elimination of family-wage barriers is necessary to guarantee the fundamental rights to equal employment opportunity, to have and raise children, and to pursue a career of one's choice. Requiring AWAs redresses violations of these rights by challenging family-wage barriers. This remedy would "provide tangible meaning to . . . the contours of those rights"[356] without redefining fundamental rights or creating a new right.

The Supreme Court and Congress have a constitutional power to grant prophylactic relief.[357] Although prophylactic relief is most commonly viewed

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353. Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 314 (2004).

354. *See supra* Section I.

355. *See, e.g.*, Walsh v. Nat'l Computer Sys., 332 F.3d 1150 (8th Cir. 2003).

356. Thomas, *supra* note 353, at 311–12.

357. *See* Dickerson v. United States, 530 U.S. 428, 437–42 (2000) (implying that the Court and Congress share power to create prophylactic remedies).

and imposed as an exercise of Congressional power, a court's Article III jurisdiction over "[c]ases . . . [and] [c]ontroversies"[358] grants it greater flexibility to implement prophylactic remedies than Congress. While "judicial powers may be exercised only on the basis of a constitutional violation,"[359] "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[360] The Supreme Court defines constitutional rights and, when prophylactic relief prescribed by the Court is constitutionally based, Congress cannot supersede it.[361] Congress' prophylactic remedies must have "congruence and proportionality" to the proven harm, and the Court ultimately determines whether a Congressional remedy meets that standard.[362] In addressing Congressional power to prescribe prophylactic remedies in *Hibbs*, the Supreme Court recognized that affirmative entitlements form a component of sex discrimination law.[363] However, the affirmative entitlements prescribed by Congress thus far have fallen short of effecting full equality.[364] This shortcoming bolsters the point that "prophylactic relief is necessary, and even integral, to effective judicial response to existing complex problems" because prophylactic relief "allows the courts to address all of the factors" contributing to the wrong with precision.[365] Since courts can implement similar, broader, and more flexible prophylactic relief than that provided by federal legislation thus far, *Hibbs* provides a foundation for the judiciary's use of affirmative entitlements.

Courts exercise their power to direct conduct affiliated with, rather than directly causing, harm in a variety of contexts. For example, courts have

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358. U.S. CONST. art. III, § 2 (2006).

359. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (affirming prophylactic remedies for school desegregation and stating that a school desegregation case does not differ fundamentally from other cases involving the framing of equitable relief to repair the denial of a constitutional right).

360. *Id.* at 15.

361. *Dickerson*, 530 U.S. at 437–42 (distinguishing between Court remedies that are constitutionally and non-constitutionally based in analyzing whether a statute that undermined the Court's *Miranda* rule was a valid exercise of Congressional power).

362. City of Boerne v. Flores, 521 U.S. 507, 520 (1997); *see also* Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424, 457 (D.D.C. 2011) (articulating a three-step analysis to review Congress' enactment of remedial prophylactic legislation under Section 5 of the Fourteenth Amendment as follows: (1) identify a constitutional right that Congress sought to enforce when it enacted a challenged legislation; (2) "examine whether Congress identified a history and pattern of unconstitutional [conduct] by the [s]tate that justified the enactment of a remedial measure"; and (3) "decide whether the challenged legislation constitutes an appropriate response to the identified history and pattern of unconstitutional conduct," i.e., whether is it congruent and proportional to targeted violation (internal quotations omitted)).

363. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003); *see also* Dinner, *supra* note 27, at 421 (acknowledging that "[c]ontemporary equal-protection doctrine has come to recognize that affirmative social-welfare entitlements form an important component of sex discrimination law" and that it will be necessary for Congress to build on this base and provide new interventions and entitlements to advance sex equality).

364. *See supra* Sections I–II; *see also* Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege?*, 21 YALE J.L. & FEMINISM 161, 164–65 (2009) (describing the limited impact of FMLA and the ways that compliance with FMLA tends to exacerbate gender inequality in the workplace).

365. Thomas, *supra* note 353, at 324.

required changes in employment policies, trainings, and monitoring to alleviate discrimination.[366] These remedies establish organizational cultures designed to avoid the harm and allow the defendant to self-regulate against future harms.[367] Instead of simply compensating a single plaintiff with injunctive relief or monetary damages, these changes can begin to break down family-wage barriers on an institutional level.

