

SINGLE AND CHILDFREE! REASSESSING PARENTAL AND MARITAL STATUS DISCRIMINATION

Trina Jones*

*. Professor of Law, Duke University School of Law. I am grateful for the excellent research assistance provided by Rachel Smithson, Rebecca Gedalius, Haley Warden Rogers, Alison Newman, Brittany Edwards-Franklin, Irina Trasovan, Acrivi Coromelas, Christine Kim, Liz Wangu, and Sriram Giridharan. For their helpful feedback and encouragement, I would also like to thank Adeno Addis, Raquel Aldana, Mario Barnes, Joseph Blocher, Jessica Clarke, Doriane Coleman, Marcela David, Adrienne Davis, David Grey, Angela Harris, Jill Hasday, Margaret Hu, John Inazu, Lisa Ikemoto, Kimberly Krawiec, Linda Krieger, Saru Matambanadzo, Mari Matsuda, Jay Mootz, Blake Morant, Chuck Lawrence, Stephen Lee, Justin Levinson, Ralf Michaels, Kimberly Norwood, Shu-Yi Oei, Angela Onwuachi-Willig, Lisa Pruitt, Song Richardson, Leticia Saucedo, Peggie Smith, Roxanne Springer, Madhavi Sunder, Rose Villazor, Henry Weinstein, and Adrien Wing. In addition, I am indebted to the editors of the Arizona State Law Journal for their care and commitment to this project and to Fred Kameny, Jean Jentilet, and Susan Hinson for their administrative assistance. This work benefited from student feedback at the University of Minnesota Law School and from faculty workshops at the following law schools: Duke, Iowa, Washington University (St. Louis), Wake Forest, UC Davis, Pacific McGeorge, Tulane, and the University of Hawai'i. Finally, I thank God and my family from whom I draw continuous support.

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INTRODUCTION

*Janet's perfect for that job . . . [b]ecause for that job, you have to have no life. Janet has no family. Perfect. She can devote, literally, 19, 20 hours a day to it.*¹

Former Pennsylvania Governor Ed Rendell made the above statement following President Obama's nomination of Janet Napolitano to head the Department of Homeland Security.² Rendell's observations about Napolitano, who is unmarried and childless, reflect concerns being raised in the United States by some single workers without children. These workers, referred to herein as SWOCs,³ maintain that their employers⁴ assume they have no lives and therefore can and should devote all of their waking hours to work, meaning employers expect single workers without children to travel with little notice, to work evening hours, and to be available on weekends and holidays.⁵ SWOCs contend that these expectations are in contrast to the ones placed on working parents,⁶ who they maintain are more readily excused from work to attend to their children's needs, whether those needs are a doctor's appointment, soccer practice, or simply being home because school is out. Even ardent advocates for family-friendly workplaces acknowledge the potential problem. For example, in commenting on the backlash against parents, particularly mothers who use family-friendly policies, Joan Williams has observed

1. Jimmy Orr, *Ed Rendell on Janet Napolitano: Perfect Because She Has No Life!*, CHRISTIAN SCI. MONITOR, Dec. 3, 2008, <http://www.csmonitor.com/USA/Politics/The-Vote/2008/1203/ed-rendell-on-janet-napolitano-perfect-because-she-has-no-life>.

2. *Id.*

3. One could also employ the acronym SINKs (Single Income No Kids). The term SWOC (Single Workers Without Children) is used instead to underscore that this Article is focused primarily on the *employment* experiences of single individuals without children.

4. Of course, Rendell was not Napolitano's employer (although he was formerly the chief executive of a state with nearly 80,000 state employees). His comment, however, demonstrates the sort of assumptions to which SWOCs are subject and the fact that people, even sophisticated and experienced politicians, see nothing objectionable or problematic about expressing these views.

5. See *infra* Part I.A. To be sure, some employers apply these expectations to married individuals and parents as well; that is, some employers may penalize all employees (regardless of parental or marital status) who cannot carry out their work obligations without some accommodation. These attitudes have and continue to be subject to challenge and there is no need to address them here. Also, this Article's focus is on workplaces that are (or strive to be) family-friendly and the consequences of family-friendly cultures for SWOCs.

6. Although the terms "working parent," "working mother," and "working father" are used herein to reference employment obligations outside of the home, they are not intended to overlook or to minimize the substantial commitments of parents inside the home.

[t]he backlash is fueled, in significant part, by employer exploitation: employers allow some mothers to go part-time, then pocket the part-time dividend that results when employers dump the excess work on existing employees but pay them no additional compensation for doing it. This is good, old-fashioned worker exploitation. Feminists need to work with reporters to point out this phenomenon, to defuse the growing backlash against mothers.⁷

While Williams' focus appears to be the negative repercussions of employer behavior for working mothers, SWOCs are raising their own concerns about parental preferences as these workers tend to be repositories of the extra work.⁸

Modern workplaces are not only more accommodating to parents than they have been in the past; they also tend to be more supportive of married employees (regardless of whether these employees have children). Indeed, as demonstrated in Part I, married employees tend to earn more than their unmarried counterparts. Married workers are also eligible for numerous employment benefits (e.g., health care coverage for spouses, spousal leave under the Family and Medical Leave Act) simply because they are married.⁹ Marital accommodations and benefits no doubt reflect the privileged status of marriage in the United States¹⁰ and this country's ideological investments

7. Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1450 (2001).

8. See Mary B. Young, *Career Issues for Single Adults Without Dependent Children*, in THE CAREER IS DEAD—LONG LIVE THE CAREER: A RELATIONAL APPROACH TO CAREERS 196 (Douglas T. Hall ed., 1996); Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1759 (2001); Mary B. Young, *Work-Family Backlash; Begging the Question, What's Fair?*, 562 ANNALS AM. ACAD. POL. & SOC. SCI. 32, 36 (1999) [hereinafter *Work-Family Backlash*]. As discussed more fully in Part II.C.2, gender must be considered when examining the effects of family-friendly policies. As Professor Mary Anne Case observes, these policies may cause employers to avoid hiring women, whom they may perceive as being more expensive to employ due to concerns about higher rates of absenteeism and more frequent use of leaves, etc. Case, *supra* at 1761. Case notes that this may place permanently childless women in a lose/lose situation: "so long as [they] are potentially mothers, [they] are at risk for discrimination; so long as [they] are not actually mothers, [they] get no offsetting compensation from the increased childcare benefits. Men without children get no increased benefits either, but they are not at risk for increased discrimination." *Id.* at 1759.

9. Indeed, there are well over a thousand statutory provisions in U.S. federal law where marital status is a factor in determining eligibility for various benefits. See DAYNA K. SHAH, U.S. GEN. ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

10. See *infra* notes 171–76. The U.S. Supreme Court has repeatedly, for well over a century, described marriage as "the most important relation in life." *Maynard v. Hill*, 125 U.S. 190, 205 (1888); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been

in the tangible and symbolic benefits associated with that institution.¹¹ Yet, many SWOCs question whether the marital relation justifies the differential allocation of employment terms and conditions.

Through examination of the rising chorus of complaints being voiced by single workers without children, this Article investigates whether these workers are subject to a new form of marital and parental status discrimination, and if so, what, if anything, should be done about it.¹² This inquiry is of some moment as the number of singles has steadily increased in recent decades.¹³ Singles presently constitute approximately 44.1% of the

recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

11. This investment has been apparent in recent years in debates surrounding the efforts of LGBTQ persons to secure marriage equality. *See* *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), *vacated*, 133 S. Ct. 2652 (2013) (challenging the constitutionality of a referendum passed by California voters that would prohibit same-sex marriages within that state); *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (challenging the constitutionality of the Defense of Marriage Act, a federal statute that renders same-sex couples ineligible for certain federal benefits); *see also Overview of Federal Benefits Granted to Married Couples*, HUM. RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples> (last visited Jan. 28, 2015).

12. Bias against singles, because they are single, is sometimes referred to as “singlism.” This term originated with the work of Bella DePaulo, a social psychologist at the University of California, Santa Barbara. *See* Bella DePaulo, *Singlism: What Is It?*, in *SINGLISM: WHAT IT IS, WHY IT MATTERS, AND HOW TO STOP IT* 14, 17 (Bella DePaulo ed., 2011) [hereinafter *SINGLISM*]. DePaulo notes “I named the bias of singlism to make it more recognizable, in hopes that every time the word was uttered or read, a puff of old-fashioned consciousness-raising would waft through the air.” *Id.* at 14. Although DePaulo’s work focuses on the treatment of singles, she recognizes that married persons without children face similar concerns. She refers to this form of parental status discrimination as singlism’s cousin. *Id.* at 16. While they are separate categories, she notes:

[t]here is often a life-span dimension to the two sets of biases. Singlism stalks you until you become seriously coupled (or forever if you don’t), but even if you do join another in committed conjugality, you are still not home free. Eventually, the cousin steps in and starts asking when the little ones are going to show up.

Id. Singlism does not accurately cover the bias discussed in this Article as the analysis herein addresses adverse treatment on the basis of both marital and parental status. In addition, although the term is catchy and I have grown quite fond of it, describing discrimination against singles as “singlism” is peculiar as such terms are usually employed to capture discrimination against a category, as opposed to subgroups (e.g., Blacks, Whites, men, women) within a category. For example, discrimination on the basis of race is racism (not Blackism) and discrimination on the basis of sex is sexism (not womanism). Thus, the appropriate, albeit less catchy and less personally appealing, label for discrimination against singles is discrimination on the basis of marital status or anti-singlism (like anti-Semitism).

13. *See* U.S. CENSUS BUREAU, *FAMILIES AND LIVING ARRANGEMENTS: MARITAL STATUS* tbl.MS-1 (2013), *available at* <http://www.census.gov/hhes/families/data/marital.html> (showing a consistent growth in the number of unmarried persons since the 1960s).

adult population in the United States¹⁴ and over 60% of the labor force.¹⁵ Although marital status is fluid (e.g., some singles will marry and some married persons will divorce or become widowed), many Americans are likely to spend a substantial portion of their adult lives single.¹⁶ In addition to singles, childless adults are a growing percentage of the population¹⁷ as Americans increasingly are either delaying or deciding to forego having children.¹⁸ These demographics figures, coupled with growing interest in the subject matter,¹⁹ render it necessary to probe the practical and legal

14. U.S. CENSUS BUREAU, PROFILE AMERICA: FACTS FOR FEATURES: UNMARRIED AND SINGLE AMERICANS WEEK: SEPT. 16–22, 2012, at 1 (2012), *available at* http://www.census.gov/newsroom/releases/pdf/cb12ff-18_unmarried.pdf (including people who are divorced, widowed, and those who have always been single).

15. U.S. CENSUS BUREAU, LABOR FORCE, EMPLOYMENT AND EARNINGS: STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 384 tbl.597 (2012), *available at* <http://www.census.gov/prod/2011pubs/12statab/labor.pdf>. Moreover, approximately 44% of adults between the ages of 18 and 45 believe that marriage is becoming obsolete. PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 12 (2010), *available at* <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> (reporting that 44% of Millennials, 18 to 29 year olds, and 41% of Generation Xers, 30 to 49 year olds, believe that marriage is becoming obsolete); *see also* Kate Bolick, *All the Single Ladies*, ATLANTIC, Nov. 2011, at 120 (suggesting that women’s economic incentives to marry may be declining as women begin to obtain parity with men in income, educational achievement, and employment prospects).

16. Not only is the marriage rate at an all-time low, but individuals are waiting longer to marry. *See* D’Vera Cohn, *Love and Marriage*, PEW RESEARCH CTR. (Feb. 13, 2013), <http://www.pewsocialtrends.org/2013/02/13/love-and-marriage/>. In addition, divorce is still prevalent and among divorced adults, only 29% say that they would like to marry again. *Id.* That figure is 8% for widowed persons. *Id.*

17. *See* GRETCHEN LIVINGSTON & D’VERA COHN, PEW RESEARCH CTR., CHILDLESSNESS UP AMONG ALL WOMEN; DOWN AMONG WOMEN WITH ADVANCED DEGREES 1 (2010), *available at* <http://www.pewsocialtrends.org/files/2010/11/758-childless.pdf>. Livingston and Cohn found that in 2008, approximately “one-in-five American women end[ed] her childbearing years without having borne a child, compared with one-in-ten in the 1970s.” *Id.* In addition, in 2008, 18% of women between the ages of 40–44 had not given birth. *Id.* In 1976 that number was 10%. *Id.*; *see also* Lauren Sandler, *The Childfree Life: When Having It All Means Not Having Children*, TIME, Aug. 12, 2013, at 38 (discussing rising rates of childlessness in the United States).

18. LIVINGSTON & COHN, *supra* note 17, at 2 (noting that about half of all childless women in their early forties are childless by choice); *see also* Bolick, *supra* note 15, at 120 (“Of course, between the diminishing external pressure to have children and the common misperception that our biology is ours to control, some of us don’t deal with the matter in a timely fashion.”). Worldwide, U.S. women have one of the highest rates of childlessness. Gretchen Livingston, *In Terms of Childlessness, U.S. Ranks Near the Top Worldwide*, PEW RESEARCH CTR. (Jan. 3, 2014), <http://www.pewresearch.org/fact-tank/2014/01/03/in-terms-of-childlessness-u-s-ranks-near-the-top-worldwide/> (reporting that only 6 of 118 countries or areas with 100,000 or more inhabitants reported childlessness rates higher than the U.S.).

19. If one looks beyond the ubiquitous self-help books filled with advice on how to “survive” or “embrace” singledom, one can find several scholarly examinations of the experiences of unmarried persons and the ways in which social structures have and continue to prioritize marriage and parenting. *See generally* MICHAEL COBB, SINGLE: ARGUMENTS FOR THE UNCOUPLED

implications of employee decisions concerning marital and parental status and employer responses to them.

The analysis proceeds as follows. Part I chronicles the types of concerns single workers without children are expressing about their work lives and reviews a growing body of anecdotal and empirical evidence suggesting that SWOCs experience employment conditions that may violate the principle of equal pay for equal work. Part II analyzes whether the motivating force behind the dissimilar treatment of SWOCs is an employee's unmarried status, the absence of dependent children (because of course many singles have children),²⁰ or both. Part II also considers issues of class, gender, and race which serve to situate workers differently and to affect their available opportunities. Part III evaluates commonly offered justifications for the dissimilar treatment of SWOCs and explores whether this treatment should be considered unlawful discrimination. Although claims by SWOCs may be unfamiliar to judges and policy makers because they involve negative, or less familiar, expressions of commonly understood rights (e.g., the right to parent or to marry), Part III maintains that these claims are nonetheless legitimate.

(2012); BELLA DEPAULO, *SINGLED OUT: HOW SINGLES ARE STEREOTYPED, STIGMATIZED, AND IGNORED, AND STILL LIVE HAPPILY EVER AFTER* (2006) [hereinafter *SINGLED OUT*]; SINGLISM, *supra* note 12; JUDITH STACEY, *UNHITCHED: LOVE, MARRIAGE, AND FAMILY VALUES FROM WEST HOLLYWOOD TO WESTERN CHINA* (2012); Rachel Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223 (2004). More informal websites and blogs chronicling the experiences of unmarried and/or childfree persons also abound. See, e.g., *Books*, CHILDREE.NET, <http://www.childfree.net/books.html> (last visited Jan. 28, 2015); THE CHILD FREE LIFE, <http://thechildfreelife.com/> (last visited Jan. 28, 2015); UNMARRIED AMERICA, <http://www.unmarriedamerica.org/> (last visited Jan. 28, 2015). The treatment of childless workers has even drawn the attention of President Obama. During his 2014 State of the Union Address, when commenting on the earned income tax credit, President Obama noted that policymakers must be sensitive to the needs of childless workers. Address Before a Joint Session of the Congress on the State of the Union, 2014 DAILY COMP. PRES. DOC. 50 (Jan. 28, 2014). In a follow-up budget proposal to Congress, the President sought to extend this tax credit to childless workers. See Jackie Calmes, *Obama Budget Would Expand Low-Income Tax Break*, N.Y. TIMES, Mar. 4, 2014, at A12, available at <http://www.nytimes.com/2014/03/04/us/politics/obama-budget-would-expand-low-income-tax-break.html> (noting that the extension would help approximately 13 million childless Americans who are employed but remain poor).

20. Joyce A. Martin et al., *Births: Final Data for 2009*, 60 NAT'L VITAL STATISTICS REP. 1, 2 (2011), available at http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_01.pdf. The Census Bureau reports that in 2011, there were 10 million single mothers with children younger than 18. U.S. CENSUS BUREAU, *PROFILE AMERICA: FACTS FOR FEATURES: MOTHER'S DAY: MAY 13, 2012*, at 5 (2012), available at http://www.census.gov/newsroom/releases/pdf/cb12ff-08_mothersday.pdf. In 1970 that number was 3.4 million. *Id.* About thirty years later, 40% of children were born to single mothers and about 27% of all minor children were living in single-parent households, the vast majority with their mothers (about six out of seven). ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, *LIVING ARRANGEMENTS OF CHILDREN: 2009*, at 2, 4 tbl.1 (2011), available at <http://www.census.gov/prod/2011pubs/p70-126.pdf> (using data from 2007 and 2009).

Thus, it concludes that departures from formal equality, or the principle of equal treatment, should be justified. Part IV offers anti-subordination theory as a justification for some family-friendly benefits. Part V considers possible employer responses to an expansion of work-life benefits to SWOCs. The analysis, however, does not end at this point, for lurking beneath the surface of this inquiry are important questions about the types of relationships this society values and whether the workplace and U.S. law have served, perhaps unintentionally, to valorize and in turn to reinforce certain traditional arrangements (i.e., heterosexual marriage and parenting). Part VI tackles these normative considerations by examining this country's implicit prioritization of parenting and marriage and by asking whether other relationships and arrangements (e.g., caregiving by SWOCs), that are not subsidized or supported by contemporary employment policies and laws, also further goals purportedly served by marriage and parenting.

It is important to note at the outset that the issues addressed herein are complex and controversial. Parents, particularly women, for decades have undertaken herculean efforts to promote more flexible and accommodating workplace cultures.²¹ Notwithstanding these efforts, the presence of the maternal wall and the motherhood penalty means that working mothers earn considerably less than working fathers and childless individuals and they are subject to more negative performance evaluations and reduced prospects for promotion and training.²² Working fathers also face obstacles. Even in

21. For an excellent overview of this history, see generally JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* (2010); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000); see also SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 98–108 (1996); Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHL-KENT L. REV. 1673, 1680 (2001).

22. See generally Deborah J. Anderson, Melissa Binder & Kate Krause, *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort and Work-Schedule Flexibility*, 56 INDUS. & LABOR REL. REV. 273, 291–92 (2003) (finding that a 3–5% wage penalty remains even after human capital inputs and unobserved heterogeneity are considered); Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 GENDER & SOC'Y 616, 639 (2010) (female study participants rated successful mothers less likeable than otherwise identical fathers and penalized mothers in recommendations for promotion, hire, and salary); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 219 (2001) (finding a 7% motherhood penalty per child of which only one-third is explained by the decreased job experience and seniority of mothers); Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1303–05 (2007) (finding that mothers are discriminated against while fathers are often advantaged by their parental status); Amy Cuddy, Susan Fiske & Peter Glick, *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701 (2004) (finding that when working women become mothers, they trade perceived competence for perceived warmth, but when working men become fathers, they gain perceived warmth and maintain perceived competence); Jennifer Glass, *Blessing or Curse? Work-Family Policies and Mothers' Wage Growth Over Time*,

family-friendly workplaces, fathers often cannot utilize flexible work arrangements without adverse consequences due, in part, to gender role stereotyping (e.g., lingering beliefs that masculinity and caregiving are mutually exclusive).²³ Recognition of the considerable barriers that remain for working parents makes this topic particularly sensitive, and indeed some readers may be legitimately concerned that examination of the experiences of SWOCs will divert attention from the ongoing challenges parents face and may undermine reform efforts.²⁴ (This fear, oddly enough, may be a form of familial status discrimination²⁵ to the extent that it dismisses or reflects a perhaps unconscious²⁶ bias against SWOCs and their concerns).

It is also important to acknowledge at the outset that the United States does not do enough to support children. This country lags horribly behind other developed nations in terms of public benefits for parents and children (e.g., access to health care, early childhood education, paid parental leave).²⁷ One could argue that the United States should be doing *more*, and not *less*, for

31 WORK & OCCUPATIONS 367 (2004) (finding that much of the male-female gender gap is attributable to the motherhood penalty); Rebecca Glauber, *Marriage and the Motherhood Penalty Among African Americans, Hispanics, and Whites*, 69 J. MARRIAGE & FAM. 951 (2007) (finding that some women of color experience a smaller motherhood penalty than white mothers); Michelle Hebl, Peter Glick, Eden Kin, Sarah Singletary & Stephanie Kazama, *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards that Maintain Traditional Roles*, 92 J. APPLIED PSYCHOL. 1499 (2007) (documenting bias against pregnant women seeking full-time employment, especially in what are considered traditionally masculine jobs). The motherhood penalty and the maternal wall are discussed in Part II.C.2. As pointed out in that section, depending upon the size of the motherhood penalty, SWOCs may not be disadvantaged vis-à-vis working mothers. See discussion *infra* Part II.C.2. Indeed, when one factors in gender, class, and race, SWOCs appear to have the strongest claim of marital and parental status bias when they are compared to married men and working fathers in professional or high-wage settings. See *id.*

23. See *infra* notes 147–148 and accompanying text.

24. This concern caused the author of this article to delay writing about the experiences of single and childfree persons for years, especially after reading of the backlash one scholar received when she raised concerns about parental benefits. See Case, *supra* note 8, at 1754 n.5.

25. As used herein, the term “familial status discrimination” encompasses both discrimination on the basis of parental status and marital status. In some statutes, this phrase includes only discrimination on the basis of parental status. See, e.g., The Fair Housing Act, 42 U.S.C. § 3602(k) (2012).

26. As discussed in Part VI, the treatment of SWOCs is unlikely to be fueled by conscious, negative animus. Rather, it more likely results from social, political, and legal structures that implicitly prioritize and normalize marriage and parenting.

27. See TIMOTHY CASEY & LAURIE MALDONADO, LEGAL MOMENTUM, WORST OFF—SINGLE-PARENT FAMILIES IN THE UNITED STATES 9–15 (2012), available at <http://www.legalmomentum.org/our-work/women-and-poverty/resources--publications/worst-off-single-parent.pdf>; see also Debbie Kaminer, *The Child Care Crisis and the Work-Family Conflict: A Policy Rationale for Federal Legislation*, 28 BERKELEY J. EMP. & LAB. L. 495, 496–506 (2007) (examining the lack of affordable child care in the United States and advocating for increased government regulation and funding).

these groups. For a variety of reasons, however, the United States is unlikely to adopt an approach like that utilized in Western Europe, Scandinavia, and Australia, where governments commit considerable public funds to directly subsidize specific benefits for children.²⁸ Instead, in the United States significant benefits will continue to be distributed through the workplace. Given this reality, the question is how to ensure that the current system produces maximum fairness and optimal outcomes.

The goal of this Article is not to eliminate family-friendly policies or practices. Rather, it is to open a conversation about some of the unintended consequences and unseen costs of these policies and to reveal the ways in which their present configuration reinforces a rather limited conception of family and community. Opening up this dialogue requires that one ask whether policymakers and employers should continue, in a somewhat random fashion, to prioritize the needs of parents and married couples, without considering the effects of family-friendly policies on other workers, thereby inviting discord, animosity, and backlash? Or should they examine the concerns of all workers and attempt to create solutions, even imperfect ones, that may produce more equitable outcomes for all? These are not simple issues, and as the analysis herein demonstrates, finding the right balance will not be easy. However, identification of the overall issue and the underlying values at stake are important first steps.

A brief note about terminology. People are either legally single or legally married. Legally single includes those who are divorced, widowed, or who have never been married (or “always single”).²⁹ Legally married includes those whom the law recognizes as being married. Legally single and legally married populations can be further divided into two categories, the socially single and the socially coupled. Unmarried persons who are in long-term

28. There is a difference between direct governmental subsidization—in which most everyone contributes through taxes—of specific benefits for children (food, housing, education, healthcare, childcare) and requiring a subset of workers in some workplaces to indirectly subsidize the costs of parenting by working longer hours for fewer benefits. In addition, as noted in Part II.C.1, *infra*, low-wage employers tend to offer fewer family-friendly benefits than high-wage employers. Governmental subsidization of benefits may, in some sense, be more egalitarian than the current employer-sponsored system as benefits would be available to workers across the economic spectrum. See Danielle Paquette, *The Stark Disparities of Paid Leave: The Rich Get to Heal. The Poor Get Fired*, WASH. POST, Jan. 16, 2015, available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/16/the-stark-disparities-of-paid-leave-the-rich-get-to-heal-the-poor-get-fired/> (discussing the benefits for low-wage workers of state-sponsored paid leave programs).

29. Bella M. DePaulo & Wendy L. Morris, *The Unrecognized Stereotyping and Discrimination Against Singles*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 251, 251 (2006) (citation omitted).

relationships regarded as “serious”³⁰ are legally single, but socially coupled (e.g., persons like Oprah Winfrey and Goldie Hawn who are unmarried but have been with their partners for several decades). People can also be legally married, but socially single (e.g., a married couple who separated decades ago but never divorced). In this Article, the word “single,” unless otherwise indicated, references legally single people, regardless of whether they are socially coupled,³¹ because this is the definition most often employed in statistical measures, laws, and formal policies.