Prophylactic remedies must be narrowly targeted at redressing the proven harm, not at an ancillary social problem, and the conduct targeted must demonstrate a causal link to the harm.[368] A causal link exists when the conduct bears a factual relationship and is of a sufficiently close degree to the harm.[369] Where a constitutional violation has been found, the remedy does not exceed the violation if the remedy is tailored to cure the "condition that offends the constitution."[370] The Congressional findings favorably cited by the Supreme Court in upholding the FMLA in *Hibbs* indicate that the FMLA's deficiencies have EPC implications.[371] The findings pave the way for courts to exercise their own prophylactic power to remedy the constitutional violations resulting from family-wage barriers.

If the statistical evidence cited by Congress in enacting the FMLA indicates the patterns of an individual state employer, a causal link between the conduct ordered and the harm exists. The specific remedy of requiring an employer to offer AWAs to people with caregiving responsibilities is an antidiscrimination measure that furthers equality. This remedy protects fundamental rights, without resulting in something more for the protected group. AWAs eliminate family-wage barriers that exclude women from equal participation in the workplace.[372] Employers might criticize AWAs for being too costly, but evidence suggests that offering AWAs "hold the promise to save money by decreasing the

366. *See, e.g.*, Equal Emp't Opportunity Comm'n v. Boh Bros. Constr. Co., No. 09-6460, 2011 WL 3648483, at *1–4 (E.D. La. Aug. 18, 2011) (requiring a sexual harassment policy, notice of the verdict, and sexual harassment training to correct and prevent sexual harassment in the workplace); Equal Emp't Opportunity Comm'n v. D.C.P. Midstream, L.P., 608 F. Supp. 2d 115, 116 (D. Me. 2009) (requiring training and monitoring in response to a claim of a racially hostile work environment); Sherman v. Kasotakis, 314 F. Supp. 2d 843, 886 (N.D. Iowa 2004) (ordering a restaurant to adopt policies and practices to eliminate race discrimination in public accommodations); Spina v. Forest Pres. Dist. of Cook Cnty., No. 98-C-1393, 2002 WL 1769994, at *4 (N.D. Ill. July 31, 2002) (requiring the defendant law enforcement agency to maintain separate locker facilities for female officers and adopt a zero policy tolerance for violators of a sexual harassment policy).

367. Thomas, *supra* note 353, at 326.

368. Milliken v. Bradley, 433 U.S. 267, 280–82 (1977).

369. *Id.* at 280–81 (stating that the "nature and scope" of a remedy must be confined to the constitutional harm); *see, e.g.*, Freeman v. Pitts, 503 U.S. 467, 496 (1992) (stating "vestiges of segregation must be so real that they have a causal link to the de jure violation being remedied").

370. *Milliken*, 433 U.S. at 282.

371. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735 n. 11 (2003); Family Medical Leave Act 29 U.S.C.A. § 2601(a) (2006).

372. This is akin to the argument that ADA accommodations are antidiscrimination measures that challenge an arbitrary physical environment built around a particular person. *See* Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 586–87 (2004) (presenting perceived limitations in the workplace as primarily social constructs that are the result of bias, assumptions, or employer habit, but not because of actual physical inability).

costs associated with attrition, absenteeism, recruiting, quality control, and productivity."[373] Consequently, the remedy not only furthers equality in the workplace, but it may also be good for business.

The court's power to impose prophylactic remedies, and their use in parallel contexts, supports judicial remedies for family-wage barriers. Prophylactic remedies specifically target conduct affiliated with violations of fundamental rights and are necessary to ensure the practical enforcement of women's equal protection and substantive due process rights. If the courts do not remedy family-wage barriers, and women remain society's primary caregivers, women's equal protection and substantive due process rights will be jeopardized because women will be forced to choose between work and caregiving. The imposition of AWAs would change the structure of work for all employees and facilitate women's workplace attachment while challenging traditional sex roles.

CONCLUSION

Impact litigation must be used in conjunction with other methods of cause-lawyering to eliminate family-wage barriers to workplace attachment. This article provides a backdrop for advocates to develop a cohesive litigation strategy for pursuing these claims. As these strategies develop, certain claims or theories might succumb to others, depending on the many variables at play. Regardless, litigation is integral to recognizing the fundamental rights are at stake at the intersection of caregiving and family-wage work structures. In *Hibbs*, the Supreme Court validated the use of prophylactic remedies in achieving women's employment equality through structural changes to the workplace.[374] The Court acknowledged that gender equality issues arise at the intersection of work and caregiving. Thus, *Hibbs* lays a foundation for a court to use its Article III powers to prescribe these types of remedies and break down family-wage barriers confronted by the women forced to choose between work and caring for their children.

373. Williams & Segal, *supra* note 71, at 87–88.

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