Regarding adults without children, in recent years both the terms “childless” and “childfree” have been used to describe this group. Some people prefer “childfree” to “childless” because “childless” suggests that a

30. *Id.* A variety of factors may be used to determine whether a relationship is serious, including its duration, whether the couple lives together, whether the relationship is monogamous, how the couple views the relationship, how the couple portrays the relationship to others, etc.

31. To be sure, this approach is not perfect as persons who are legally single but socially coupled, or legally married but socially single, may have access to some, but not all, of the benefits associated with marriage. For example, some legally single but socially coupled persons, depending upon the “seriousness” of their relationship, might (depending upon their employers) avoid certain employment obligations (e.g., overtime and evening work, extensive travel). However, because they are not married, these persons will not be eligible for certain benefits (e.g., health care benefits for partners, FMLA leave). On the other hand, legally married persons who are socially single may be eligible for health care and other spousal benefits, yet because they are socially single, they may not be excused from certain employment obligations (e.g., overtime work and travel). LGBTQ individuals also present interesting conceptual challenges. They may be legally single, in states where same-sex marriage is illegal, but socially coupled and entitled to workplace benefits (if the state or their employer recognizes civil unions or domestic partnerships). For example, before the state of North Carolina recognized same-sex marriage, Duke University employees who were in same-sex partnerships were entitled to employment benefits. *Same Sex Spousal Equivalent Information*, DUKE HUMAN RES., <http://www.hr.duke.edu/benefits/enrollment/samesex/index.php> (last visited Aug. 1, 2013) (“Duke University . . . is glad to be able to extend benefits to the same sex partner of an employee that are similar (though not identical) to the benefits extended to the opposite sex spouse of an employee. The identical benefit package is presently constrained under federal and state laws . . .”). Same-sex marriage in North Carolina has been legal since October 10, 2014 when U.S. District Court Judge Max Oliver Cogburn, Jr. ruled that the state’s ban on same-sex marriage was unconstitutional. *See General Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d 790, 791 (W.D.N.C. 2014). The U.S. Supreme Court declined the appeal of a Virginia case on October 6, 2014, leaving the Fourth Circuit’s decision in favor of marriage equality in Virginia in place, thus creating binding precedent on courts in North Carolina. *See Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (Oct. 6, 2014). On January 16, 2015, the Supreme Court granted certiorari in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 2015 U.S. LEXIS 624 (Jan. 16, 2015), a case in which the Sixth Circuit upheld four states’ bans on same-sex marriage. By granting cert, the Court may address a split in the circuits on the constitutionality of same-sex marriage. *See Adam Liptak, Taking Up Gay Marriage, But on Their Own Terms*, N.Y. TIMES, Jan. 17, 2015, http://www.nytimes.com/2015/01/18/us/supreme-court-same-sex-marriage.html?_r=0 (analyzing various approaches the Court may take to the issue).

nonparent is lacking something. In addition, the term “childless” may not accurately describe the childfree: those who deliberately elect not to have children. Even with its drawbacks, some people prefer “childless” to “childfree” because “childfree” may appear boastful or celebratory, may be insensitive to those who cannot reproduce, and may imply that children are unwanted burdens. Though not as frequently used, “child-ridden” and “child-blessed,” with their obvious connotations, are also employed.³² Because an objective of this Article is to expose widely held, but insufficiently examined, assumptions about the lives and experiences of adults without children, this Article uses the term “childfree” in the title and frequently throughout the analysis. The goal is to challenge the embedded and pervasive belief that childfree status is a less-than-optional, unsatisfactory, default condition, as opposed to what is frequently an affirmatively desired and deliberately chosen, positive status.

Finally, as used herein, the term “single” includes unmarried persons regardless of whether they have chosen to be permanently single or desire someday to marry. Similarly, the terms “childfree” and “childless” include nonparents regardless of whether they are infertile, have elected never to reproduce, or are future parents-to-be.³³ Although the motive behind a person’s status may be important for personal identity and may influence whether that person is viewed as a threat to extant norms,³⁴ the legal and practical consequences of a status, with regard to how individuals are treated in the workplace, are frequently the same regardless of the reasons for that status.

I. THE EFFECTS OF FAMILY-FRIENDLY POLICIES ON SWOCs

Family-friendly benefits have increased considerably over the last forty years.³⁵ These benefits fall into three categories: (1) alternative work

32. See Lisa Belkin, *Your Kids Are Their Problem*, N.Y. TIMES MAG., July 23, 2000, at 30, available at <http://www.nytimes.com/2000/07/23/magazine/your-kids-are-their-problem.html> (discussing the difference in terminology); Chanel Dubofsky, ‘Childless’ or ‘Childfree’: *The Difference Matters*, RH REALITY CHECK (May 8, 2014, 5:05 PM), <http://rhrealitycheck.org/article/2014/05/08/childless-childfree-difference-matters/> (same).

33. Adults without children fall into three categories: voluntarily childless (those who choose not to have children), involuntarily childless (those who cannot have children), and temporarily childless (those who do not presently have children, but plan to at some future date).

34. A person who chooses to be permanently single may be viewed as more threatening to the hegemony of marriage than one who desires to someday marry. Similarly, a person who chooses not to be a parent may be seen as a greater threat to existing norms than a future parent-to-be.

35. As discussed in Part II.C.1 *infra*, benefits vary depending upon the employer and type of employment. In addition, the adoption of family-friendly benefits has not been uniformly

arrangements; (2) leave time; and (3) dependent care services and assistance. Alternative work arrangements include, among other things, modified daily start and stop times, compressed work weeks, part-time work, schedule swaps, job sharing, and telecommuting.³⁶ Leave time includes maternity and paternity leaves, paid sick leave for an employee or her family member, and authorized leave under statutes like the Family and Medical Leave Act.³⁷ Dependent care services and benefits include, among other things, on-site childcare centers, vouchers to subsidize childcare costs, and tuition benefits.³⁸ At times, family-friendly benefits are embodied in formal policies (e.g., maternity and paternity leaves), and at other times they are merely informal practices (e.g., a supervisor's exercise of discretion in deciding whether to grant a schedule adjustment). Where they exist, family-friendly policies and practices have assisted married employees and working parents to negotiate the treacherous terrain between family obligations and work responsibilities. Yet, these policies require workplace adjustments that affect other workers. In addition, the proliferation of family-friendly policies comes at a time when most workers, not just those with traditional families, are struggling with issues of work-life balance.³⁹ The extension of flexibility and benefits to *some* workers, when just about all workers are experiencing increased difficulty establishing a healthy work-life balance, has thus created something of a tipping point, causing single workers without children to question the fairness of the load they are carrying. Using empirical studies and anecdotal accounts,

upwards over time, particularly during hard economic times. The general trajectory, however, in recent decades has been positive. See, e.g., Brigid Schulte, *Aging Population Prompts More Employers to Offer Elder-Care Benefits to Workers*, WASH. POST, Nov. 16, 2014, http://www.washingtonpost.com/local/aging-population-prompts-more-employers-to-offer-elder-care-benefits-to-workers/2014/11/16/25f9c8e6-6847-11e4-a31c-77759f9c1eacc_story.html.

36. Mary Secret, *Identifying the Family, Job, and Workplace Characteristics of Employees Who Use Work-Family Benefits*, 49 FAM. REL. 217, 217 (2000).

37. *Id.*

38. *Id.*; see OFFICE OF DISABILITY EMP'T POLICY WOMEN'S BUREAU, U.S. DEP'T OF LABOR, ADVANCING WORKPLACE FLEXIBILITY POLICY AND PRACTICES 4, 6 (2011), available at <http://www.dol.gov/odep/pdf/WBForum.pdf> [hereinafter ADVANCING WORKPLACE FLEXIBILITY].

39. The Organization for Economic Co-Operation and Development (OECD) ranks the U.S. near the bottom among developed countries for work-life balance. See ORG. FOR ECON. CO-OPERATION & DEV., OECD BETTER LIFE INDEX: COUNTRY REPORTS 109 (2013), available at <http://www.oecd.org/newsroom/BLI2013-Country-Notes.pdf>. In 2013, out of thirty-four countries, the U.S. ranked twenty-three in an assessment that considered work hours and time available for leisure and personal care. Derek Thompson, *The 23 Best Countries for Work-Life Balance (We are Number 23)*, ATLANTIC, Jan. 4, 2012, <http://www.theatlantic.com/national/archive/2012/01/the-23-best-countries-for-work-life-balance-we-are-number-23/250830/>.

this Part overviews three areas of concern to SWOCs: (1) hours worked; (2) compensation; and (3) other miscellaneous benefits.

A. *Work Hours and Leave Time*

In a 2007 *Forbes* article, Leslie Talbot observes: “[i]n their zeal to appear ‘family friendly,’ companies often overcompensate at the expense of singles, pressuring unmarried employees to travel more frequently, work more weekends and holidays, stay later during the week and refrain from taking time off during school vacation season, regardless of rank or seniority.”⁴⁰ Similarly, in the June 2013 issue of *Marie Claire* magazine, Ayana Byrd examines the frustration many single workers experience doing “cleanup for their married-with-kids coworkers.”⁴¹ Among others, Byrd recounts the story of Simone Allen, a thirty-two year old litigation attorney in a large Philadelphia law firm. Byrd reports that when Ms. Allen started at her firm a year ago, she

packed her after-work calendar to ensure that she wouldn’t spend every night at the office . . . But in a matter of weeks . . . she couldn’t get out of the office in time . . . Instead, [Allen is] spending most nights poring over her cases—and she’s one of the only ones working such intense overtime at her office. With more than 100 lawyers on staff at her firm, fewer than five are single and do not have kids, . . . and overwhelmingly, those are the attorneys juggling the extra load.⁴²

Byrd also tells the story of Tanya Kelly, an IT training consultant in New Jersey, who stated that “each year I ask for the week off after Christmas, and my supervisor says no every time because another employee has to be home with her kids that week . . . After giving 110 % all year, I can’t spend this time with *my* family?”⁴³

40. Leslie Talbot, *Stop Singlism!*, FORBES (Aug. 21, 2007), http://www.forbes.com/2007/08/21/talbot-singles-discrimination-forbeslife-singles07_cx_lt_0821talbot.html.

41. Ayana Byrd, *The Single Girl’s Second Shift*, MARIE CLAIRE (June 18, 2013), <http://www.marieclaire.com/career-money/jobs/single-girls-second-shift>.

42. *Id.*

43. *Id.* Apparently the dissimilar treatment extended beyond the holidays as Kelly told Byrd that she has been denied the option to telecommute when she has doctor’s appointments, though her coworkers “chime in from home because they need to get their kids ready for Halloween or the first day of summer camp.” *Id.* According to Kelly, “it seems that some of them use their kids as an excuse to not do as much work.” *Id.*

Popular accounts like these are ubiquitous⁴⁴ and have been backed up in recent years by scholarly studies.⁴⁵ Although much qualitative and empirical work remains to be done, social scientists have begun to document the pervasiveness of stereotypes of single and childfree persons⁴⁶ and to produce data substantiating SWOCs' claims that they are required to work longer hours than their counterparts and that employers do not value their personal lives and free time as much as that of their co-workers.⁴⁷

44. See, e.g., Belkin, *supra* note 32, at 36; Matt Bradley, *In 'Family Friendly' Workplaces, Singles Feel Overlooked*, CHRISTIAN SCI. MONITOR, June 12, 2006, <http://www.csmonitor.com/2006/0612/p13s01-wmgn.html>; Sara Eckel, *Singles Have 'No Life' and Other Work Stereotypes*, FORBES (Apr. 23, 2010, 4:30 PM), <http://www.forbes.com/2010/04/23/single-worker-stereotypes-forbes-woman-leadership-career.html>; Maura Kelly, *Singled Out: Are Unmarried People Discriminated Against*, DAILY BEAST (Feb. 6, 2012), <http://www.thedailybeast.com/articles/2012/02/06/singled-out-are-america-s-unmarried-discriminated-against.html>; Kathleen Murray, *The Childless Feel Left Out When Parents Get a Lift*, N.Y. TIMES, Dec. 1, 1996, http://www.childfree.net/potpourri_lift.html; Hannah Seligson, *When the Work-Life Scales Are Unequal*, N.Y. TIMES, Sept. 1, 2012, <http://www.nytimes.com/2012/09/02/business/straightening-out-the-work-life-balance.html?pagewanted=all>; Robin Wilson, *Singular Mistreatment*, CHRON. HIGHER EDUC., Apr. 23, 2004, <http://chronicle.com/article/Singular-Mistreatment/13868>. Commentary on posts are also illuminating. See, e.g., FORBESWOMAN, <https://www.facebook.com/forbeswoman/posts/121017094580802> (last visited Jan. 28, 2015) (debating the pros and cons of bias against singles and childfree persons). For additional anecdotal accounts, see the myriad accounts posted on the website of the American Association of Single People, <http://www.unmarriedamerica.org/library/workplace-issues.html> (last visited Jan. 28, 2015).

45. For an excellent overview of relevant social science research, see Wendy J. Casper et al., *Beyond Family-Friendly: The Construct and Measurement of Singles-Friendly Work Culture*, 70 J. VOCATIONAL BEHAV. 478 (2007); see also SINGLED OUT, *supra* note 19; SINGLISM, *supra* note 12; *Work-Family Backlash*, *supra* note 8.

46. See DePaulo & Morris, *supra* note 29, at 251; Tobias Greitemeyer, *Stereotypes of Singles: Are Singles What We Think?*, 39 EUR. J. SOC. PSYCHOL. 368–83 (2009); Tanya Koropecyk-Cox, *Singles, Society, and Science: Sociological Perspectives*, 16 PSYCHOL. INQUIRY 91 (2005); Elizabeth Sharp & Lawrence Ganong, *"I'm a Loser, I'm Not Married, Let's Just All Look at Me:" Ever-Single Women's Perceptions of Their Social Environment*, 32 J. FAM. ISSUES 956 (2011); *Work-Family Backlash*, *supra* note 8.

47. See SINGLISM, *supra* note 12, at 78–83; Casper et al., *supra* note 45; Wendy Casper & Jennifer E. Swanberg, *Single Childfree Adults: The Work-life Stress of an Unexpected Group*, in HANDBOOK OF MANAGERIAL BEHAVIOR AND OCCUPATIONAL HEALTH 95–107 (Alexander-Stamatios G. Antoniou, et al. eds., 2009); see also *Work-Family Backlash*, *supra* note 8, at 32–46. Significantly, the issue of longer hours has arisen just about every time I have discussed this project with a SWOC. Both privacy concerns and space limitations prevent a complete recitation of all of these accounts, and recitation is unnecessary given the findings of the scholars cited in *supra* note 45. But, to give the reader a sense of their flavor, one friend shared a circumstance involving a government attorney who complained that she could not “have a life or even develop a serious relationship that might lead to marriage or children” because she was so busy covering for those who were already married or with children. Conversation with Margaret Hu, Visiting Assistant Professor, Duke University School of Law, in Durham, N.C. (March, 2013); see also E-mail from Kimberly Krawiec, Professor of Law, Duke University School of Law, to Trina

Although longer hours and increased travel expectations are common concerns raised by single workers without children, these are not the only ways in which SWOCs maintain that they are dissimilarly treated in the workplace. Related to hours worked are varying expectations about the use of leaves and part-time arrangements. For example, in recent years employers have increasingly adopted leave and part-time policies for which all employees are eligible.⁴⁸ While these policies are technically open to everyone, in practice some SWOCs hesitate to use them because they believe the policies are implicitly geared toward married employees or employees with children. To be sure, many employees, including parents and married individuals, fear that any deviation from “traditional” work arrangements, or employer-preferred schedules, will produce adverse consequences. The case of Matthew Smith,⁴⁹ however, demonstrates that the fear of backlash may be greater for those who elect part-time employment for non-dependent care purposes (with dependency narrowly defined to include caring for a spouse, parent, or child).

Matthew, a single, gay male, senior associate at a major law firm, desired to utilize his firm’s new part-time policy in order to secure greater work-life balance. Matthew had determined that he did not want to work full time in a law firm environment and that he would need to either cut back or leave the firm entirely. No one at the firm told Matthew that it would be more difficult for him to obtain a promotion to counsel or partnership than it would be for part-time workers with dependent children. Matthew, however, feared that the firm’s decision makers would react differently to his choice because he was a minority among the firm’s part-time lawyers. Matthew does not

Jones, Professor of Law, Duke University School of Law (June 8, 2013) (on file with author) (noting that she used to complain about the unequal distribution of work, especially the “travel thing,” when she was in practice, but noting that it was “hard to balance this concern against the already tough lot facing working parents”); Telephone Conversation with Andrea Jones (Aug. 5, 2013) (observing “this happens all the time and it drives me crazy”); Telephone Conversation with Tamala Boyd (Mar. 2013) (acknowledging the problem and wishing that something could be done about it).

48. See, e.g., *Compensation and Benefits*, GOLDMAN SACHS, <http://www.goldmansachs.com/careers/why-goldman-sachs/compensation-and-benefits/compensation-and-benefits-us.html> (last visited Nov. 5, 2014) (“Based on manager approval, the following arrangements may be available to help employees meet their personal and family responsibilities: part-time schedules, job sharing, telecommuting, and alternate hours.”); *Flextime Scheduling: Guidelines and Procedures*, UNIV. OF CAL., S.F., <http://ucsfhr.ucsf.edu/index.php/policies/article/flextime-scheduling-guidelines-and-procedures1/> (last visited Nov. 5, 2014); *Work/Life Programs*, ARNOLD & PORTER LLP, http://www.arnoldporter.com/careers_our_environment_work_life_program.cfm (last visited Nov. 5, 2014) (allowing attorneys who work at least twenty-five hours per week to qualify for health and welfare benefits and allowing the use of flex-time and compressed work weeks).

49. This is an alias to protect this person’s identity.

remember the exact demographics of the firm's part-time lawyers, but in informal meetings with these individuals, he noted that he was the only male and the only person without children. Thus, he was an outlier and believed that asking to go part time would raise eyebrows and spark curiosity. Matthew's concerns extended not only to promotion, but also to the issue of whether the firm would respect his limited work hours. Matthew's colleagues who worked part time for childcare purposes had fixed schedules and set time restrictions. Matthew was not constrained in the same way regarding exact times or days when he could not be in the office. Thus, Matthew was on-call all of the time, which made the day-to-day challenge of working part time a bit more difficult.⁵⁰

Researchers have found that Matthew's concerns about going part time are not uncommon.⁵¹ Indeed, the perception that family-friendly benefits are only available to workers with traditional family responsibilities has been identified as one of three components of workplace cultures that must be addressed in order to implement workplace flexibility more effectively.⁵²

B. Compensation

Although some employers expect single workers without children to work longer hours, travel more, and take fewer leaves, these workers are not necessarily paid more for their added effort.⁵³ A 2003 study by economists

50. Fortunately, Matthew's story has a good ending. He went part time and was promoted to counsel at the end of his eighth year with the firm due, in part, to substantial support and advocacy by his practice group.

51. See Casper et al., *supra* note 45, at 482.

52. See ADVANCING WORKPLACE FLEXIBILITY, *supra* note 38, at 2. The other two components are developing a better understanding of employees' employment needs and fostering open communication and dialogue between employers and employees. *Id.*

53. Although the dissimilar treatment of SWOCs is just beginning to receive significant attention, the issue was raised as far back as 1972 in an episode of *The Mary Tyler Moore Show*. In that episode, a single, childless Mary learns that she was paid less than the previous occupant of her position. When Mary demands that her boss, Mr. Grant, explain the pay disparity, Grant shrugs and replies "because he was a man." He then assures Mary that "it had nothing to do with her work." Mary immediately exclaims "Mr. Grant, there is no good reason why two people doing the same job at the same place shouldn't be making," but is interrupted when Grant says "he had a family to support, you don't. Now, why don't you come back when you have an answer to that." Mary leaves Grant's office, but returns in a matter of seconds with "because financial need has nothing to do with it, because in order to be consistent with what you're saying, you would have to pay the man with three children more than the man with two children, and the married man more than the bachelor, and Mr. Grant, you don't do that so what possible reason could you give me for not paying me at least as much as the man who had this job before me?" *The Mary Tyler Moore Show: The Good-Time News* (CBS television broadcast Sept. 16, 1972), available at <http://www.hulu.com/watch/25325#i0,p0,s3,d0> (relevant section begins at 3:50).

Kate Antonovics and Robert Town found that marriage increases men's wages by as much as 26%.⁵⁴ Data suggest that fatherhood also increases men's wages.⁵⁵ Marriage and parenting, however, have not historically produced the same effects on the wages of married women and working

54. Kate Antonovics & Robert Town, *Are All the Good Men Married? Uncovering the Sources of the Marital Wage Premium*, 94 AM. ECON. REV. 317, 320 (2004). Three theories are often set forth to explain married men's higher wages: (1) that marriage enables men to be more productive outside of the home (because their spouses are "keeping house"); (2) that employers have a preference for married men; and (3) that more productive men are more likely to marry. *Id.* at 317. Antonovics and Town found no evidence to support theories one and three. Although they conclude that "marriage causes men's wages to rise," they suggest that this may be because with a family to support, married men "work harder and more assertively seek out raises and better job opportunities." *Id.* at 319–20; *see also* Joni Hersch & Leslie S. Stratton, *Household Specialization and the Male Marriage Wage Premium*, 54 INDUS. & LABOR REL. REV. 78, 93 (2000) (finding no support for the idea that more productive men are likely to marry or that household specialization makes men more productive); Eng Seng Loh, *Productivity Differences and the Marriage Wage Premium for White Males*, 31 J. HUM. RESOURCES 566, 587 (1996) (finding no support for the theory that married men are more productive than never married men); Daniel Bukszpan, *Why Do Married Men Earn More?*, CNBC (Nov. 6, 2012, 4:24 PM), <http://www.cnbc.com/id/49713774> (noting that unconscious bias may account for the marriage wage gap).

55. *See* Scott Coltrane, *Elite Careers and Family Commitment: It's Still About Gender*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 214, 214 (2004) (finding that professional men are viewed as more mature and stable and more suited for upper-level management positions after they become fathers); Rebecca Glauber, *Race and Gender in Families and at Work: The Fatherhood Wage Premium*, 22 GENDER & SOC'Y 8, 24–25 (2008) (finding that "men experience an increase in their wages first when they marry and then again when they have children within marriage," that single men do not experience a fatherhood wage premium, and that "compared to white men and Latinos, Black men experience a smaller premium in terms of hourly wages and annual earnings"); Melissa J. Hodges & Michelle J. Budig, *Who Gets the Daddy Bonus? Organizational Hegemonic Masculinity and the Impact of Fatherhood on Earnings*, 24 GENDER & SOC'Y 717 (2010) (examining potential causes of the fatherhood bonus and racial variations in the size of that bonus); Shelley Lundberg & Elaina Rose, *The Effects of Sons and Daughters on Men's Labor Supply and Wages*, 84 REV. ECON. & STAT. 251, 257–64 (2002) (finding that fatherhood results in significantly higher wages and hours worked for the first two children, with larger positive effects if the child is male); *see also* Correll, Benard & Paik, *supra* note 22, at 1332 (finding that study participants offered fathers higher starting salaries and viewed fathers as more committed to paid work than childless men). Although causation is unclear, two explanations are commonly offered for the fatherhood wage premium: (1) that fatherhood motivates men to become more productive workers; and (2) that pervasive cultural norms regarding masculinity, fatherhood, and breadwinning lead employers to favor fathers. *See* Glauber, *supra*, at 9, 10–12. Recent studies indicate that a wage bonus persists even after adjusting for work hours, work effort, and other relevant factors. *See* Hodges & Budig, *supra*, at 740–41. Interestingly, recent research suggests that single men do not receive a fatherhood wage premium. Glauber, *supra*, at 24. Several reasons are suggested for this outcome: (1) single men may not appear "to conform to cultural ideals of normative, breadwinning fatherhood, and employers may not extend preferential treatment to unmarried fathers;" (2) single fathers "do not benefit as much as married fathers from a gender division of household labor;" and (3) single fathers may not "experience as much of an increase in their commitment to breadwinning status because their children tend to not live with them." *Id.*

mothers due to the problematic assumption that married women's wages are secondary to their husbands'⁵⁶ or that working mothers are less dependable and less committed workers.⁵⁷ SWOCs also have not been eligible for either a marriage or a parenthood salary boost since, by definition, they are neither married nor parents.⁵⁸

56. See Alexander H. Jordan & Emily M. Zitek, *Marital Status Bias in Perceptions of Employees*, 34 BASIC & APPLIED SOC. PSYCHOL. 474, 474 (2012) (finding that women may be "viewed as less suitable for employment when married than when single, whereas the reverse may be true for men"). Jordan and Zitek note that "[a]ssumptions about employee's motivations to earn money may . . . engender bias against married women Due to the assumption that women are less likely to be relied upon as the primary breadwinner for a married couple, people might expect married female employees to be less dedicated to their jobs compared to their single counterparts (who must provide their own income), whereas people might expect male employees to be more motivated in their jobs if married." *Id.* at 475. In addition to expectations of less financial responsibility, Jordan and Zitek note that expectations of greater family responsibilities, gender stereotypes, and assumptions about marriage leading to childbearing may also affect married women's opportunities. *Id.*

57. See Benard & Correll, *Normative Discrimination*, *supra* note 22, at 639 (finding that female study participants held mothers to stricter standards than fathers and penalized mothers when it came to recommendations for promotion, hire, and salary); Correll, Benard & Paik, *supra* note 22, at 1332 (finding that study participants viewed mothers as less competent and committed than otherwise identical workers who were not mothers and discriminated against mothers when making hiring and salary decisions).

58. It may be argued that any disadvantage experienced by SWOCs will be made up when these individuals marry or have children of their own. In addition, it may be argued that SWOCs will benefit from working longer hours because over time they will receive higher pay increases and greater opportunities for promotion as a result of their additional efforts. These arguments are addressed in greater detail in Part III.B *infra*. For now, it bears noting that the first assertion—that "it will all even out over time"—includes an assumption of coupling and reproduction that may no longer be valid. Marriage and childbearing are decreasing. As indicated earlier, approximately 44% of individuals aged 18–45 believe that marriage is becoming obsolete. See *supra* note 15. Moreover, fewer women are reproducing today than in the past. See *supra* note 17. In any event, it is arguably unfair to impose additional burdens on part of the working population based upon speculative assumptions about a future return. This return will not occur for those individuals who choose not to marry or not to parent. In addition, it will not arise for those who change jobs and find themselves in less family-friendly workplaces. With regard to singles without children possibly receiving greater compensation and rewards for their greater investments in the workplace, it is not clear that this justifies imposing additional, *unrequested* responsibilities on singles in the first place. If a single person does not wish to have the additional responsibilities, should he or she be required to bear them—even if there is a promise of greater compensation or advancement? In addition, while longitudinal studies tracking the pay and work hours of single workers versus those who are married or parents would be welcome, the available statistical evidence does not support this proposition. While women with children tend to earn less than other groups, married men with children and married women earn more than single men or single women. See *supra* notes 22, 54–55, 219. For more discussion of this argument, see *infra* Part III.B.

C. Other Benefits

Not only are SWOCs compensated at lower levels than married men and fathers, they also receive fewer employment benefits than married employees and working parents.⁵⁹ These benefits may range from the small and seemingly mundane, like subsidized lunches and reduced coverage of moving expenses,⁶⁰ to the large and significant, which may include additional benefits worth thousands of dollars. For example, under the Family and Medical Leave Act (FMLA), covered individuals are permitted unpaid leave to care for a spouse, parent, or child.⁶¹ While single and childless workers can utilize the FMLA to care for a parent (and vice versa), they cannot take leave to care for someone who, for them, may be as important as a spouse or a child (e.g., a close friend, sibling, extended family member, or someone else's child).⁶²

59. See Casper et al., *supra* note 45, at 481 (“[M]ost work-life programs provide services that are of little benefit to single adults without dependent children.”). Indeed, it is quite interesting when one looks at the list of benefits provided by employers to see how many are geared towards families. For example, among its benefits, in addition to medical, dental, vision, and life insurance—and take-out food service—Yahoo provides sixteen weeks of paid maternity leave, eight weeks of paid paternity leave, new baby gifts from the company, adoption assistance, and dependent day care flexible spending accounts. See Shana Lynch, *Yahoo’s New Benefits: 16 Weeks Maternity Leave, Take-Out on the House*, SILICON VALLEY BUS. J. (Apr. 30, 2013), <http://www.bizjournals.com/sanjose/news/2013/04/30/yahoo-buys-your-take-out-dinner.html>. Similarly, Goldman Sachs offers a back-up childcare program, sixteen weeks of paid maternity leave, eight weeks of paid adoption leave, one additional week of vacation for newly married persons (in the year that they marry), on-site lactation rooms, 24-hour access to lactation consultants, a maternity mentoring program, and adoption assistance. See *Compensation and Benefits*, GOLDMAN SACHS, <http://www.goldmansachs.com/careers/why-goldman-sachs/compensation-and-benefits/compensation-and-benefits-us.html> (last visited Jan. 28, 2015). Target offers a free maternity support program, adoption assistance, and a childcare discount. See *Health*, TARGET, <https://corporate.target.com/careers/benefits/health-benefits> (last visited Jan. 28, 2015). Among the few benefits that are not “family-centric” are fitness discounts for employees, tobacco cessation plans, and of course, the take-out food service.

60. Case, *supra* note 8, at 1764–65 (describing a situation involving a dean who offered to subsidize the lunches of only junior faculty who were married or with children and of another administrator who balked at paying a single woman’s moving expenses because the estimate to move her was higher than an estimate involving a family of four). Case also recounts being told by one potential employer, when negotiating university housing, that “apartments larger than one bedroom are given only to those with children . . . and that houses are for families.” *Id.*

61. 29 U.S.C. §§ 2601, 2612 (2012). The FMLA is not technically an anti-discrimination law, but more of a labor standards statute similar to the Fair Labor Standards Act. See 29 U.S.C. §§ 2611–19 (setting minimum wage and hour standards). Instead of prohibiting discrimination based on certain characteristics, the FMLA insures that workers receive a base level of entitlements. To be eligible for FMLA leave, an employee must work for an employer who employs 50 or more people, and the employee must have worked for the employer for at least 12 months logging at least 1,250 hours of service in the 12-month period immediately preceding the leave. 29 U.S.C. § 2611.

62. See 29 U.S.C. § 2612. To be sure, it may be argued that married individuals and parents cannot take leave to care for these people either. This begs the question, however, of whether it

In addition to the above, single and childless workers tend to pay more for employer-sponsored health insurance premiums than employees with children. For example, at the University of California, in 2013, employees with annual salaries between \$50,000 and \$98,000 paid \$45.72 per month for basic health coverage for themselves alone. Two adults paid \$102.61 for the same coverage. One adult plus any number of children paid \$82.30. A family consisting of two adults and any number of dependent children paid \$139.18.⁶³ Thus, per capita, single individuals and adults without children paid more for the same coverage, and smaller families on average paid more than larger families.⁶⁴ Because these plans are often employer-subsidized, to the extent that an employee can secure coverage for a spouse or child, the employee is already receiving a sizable benefit.

As discussed in Part II.C.1 *infra*, high-wage workers in professional workplaces receive the strongest employment benefits. In addition to paid sick leave, paid maternity and paternity leave, and various insurance benefits, some high-wage employers offer adoption assistance, daycare facilities for dependent children, backup childcare assistance, additional vacation time for newly married persons, on-site lactation rooms, 24-hour access to lactation consultants, and maternity mentoring programs, among other things.⁶⁵ In the academic setting, among the more lucrative benefits granted by some employers for which nonparents are ineligible are what are known as tuition benefit programs.⁶⁶ In addition to normal salaries, these programs compensate

is fair to carve out a subset of relationships, experienced by a segment of the population, for special treatment while ignoring other significant relationships. Upon what basis do we prioritize marriage and parenting over other relationships? See *infra* Part III for further discussion of this issue.

63. 2013 Medical Plan Costs, UNIV. CAL. HUMAN RES. & BENEFITS (2013), http://atyourservice.ucop.edu/employees/health_welfare/medical/medical-plan-costs-2013.html#b.

64. It appears that the University of California example is widespread. A survey of customers of one online, national insurance agency found that individual policy premiums averaged \$183 per month in early 2011, and two adults on a family plan averaged \$175 each. The per capita premium decreased for each additional child, with the per capita rate reaching \$92 on average for family plans with six or more members. EHEALTH, THE COST AND BENEFITS OF INDIVIDUAL & FAMILY HEALTH INSURANCE PLANS 11 (2011), available at http://news.ehealthinsurance.com/_ir/68/20125/2011_Cost_and_Benefits_Report_FINAL.pdf. To be sure, whether smaller families are subsidizing larger families will turn on the size of the costs incurred by additional dependents.

65. See *supra* note 59.

66. For a description of such policies, see *Benefits and Insurance for Administrative Employees*, GRINNELL COLL., <http://www.grinnell.edu/about/offices-services/benefits-insurance/employeebenefits> (last visited Jan. 28, 2015); *Children's Educational Assistance Plan*, PRINCETON UNIV., <http://www.princeton.edu/hr/benefits/educ/child/> (last visited Jan. 28, 2015); *Children's Tuition Grant*, DUKE UNIV., https://www.hr.duke.edu/benefits/education/tuition_grant/index.php (last visited Jan. 28, 2015);

university employees for the college tuition of one or two of the employee's children up to the amount (or some percentage) of the employing school's tuition. (The children need not attend the employer's school.) Thus, if the tuition at the employing school is \$30,000 a year, then eligible employees may receive up to \$240,000 in additional compensation while their children are in college (\$30,000 x 4 years in college x 2 children). Importantly, these employers offer no comparable program or offsetting benefit to childfree employees.⁶⁷

Although the focus of this Article is on the employment experiences of single workers without children, it is perhaps worth mentioning that SWOCs experience dissimilar treatment in a variety of settings outside of the workplace. Some evidence indicates that couples without children tend to be preferred over singles in the housing market.⁶⁸ The spouse or child of a deceased employee is eligible to receive the decedent's social security benefits while the social security benefits of SWOCs go back into the system.⁶⁹ In some cases, spouses can contribute to their partner's IRA

Faculty, Other Academic Appointees and Dependent Children Tuition, UNIV. OF CHI., <http://hrservices.uchicago.edu/benefits/tuition/employees/facoap.shtml> (last visited Jan. 28, 2015); *Scholarship Plan for Sons and Daughters of the Faculty and Staff of Yale University*, YALE UNIV., <http://www.yale.edu/hronline/benefits/ChildrensScholarship.html> (last visited Jan. 28, 2015); *Tuition Grant Program*, STANFORD UNIV., <http://www.stanford.edu/dept/dms/hrdata/eap/tgp.html> (last visited Jan. 28, 2015). These programs are also known as "golden-handcuffs" because sometimes employees find it hard to walk away from tuition benefits even if their employment conditions are otherwise undesirable.

67. Two justifications are commonly offered for these programs: (1) they reflect the institution's commitment to higher education; and (2) they are useful in recruiting highly competitive candidates who have families. One wonders, of course, whether the commitment to higher education might not be advanced by providing scholarships to young people based upon need and not upon the identity of their parent's employer. Moreover, one might question whether there is a need to supplement the educational training of faculty members' children, many of whom are quite comfortably within the middle- or upper-middle class and who are likely to be disproportionately competitive for merit-based scholarships and grants. Regarding the second objective, additional compensation might also lure highly competitive SWOCs to an institution. Yet, there is nothing comparable to a tuition benefit program available to such individuals.

68. Wendy Morris et al., *No Shelter for Singles: The Perceived Legitimacy of Marital Status Discrimination*, 10 GROUP PROCESSES & INTERGROUP REL. 457, 457 (2007). While couples may be preferred to singles, adults without children are preferred to adults with children. The latter violates the Fair Housing Act of 1968, which prohibits discrimination in housing on the basis of familial status. 42 U.S.C. § 3601 (2012). The Fair Housing Act, however, does not include marital status as a protected category and thus does not appear to bar discrimination against unmarried persons. See generally Edward Allan, *Six Years after Passage of the Fair Housing Amendments Act: Discrimination against Families with Children*, 9 ADMIN. L.J. AM. U. 297, 297 (1995); Matthew J. Smith, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055, 1055 (1991).

69. U.S. SOC. SEC. ADMIN., PUB. NO. 05-10085, BENEFITS FOR CHILDREN (2012), available at <http://www.ssa.gov/pubs/EN-05-10085.pdf>; *Survivors Planner: Survivors Benefits for Your*

accounts.⁷⁰ No comparable program exists for single persons. And then, as social psychologist Bella DePaulo points out, there are “the auto insurance rates, health club memberships, professional subscriptions, vacation packages, and all the rest of the deals for which two married people each pay less than one single person.”⁷¹

It may seem unfair to require that SWOCs pay more per capita than a family of four for something like a health club membership, given that the family, because it has more members, will likely make more demands on the facility and its resources. However, very few SWOCs appear to balk at the idea of granting families access to goods and services that may be unaffordable absent a discount. Perhaps this is because purchased goods and services (e.g., health clubs, museums, zoos), delivered outside of the employment context, are viewed differently than labor. SWOCs can elect to pay more for these goods and services (and in effect indirectly subsidize families’ enjoyment of them), or they can choose not to partake of these goods and services. Labor, however, is perceived differently. Most people must work. The notion that Samantha must work the same hours (or longer hours) for less pay and fewer benefits than her co-worker Bob, simply because Samantha is single and without children, while Bob is married with

Widow or Widower, U.S. SOC. SEC. ADMIN.,
<http://www.socialsecurity.gov/survivorplan/onyourown2.htm> (last visited Jan. 28, 2015).

70. Andrew Chan, *Managing Your Money: Spousal IRA Contributions*, BOSTON.COM (Apr. 9, 2010), http://www.boston.com/business/personalfinance/managingyourmoney/archives/2010/04/spousal_ira_con.html. The tax code may be unfair to SWOCs in other ways. In her work, Bella DePaulo asserts that singles always pay more in taxes than married or unmarried couples with the same taxable income, and that the estate tax exemption may be unfair to singles. SINGLED OUT, *supra* note 19, at 225–27; see also *Windsor v. United States*, 699 F.3d 169, 169 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013). Similarly, in her critique of the joint return, Lily Kahng concludes:

[T]here are both unmarried couple’s penalties and single person’s penalties under our tax system—that is, both unmarried couples and single people sometimes pay more tax than a married couple with the same income. On the flip side, there is also sometimes an unmarried couple’s bonus—an unmarried couple can pay less than a married couple with the same income. In contrast, there is never a single person’s bonus—a single person never pays less tax than a married couple with the same income.

Lily Kahng, *One is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 660 (2012).

71. SINGLED OUT, *supra* note 19, at 221–22. DePaulo goes on to point out other little things. She notes “[s]upermarkets, for example, reward supersizers, when shoppers get to pay less per unit the more they buy. For perishable items, this can be a complete-lose situation for singles—they are just not going to use all that food before it goes bad.” SINGLISM, *supra* note 12, at 83. Admittedly, some of these observations may be overblown as two single people can share groceries and vacation packages.

children, seems somehow unfair. The key distinction appears to be that purchasing goods and services involves a decision about how one spends one's money. Compensation and benefits, however, involve decisions about how someone else values one's labor. A central premise in discrimination law is that factors unrelated to the actual job being performed should generally not be relevant to that valuation. In other words, individuals performing the same job should be treated alike.⁷²

Notwithstanding anecdotal accounts and a growing body of empirical data, the concerns of SWOCs remain largely invisible.⁷³ When shared, these concerns are frequently dismissed and viewed as trivial by married individuals and especially by working parents, whose loads are heavy or who may perceive a threat to their benefits. Fearing backlash, many single and childfree workers stay silent.⁷⁴

II. WHAT ACCOUNTS FOR THE DISSIMILAR TREATMENT OF SWOCs?

Assuming, as the evidence suggests, that the dissimilar treatment of SWOCs exists and is widespread, a question remains whether this treatment is—or ought to be considered—a form of unlawful discrimination. To

72. Exceptions exist for things like religion and disability, where accommodations are sometimes made. The heart of the current controversy, as discussed in Part III *infra*, is whether and to what extent marriage and parenting should receive similar treatment.

73. The invisible nature of the problem was underscored during a conversation between the author of this Article and the managing partner of a medical partnership. Conversation with David H. Serfas, Med. Doctor & Managing Partner, Asheville Cardiology Associates, in Tuscany, It. (May 17, 2012). When the partner learned of this project, he had what appeared to be a “light bulb” moment. *Id.* He said that because his children are now grown and no longer live at home, he often offers to cover for his colleagues with young children during the holidays. *Id.* The partner said it never occurred to him to make a similar overture toward his colleagues who are unmarried and without children. *Id.*

74. The reluctance of some SWOCs to share their concerns was demonstrated during a conversation between the author and a faculty assistant. Interview with Assistant A, Author and Faculty Assistant (2012). The assistant, who had read a flyer announcing a presentation of the topic of bias against SWOCs, came to the author's office to express how relieved she was that someone was addressing the issue. *Id.* After carefully closing the door, the assistant whispered that she was frustrated by the number of times she was expected to cover, without additional compensation, for individuals who were either absent from the office or who had to leave early to care for their children. *Id.* The assistant stated that many people automatically assumed that she would take care of everything and would pick up the slack. *Id.* The trepidation and nervousness with which this assistant shared her story reinforced what the author was already sensing from conversations with SWOCs, that is, a feeling among some SWOCs that they should not complain or air their concerns because others believe that SWOCs “have it easy” when compared to persons with parental or spousal obligations. Indeed, SWOC frustration appears to be heightened by a sense of “enforced silence”—the ready dismissal or minimization of their concerns and the absence of an avenue or mechanism through which to share their experiences.

address the legal question with greater precision, one must first determine the cause of SWOCs' dissimilar treatment: is it single status or is it the absence of dependent children? This Part examines these questions, concluding that, depending upon the context, both of these variables can and do operate, sometimes separately and sometimes jointly, to the detriment of SWOCs. This Part also explores the ways in which class, gender and race complicate the analysis. This further examination reveals that the claims of SWOCs have greatest traction when SWOCs are compared to married men with children in professional or high-wage settings.

A. *Marital Status*

At first glance, it may seem odd to be concerned about the employment conditions of single, as opposed to married, workers because some employers view single status as a positive attribute (though, as discussed in Part III.B, this attribute may not result in a career boost or higher wages).⁷⁵ In some situations, singles are sought after for employment opportunities precisely because employers assume they have fewer external obligations and therefore can be called upon to work longer hours for less compensation, to travel more, and to relocate more readily, than their married counterparts.⁷⁶ In other words, singles are at times a more easily exploitable (and thus more desirable) labor source than married persons. The "Singles Advantage," however, encompasses more than being presumptively "unencumbered" by family obligations. Singles are also presumed to be young, energetic, ambitious, career-oriented, hardworking, creative, fun-loving, and independent. These positive stereotypes can present considerable employment opportunities. To be sure, context matters. Positive traits associated with singles may be

75. Single workers have recovered approximately 90% of the five million jobs they lost in the recent recession. Annalyn Censky, *Why the Jobs Recovery Favors Single Workers*, CNN MONEY (Aug. 16, 2012, 9:39 AM), <http://money.cnn.com/2012/08/15/news/economy/jobs-single-workers/>. Married individuals lost more jobs and have recovered a smaller percentage of them (about 22%). *Id.* To be sure, this does not necessarily mean that employers have a preference for single workers. *Id.* Economists suggest that married persons may take more time searching for jobs because if their spouse is working, they can temporarily rely upon that person's salary. *Id.* Also, younger single people are more likely to accept lower wages and have greater flexibility regarding location. *Id.* Thus, demographics as opposed to employer choice could explain these outcomes. *Id.* On the other hand, a recent study concluded that single females are perceived as more suitable for hiring and retention than married females, while married males are preferred to single males. Alexander H. Jordan & Emily M. Zitek, *supra* note 56, at 474.

76. Singles are also vulnerable to employer manipulation and demands because they generally are reliant upon one income. Censky, *supra* note 75.

desirable for the CEO of a start-up tech company like Instagram,⁷⁷ and less desirable for the CEO of a traditional investment firm like Smith Barney (unless, of course, that firm is trying to change its image).

Despite the “Singles Advantage,” in recent years social scientists have documented that singles are subject to less frequently explored negative stereotypes and biases that can limit their employment opportunities.⁷⁸ For example, singles as a group are sometimes viewed as selfish, insecure, maladjusted, irresponsible, and prone to thwart social obligations and responsibilities in favor of frivolous pursuits.⁷⁹ By contrast, persons who are married are more likely to be regarded as caring, kind, generous, responsible, and stable—just because they are married.⁸⁰ As one social scientist points out, how often has one heard a newly engaged or newly married person being praised for “settling down?”⁸¹ Presumably, this “compliment” implies that marriage is a positive, calming influence and that the engaged or newly married person now possesses a level of maturity and social responsibility that he or she previously lacked.

These marriage-related comments are gender specific. Men are praised for settling down, as if they were previously unsettled. Women, on the other hand, are praised for finding someone, as if they were somehow incomplete in their uncoupled state. These gendered norms are deeply rooted in American culture. In the colonial era, both single men and single women were considered irresponsible and viewed as threats to the social order.⁸² As Rachel Moran notes, mature, unmarried women were “rare examples used to define failed womanhood and to discipline other females into being good

77. See Courtney Palis, *11 Most Influential Young Leaders in Tech Ranked by Peek You*, HUFFINGTON POST (Apr. 3, 2012, 6:55 PM), http://www.huffingtonpost.com/2012/04/03/most-influential-young-technology-leaders-peekyou_n_1399847.html#s837241&title=10_Steve_Martocci.

78. The presence of both positive and negative stereotypes does not negate the possibility of discrimination. For example, Asian Americans (and other people of color) are subject to positive stereotypes. This does not, however, mean that they are not subject to racism due to negative racial stereotypes. See, e.g., Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 294–99 (1997) (examining shifting stereotypes of Asian Americans).

79. See DePaulo & Morris, *supra* note 29, at 251; see also Greitemeyer, *supra* note 46, at 368.

80. See DePaulo & Morris, *supra* note 29, at 251; see also Greitemeyer, *supra* note 46, at 368. It is perhaps ludicrous to assume that a mere change of status wreaks such a fundamental change in character. Does a divorcee revert to being selfish, insecure, maladjusted, etc. the moment divorce papers are signed?

81. See *infra* Part VI for discussion of the ways in which historical and contemporary structures perpetuate these norms.

82. Moran, *supra* note 19, at 235–36.

wives and mothers.”⁸³ Moran points out, however, that men were not immune from the stigma of singlehood, noting that “males achieved full manhood only when they could earn a living, marry, and support a family.”⁸⁴ Given these beginnings, it is not surprising that marriage for men gets equated with social responsibility while for women it gets associated with emotional fulfillment and “completion.”⁸⁵

In addition to gender, age influences characterizations of and assumptions about singles.⁸⁶ Older single women are frequently described as unhappy, lonely, and insecure, among other things, and are dismissed as “spinsters” or “old maids.”⁸⁷ With older men, the stereotypes are mixed, depending upon the person. Middle-aged, single men, like the formerly single actor George Clooney, are viewed as “ladies men,” “independent bachelors,” or men with “commitment-phobia.”⁸⁸ In addition, never-married single men over the age of forty are often presumed to be gay.⁸⁹

The treatment of legally single, yet socially coupled, individuals highlights the continuing privileging of marriage and the negative stereotypes to which singles are subject today. To be sure, legally single persons who are in long-term relationships that are known to their employers may be exempt from expectations that they engage in extensive professional travel or that they work holidays, weekends, and generally longer hours than married

83. *Id.* at 235.

84. *Id.*

85. As discussed in Part II.C.2, these associations can serve to situate married men and married women differently. Researchers have found that single women may be preferred to married women (because of their perceived commitment to work) and married men may be preferred to single men (because of the former’s presumed heightened family obligations). See Jordan & Zitek, *supra* note 56, at 480.

86. Greitemeyer, *supra* note 46, at 369; Koropecykj-Cox, *supra* note 46, at 93–95 (discussing the ways in which gender, race, age, and sexual orientation influence stereotypes of singles).

87. DePaulo & Morris, *supra* note 29, at 251; see also Wendy Braitman, *Goodbye to the Spinster*, in *SINGLISM*, *supra* note 12, at 28 (listing stereotypes associated with older women, including angular, clumsy, nearsighted, awkward, crabby, dour, unduly critical of others, nosey, envious, gossipy, in flirtatious pursuit of a husband). Interestingly, the term spinster was not initially used in a pejorative fashion. It was employed in eighteenth-century America in reference to young, unmarried girls who spent their time spinning in their family households. Moran, *supra* note 19, at 232; see also Braitman, *supra*, at 26 (noting that the word spinster first appeared in 1362 and began as “a description, unadorned of judgment. It means an occupation. A yarn spinner The first yarn spinners were female, and eventually the word became a legal term, a description for all unmarried women.”).

88. Reed Tucker, *Meet the Future Mrs. Clooney*, N.Y. POST (Apr. 28, 2014, 9:03 PM), <http://nypost.com/2014/04/28/meet-amal-alamuddin-the-future-mrs-clooney/>.

89. Koropecykj-Cox, *supra* note 46, at 93–95.

persons.⁹⁰ However, this may not always be the case as some employers may not view long-term, non-conjugal relationships (even though some endure longer than many marriages) the same as marriage.⁹¹ Thus, in the relationship hierarchy, individuals in long-term, non-conjugal relationships may in some circumstances be taken more seriously than singles, but less seriously than married couples. However, these legally single, socially coupled individuals still will not have access to the myriad benefits for which only married couples are eligible (e.g., FMLA leave for spousal care, health care coverage for spouses, social security benefits, etc.).⁹²

The movement for marriage equality also bears mention as it underscores both the practical and symbolic importance of marriage in the United States. As was demonstrated in *United States v. Windsor*,⁹³ some proponents of marriage equality seek to marry in order to secure tangible benefits that are allocated on the basis of marital status. In *Windsor*, the surviving spouse in a same-sex marriage was required to pay \$363,053 in estate taxes that a spouse in an opposite-sex marriage would not have had to pay.⁹⁴ She sued seeking a refund of the estate tax and prevailed in June 2013 before the U.S. Supreme Court.⁹⁵ *Windsor*'s primary significance lies in the Court's extension of due process protections to same-sex couples.⁹⁶ But the case also demonstrates how governmental benefits incentivize individuals to marry (and to have their relationships treated as marriage), thereby stressing the economic importance of this institution.⁹⁷

90. In other words, they may be viewed for all intents and purposes like married persons. Indeed, this argument was made in *Russ v. City of Troy*, where an employer argued that the plaintiff was single because he was living with and engaged to his fiancée at the time the defendant allegedly discriminated against him. No. 217921, 2001 WL 689537, at *2 (Mich. Ct. App. 2001) (per curiam).

91. Cases in which socially coupled individuals have been fired for co-habiting support the above contention. See discussion *infra* Part III.C.2.

92. See *supra* Part I.C.

93. 133 S. Ct. 2675 (2013).

94. *Windsor*, 133 S. Ct. at 2683. After marrying in Ontario, Canada, Thea Spyer, and her wife, Edie Windsor, returned to their home in New York, a state which recognized same-sex marriages performed elsewhere. *Id.* Spyer died in 2009, leaving the entirety of her sizeable estate to Windsor. *Id.* Due to the Defense of Marriage Act (DOMA), a federal statute that defined marriage as a union between a man and a woman, and thereby served to deprive same-sex couples of federal benefits, Windsor could not claim the federal estate tax exemption for surviving spouses. *Id.* She was thus required to pay a sizable tax bill. *Id.*

95. *Id.* at 2682. The Court invalidated various provisions of DOMA and thereby extended federal benefits to same-sex couples living in states where their marriages are recognized. *Id.* at 2695–96.

96. *Id.* at 2693.

97. Indeed, during the course of litigation, advocates for the plaintiff demonstrated that there are over 1,000 federal statutes involving marital or spousal status. *Id.* at 2683.

Even when marriage produces no additional economic benefits, it carries symbolic value.⁹⁸ For example, in states where domestic partnership and civil union laws grant same-sex couples many (if not all) of the tangible benefits associated with marriage, many marriage equality proponents continue to seek access to marriage.⁹⁹ One suspects this advocacy results not only from the frustration inherent in being denied a right that others possess, but also because of the sense of legitimacy and deeper level of commitment that some people feel after marrying. For some people, being married implies greater stability, permanence, emotional involvement, and social acceptance than a non-marital “partnership,” “union,” or “arrangement.”¹⁰⁰ As one of the plaintiffs in *Hollingsworth v. Perry*, another marriage equality case recently before the U.S. Supreme Court, explained, “[m]arriage has distinctive definitions and rights that come with it. And a domestic partnership seems like a corporate document.”¹⁰¹

Significantly, the plaintiffs in *Windsor* and *Perry* sought to eliminate distinctions between different types of marriages—that is, to afford same-sex and opposite-sex marriages the same stature. SWOCs on the other hand question whether marriage should be elevated at all. To be sure, there is nothing inherently wrong with being married or desiring to marry. The issue is whether the state and employers should prioritize marriage, with consequent benefits, over other types of relationships.

As the above analysis shows, beliefs about marriage are powerful determinants of social and economic status in the United States. These beliefs shape assumptions about an individual’s maturity level, degree of social responsibility and family commitment, and entitlement to public benefits and legal protections. It is not surprising that these assumptions and beliefs carry over into the employment realm and influence employer decision making in ways that affect singles. As discussed in Part III.A.2.b *infra*, the fact that these

98. See, e.g., Andrew J. Cherlin, *In the Season of Marriage, a Question. Why Bother?*, N.Y. TIMES, Apr. 27, 2013, <http://www.nytimes.com/2013/04/28/opinion/sunday/why-do-people-still-bother-to-marry.html/> (finding that “[m]arriage has become a status symbol—a highly regarded marker of a successful personal life . . . It has become the capstone experience of personal life—the last brick put in place after everything else is set”).

99. See, e.g., *Perry v. Brown*, 671 F.3d 1052, 1068 (9th Cir. 2012), *vacated*, 133 S. Ct. 2652 (2013), *remanded to 725 F.3d 1140* (9th Cir. 2013).

100. *New ‘Yes’ on 1 Ad: Civil Unions Are Not Enough*, ME. PROGRESSIVES WAREHOUSE (Oct. 10, 2012), <http://maineprogressiveswarehouse.me/2012/10/10/new-yes-on-1-ad-civil-unions-are-not-enough/> (“When we were young, we never dreamed about having a civil union or signing a piece of paper. We wanted to be married . . . I want our [daughter] to have what we have: The joy and security of marriage.”).

101. Bill Mears, *Gay Couple Fights for Right to Marry in Epic High Court Fight*, CNN.COM (Mar. 25, 2013), <http://www.cnn.com/2013/03/21/us/scotus-same-sex-prop-8/>.

assumptions and consequent outcomes are unsurprising, however, does not mean that they are necessarily fair and should escape closer examination.

B. Parental Status¹⁰²

Marital status alone is arguably inadequate to explain fully the dissimilar treatment of SWOCs. Some singles, specifically singles with children, may not be subject to the expectation that they work longer hours, travel more, and receive fewer benefits.¹⁰³ The presence of dependents may affect employer expectations.¹⁰⁴ Indeed, one might predict that employers desiring to be family-friendly will more readily reduce or otherwise adjust the work hours and expectations of these workers.¹⁰⁵ Singles with children then are like married parents and married couples without children in the sense of having family obligations and responsibilities that are deemed important. And, like other parents, singles with children are eligible for part-time work, childcare leaves, tuition benefits, and healthcare benefits, among other things, for dependent children.¹⁰⁶

102. Childfree status, like single status, can be both a positive and a negative. Some employers are drawn to childfree workers based on the assumption that these workers are highly committed to their jobs and are unencumbered by external obligations that would interfere with their work performance. Thus, some employers are likely to prefer childless men and women to mothers. See Correll, Benard & Paik, *supra* note 22, at 1332–33; Cuddy & Fisk, *supra* note 22, at 711. Yet, as pointed out in Part I.B, these same employers may prefer men with children to childless individuals due to assumptions about the increased financial obligations of fathers. *Id.*

Although childfree individuals may be valued because of their presumed competence and commitment, they are also subject to negative stereotypes and bias. Because of the persistence of the idea that motherhood is the primary role or objective of women, women who deviate from this norm are sometimes viewed as desperate, unfulfilled, selfish, socially irresponsible, immature, and deviant, among other things. See generally Gayle Letherby, *Childless and Bereft?: Stereotypes and Realities in Relation to 'Voluntary' and 'Involuntary' Childlessness and Womanhood*, 72 SOC. INQUIRY 7 (2002); Cuddy & Fiske, *supra* note 22, at 711 (finding that childless working men and women were perceived as more competent than warm). These stereotypes vary depending upon whether a woman is voluntarily or involuntarily childless. Letherby, *supra*, at 7. Childfree men are also not immune from negative characterization, as demonstrated by the sometimes derogatory comments and caricatures of SINKs (single income no kids) and DINKs (double income no kids), who are viewed as socially irresponsible, and mainly preoccupied with wasting time and money on themselves.

103. See Lillian T. Eby et al., *Perceptions of Singles and Single Parents: A Laboratory Experiment*, 34 J. APPLIED SOC. PSYCHOL. 1329 (2004).

104. See *id.*

105. See *id.* at 1329 (finding that single parents are perceived to be more mature than childless singles, and that they are more likely to be offered a job that does not require relocation and to be awarded a merit-based stipend than childless singles).

106. See *supra* Part I.

A focus on singles with children thus suggests that the critical factor leading to the dissimilar treatment of SWOCs is the presence or absence of dependent children (e.g., if SWOCs had children, they would be treated like everyone else in the workplace). Marital status, however, remains relevant to the analysis because there are certain job-related benefits for which married employees are eligible based solely on marital status (e.g., FMLA leave for spousal care, social security, and health care benefits for spouses).¹⁰⁷ Thus, when SWOCs are compared to married individuals without children, they still experience dissimilar treatment.

In sum, SWOCs experience workplace vulnerability for a variety of reasons. They are likely to be treated less well, on balance, than married employees due to stereotypes and assumptions about their single status. This is pure singlism¹⁰⁸ or the marriage advantage. But, SWOCs are also likely to be treated less well than working parents (single or married) because of their lack of dependent children. This can be termed the dependency advantage. The relative treatment of SWOCs to other workers can be displayed graphically as follows:

107. *Id.*

108. *See supra* note 12.

Comparisons:

| | SWOCs | Married Without Children | Single With Children | Married With Children |
|-----------------------------|--------------|---------------------------------|-----------------------------|------------------------------|
| Marriage Advantage | No | Yes (Pure Singlism) | No | Yes |
| Dependency Advantage | No | No | Yes | Yes |

C. Caveats and Complications: The Importance of Class, Gender, and Race

Important caveats to the above analysis must be made. Employees are not a monolithic group, and attention must be given to the ways in which class, gender, and race affect the dependency and marriage advantages. Although much research remains to be done, a few preliminary observations are possible. As discussed below, low-wage employers often do not offer family-friendly benefits. Thus, low-wage workers, who are disproportionately female¹⁰⁹ and of color,¹¹⁰ are unlikely to experience a marriage or a dependency advantage. This means that SWOCs in low-wage settings are likely to be treated similarly to married employees and working parents. In addition to class, gender plays a role in how workers are treated. Women are penalized in the workplace when they have children and when they attend to

109. See NAT'L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE 4, 23–28 (2013), available at http://www.whitehouse.gov/sites/default/files/image/image_file/equal_pay-task_force_progress_report_june_10_2013.pdf (finding that in 2012, women comprised a majority of low-wage workers); Marlene Kim, *Women Paid Low Wages: Who They Are and Where They Work*, MONTHLY LAB. REV. 26, 26 (2000) (noting that women held 59% of low-wage jobs and were more likely to be paid less than men).

110. THE HENRY J. KAISER FAMILY FOUND., SURVEY BRIEF: LOW-WAGE WORKERS AND HEALTH CARE 1 (2008).

their parental responsibilities.¹¹¹ This motherhood penalty means that where family-friendly policies exist, the dependency advantage may not apply to working mothers. Gender may also reduce the marriage advantage for women to the extent that employers continue to assume, consciously or subconsciously, that married women's incomes are secondary to their husband's.¹¹² And, finally, race must be considered. African Americans are the least likely of all racial groups to marry. Consequently, African Americans will not experience the marriage advantage at the same rate as other groups.¹¹³ Research also suggests that married African-American men experience less of a fatherhood wage premium than White and Latino men.¹¹⁴

1. Class

Much of the analysis thus far has assumed a professional workplace with salaried employees. This is because many of the benefits discussed in this Article are not available to low-wage workers.¹¹⁵ Thus, as demonstrated below, SWOCs in low-wage workplaces are much more likely to be similarly situated to their married co-workers and their co-workers with children when it comes to flextime, leaves, compensation, and other employment benefits. Essentially, in these workplaces, no one is getting much of anything.

a. Flextime and Leaves in Low-Wage Settings

In 2006, the Families and Work Institute found that, for the most part, high-wage workers have greater flexibility in their work arrangements than low-wage workers.¹¹⁶ The researchers examined, among other things, the

111. See *infra* Part II.C.2.a.

112. See *id.*

113. See Cohn, *supra* note 16, at 2 (reporting that “[b]lacks (32%) are much less likely than whites (56%) to be married . . .”).

114. See Glauber, *supra* note 55, at 25–26; Hodges & Budig, *supra* note 55, at 741–42.

115. Though definitions vary, low-wage workers are generally defined as workers who cannot support a family of four above the official poverty line after working forty hours a week for fifty-two weeks in a year. Kim, *supra* note 109, at 26; see also JAMES T. BOND & ELLEN GALINSKY, WHAT WORKPLACE FLEXIBILITY IS AVAILABLE TO ENTRY-LEVEL, HOURLY EMPLOYEES? 1 (2006), available at <http://familiesandwork.org/site/research/reports/brief3.pdf> (defining low-wage workers as “those whose earnings fall in the bottom 25% of the earnings distribution”); OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, U.S. DEP’T OF HEALTH & HUMAN SERV., WHO ARE LOW-WAGE WORKERS? 1 (2009), available at <http://aspe.hhs.gov/hsp/09/lowwageworkers/rb.pdf> (defining low-wage workers as “workers age[d] 16 to 64 whose hourly wage rate is such that even if they worked full-time, full-year their annual earnings would fall below the poverty line for a family of four.”).

116. BOND & GALINSKY, *supra* note 115, at 2; see also ADVANCING WORKPLACE FLEXIBILITY, *supra* note 38, at 1 (noting that “large segments of the U.S. labor force—particularly

relative ability of employees to control their work schedules, to work from home, to elect part-time employment, and to secure paid time off for family matters, personal illness, or a sick child.¹¹⁷ The data showed that high-wage workers are more likely than low-wage workers to be offered flextime.¹¹⁸ In addition, high-wage workers are almost twice as likely to receive paid sick leave or paid time off to care for a sick child.¹¹⁹ To be sure, many low-wage workers are eligible to take leave to care for themselves, or for a parent, child, or spouse under the FMLA.¹²⁰ This leave is, however, unpaid,¹²¹ and workers compensated at or near the minimum wage generally cannot afford to use it.¹²² This means that parents in low-wage employment are less likely to

low-wage workers in various occupations and industries—continue to have limited access to flexible workplace options.”); Casper et al., *supra* note 45, at 496 (noting that higher-income workers have greater access to work-life benefits); Paquette, *supra* note 28 (referencing benefit disparities between low- and high-wage earners in the context of proposals for more paid leave); BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, EMPLOYEE BENEFITS SURVEY: LEAVE BENEFITS tbl.32 (2013), available at <http://www.bls.gov/ncs/ebs/benefits/2013/ownership/private/table21a.htm> (showing differential access to employment benefits by occupation).

117. BOND & GALINSKY, *supra* note 115, at 2.

118. *Id.* at 4. Flextime includes a broad range of practices designed to afford employees flexibility in determining their work schedules. It includes, among other things, flexible arrival and departure times, flexible scheduling of breaks, the use of lunch in exchange for early departures, banking time to secure future time off, voluntary scheduling swaps, etc.

119. The researchers found that only 39% of low-wage workers had paid sick leave and 61% of these workers had none. *Id.* By contrast, 79% of high-wage workers had a least some paid time off for personal illness, while only 21% did not. *Id.* In addition, only one-quarter (24%) of low-wage employed parents were allowed time off to care for a sick child without losing pay while three-quarters (76%) were not allowed any paid time off for this purpose. *Id.* at 5. By contrast, more than half (54%) of high-wage employed parents were allowed a few days off to care for sick children without losing pay or having to use vacations days. *Id.*

120. 29 U.S.C. §§ 2612(a)(1)(C), (D) (2012). Fifty-nine percent of the U.S. labor force, or approximately 90 million workers, are eligible to be covered by the FMLA. See JACOB ALEX KLERMAN ET AL., ABT ASSOCIATES, INC., FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT, at ii (2013), available at <http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf> [hereinafter FMLA TECHNICAL REPORT].

121. 29 U.S.C. § 2612(c).

122. See Wen-Jui Han & Jane Waldfoegel, *Parental Leave: The Impact of Recent Legislation on Parents’ Leave Taking*, 40 DEMOGRAPHY 191, 198 (2003) (noting that financial pressures force parents to work as much as possible to provide for their children and create a disincentive to take unpaid leave, even if it means sacrificing time with their children). In recent years, a few states have enacted paid parental leave policies. See Employment Dev. Dep’t, *Paid Family Leave*, STATE OF CALIFORNIA, http://www.edd.ca.gov/disability/paid_family_leave.htm (last visited Jan. 28, 2015) (describing California’s paid family leave policy); Dep’t of Labor & Workforce Dev., *Family Leave Insurance*, STATE OF NEW JERSEY, <http://lwd.state.nj.us/labor/fli/fliindex.html> (last visited Jan. 28, 2015) (describing New Jersey’s policy); Labor Standards Div., *Rhode Island Parental and Family Medical Leave Act, Administrative Regulations*, RHODE ISLAND DEP’T OF LABOR & TRAINING, available at http://www.dlt.ri.gov/lis/pdfs/MedicalLeave_rr02.pdf (last visited Jan. 28, 2015) (describing Rhode Island’s policy).

experience a dependency advantage vis-à-vis their SWOC counterparts because low-wage employers are simply not providing as many parental benefits as their high-wage counterparts. It is reasonable to assume that if low-wage employers are not offering paid sick leave for employees themselves and for childcare, they are even less likely to provide such leave for spousal care purposes. Consequently, low-wage employees who are married are also unlikely to experience a marriage advantage regarding flextime and leaves.¹²³

*b. Compensation*¹²⁴

Married couples and parents working in low-wage settings are also more likely to be compensated at the same level as their SWOC counterparts because low-wage employers are more likely than high-wage employers to pay the same wage rate to workers within the same job category.¹²⁵ In other words, there are fewer wage disparities among low-wage workers doing the same job. Even when low-wage employees operate in multi-rate workplaces (where more than one wage is paid to workers within a job category), there

123. Interestingly, while lower-wage employees are less likely than higher-wage employees to be afforded paid sick leave (either for the employee or to care for a sick child), they are more likely to be employed in part-time positions and by employers who will permit them to shift to part-time work. BOND & GALINSKY, *supra* note 115, at 5–6. As the Family and Work Institute researchers note, this could be a mixed blessing. On the one hand, part-time work allows employees to pursue other life goals (e.g., to go to school, care for family members, travel, engage in personal hobbies, or phase into retirement). On the other hand, part-time employment tends to be associated with lower-paying occupations and industries, often resulting in less economic stability. Thus, unlike in higher-wage employment, where part-time work may be desired and affordable, in lower-wage work, full-time employment may be preferred. *Id.* at 6. In short, because of the dire economic consequences of part-time work in lower-wage employment settings, lower-wage employees who are parents or who are married are not likely to embrace or to seek out these opportunities. This again decreases any difference in the workplace conditions of these workers and their SWOC counterparts.

124. The observations in this section are limited because most studies examining the effects of marriage and parenting on wages have focused on high-wage workplaces (i.e., managerial and upper-class professions).

125. In a study of wage rate dispersion, John Buckley found that more than three-quarters of workers employed in the white-collar occupations studied were in multi-rate establishments, while fewer than half of the workers in the blue-collar occupations studied operated in such settings. John E. Buckley, *Wage Differences Among Workers in the Same Job and Establishment*, 108 MONTHLY LAB. REV. 11, 11 (1985). The remaining blue-collar workers were either the sole occupants of their positions or were paid at the same rate as others in their position. *Id.*

The lack of wage dispersion is due in part to the effects of collective bargaining and unionization. Buckley explains, “[t]he generally lower incidence of blue-collar employment in multiple-rate establishments partly mirrors the greater extent of collective bargaining among these workers than among white-collar workers . . . ‘Unions often favor the single-rate principle because it eliminates judgment-based differentials in individual pay.’” *Id.* at 12 (quoting DAVID W. BELCHER, COMPENSATION ADMINISTRATION 276 (1974)).

tends to be less wage dispersion among employees than in high-wage settings.¹²⁶ Thus, low-wage workers are less likely than high-wage workers to experience a salary boost for marriage or parenting.

c. Other Benefits

In addition to the above, low-wage workers are more likely to work for companies that offer no health care coverage.¹²⁷ In 2010, only 18% of workers in small firms earning less than \$15 an hour were covered by their employers' health plans, while more than half (53%) of higher-wage workers in small firms had such coverage.¹²⁸ In larger firms, only 47% of workers with wages under \$15 an hour had health benefits through their jobs, compared with 81% of those with higher wages.¹²⁹ Even when low-income workers have employer-sponsored health insurance, they often have difficulty paying their share of the costs.¹³⁰ Thus, with health care benefits, parents and married

126. High-wage work generally involves a broader array of duties, giving high-wage workers more opportunities to demonstrate superior performance vis-à-vis their peers. Buckley, *supra* note 125, at 12. In contrast, the range of duties in low-wage work is more limited and workers have fewer opportunities to deviate from established performance standards. *Id.* This does not mean that salary scales in low-wage employment are completely flat. While most low-wage workers are paid at or near the minimum wage, some receive higher pay in recognition of their length of service or proficiency on the job. *Id.* However, opportunities for the exercise of managerial discretion beyond these criteria are limited.

127. RUTH ROBERTSON ET AL., THE COMMONWEALTH FUND, REALIZING HEALTH REFORM'S POTENTIAL: JOBS WITHOUT BENEFITS: THE HEALTH INSURANCE CRISIS FACED BY SMALL BUSINESSES AND THEIR WORKERS 4 (2012), available at http://www.commonwealthfund.org/~media/files/publications/issue-brief/2012/oct/1640_robertson_jobs_without_benefits_small_businesses.pdf ("Low-wage workers in small and large firms were the least likely of all employees to have health benefits through their jobs"); see also THE HENRY J. KAISER FAMILY FOUNDATION, SURVEY BRIEF: LOW-WAGE WORKERS AND HEALTH CARE 2 (2008), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7804.pdf> (finding that 72% of low-wage workers in low-income households say that it is difficult for them to afford health care and health insurance); SHERRY GLIED & BISUNDEV MAHATO, THE COMMONWEALTH FUND, THE WIDENING HEALTH CARE GAP BETWEEN HIGH- AND LOW-WAGE WORKERS 2 (2008), available at http://www.commonwealthfund.org/~media/Files/Publications/Issue%20Brief/2008/May/The%20Widening%20Health%20Care%20Gap%20Between%20High%20and%20Low%20Wage%20Workers/Glied_wideninggapbetweenhighlow%20wageworkers_1129_ib%20pdf.pdf (noting that low-wage workers are less likely than high-wage workers to work for companies offering health coverage).

128. ROBERTSON ET AL., *supra* note 127, at 4.

129. *Id.*

130. SARA R. COLLINS ET AL., THE COMMONWEALTH FUND, ON THE EDGE: LOW WAGE WORKERS AND THEIR HEALTH INSURANCE COVERAGE 1 (2003), available at http://www.commonwealthfund.org/~media/files/publications/issue-brief/2003/mar/on-the-edge--low-wage-workers-and-their-health-insurance-coverage/collins_ontheedge_ib_626-pdf.pdf.

persons engaged in low-wage work are more likely to be similarly situated to their SWOC counterparts.

In summary, because low-wage employers offer few employment benefits, there are fewer disparities between parents, married couples, and SWOCs in low-wage workplaces. The marriage and dependency advantages either do not exist or are significantly reduced in these settings with regard to compensation, opportunities for flextime and leaves, and health care benefits.

Examination of the employment conditions of low-wage workers not only underscores the need to be attentive to context when considering the marriage and dependency advantages; it also casts doubt upon some of the justifications offered for the dissimilar treatment of parents, married couples, and SWOCs. As discussed in Part III.A *infra*, proponents of family-friendly policies argue that because marriage and parenting are socially valuable, society should provide incentives or a safety net for parents and married individuals. Yet, as the analysis in this Section demonstrates, these incentives and support structures are less likely to be offered to those most needing assistance (i.e., poor parents) and to those least likely to marry (i.e., poor people).¹³¹ This potentially calls into question not only the legitimacy of the offered justifications,¹³² but also the efficacy of programs designed to implement them.

2. Gender

With regard to family-friendly benefits, working fathers are situated differently than working mothers and married men are situated differently than married women. This Section explores how these differences affect the marriage and dependency advantages and the claims of SWOCs.

a. Dependency

The employment conditions of working fathers and working mothers differ significantly. As noted in Part I, fatherhood tends to increase men's salaries.¹³³ The same is not true for women; motherhood carries no salary

131. PEW RESEARCH CTR., *supra* note 15, at 11 ("In 1960, college graduates (76%) were only slightly more likely than those who never attended college (72%) to marry. By 2008, only 48% of those with a high school diploma or less were married, compared with 64% of college graduates.").

132. It could be that those arguing for family-friendly benefits have a perhaps unconscious class bias that prevents them from seeing that existing policies do not necessarily benefit persons who are socio-economically disadvantaged. It could also be that persons advocating for marital and family-friendly benefits are driven more by their own self-interests (e.g., maintaining the benefits they have) than by a general commitment to helping *all* parents and married couples.

133. See *supra* note 55.

boost.¹³⁴ Working mothers are paid less than working fathers and less than childless men and women.¹³⁵ They are also subject to more negative performance evaluations and reduced prospects for promotion.¹³⁶ These decreases in compensation and opportunities for advancement are known as the motherhood penalty or the maternal wall.¹³⁷ Numerous explanations have been offered for the motherhood penalty,¹³⁸ including: (1) mothers' reduced experience and seniority due to employment disruptions;¹³⁹ (2) lower work effort or less productivity by mothers;¹⁴⁰ (3) differences in the types of jobs mothers and nonmothers choose;¹⁴¹ and (4) unobserved heterogeneity between mothers and nonmothers.¹⁴² In recent years, scholars have also

134. See *supra* note 22.

135. See *id.*

136. See *id.*

137. See *id.* For additional analysis of the maternal wall and the ways in which gendered stereotypes harm caregivers, see Joan C. Williams et al., *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 94–99 (2003) (describing the maternal wall); see also Symposium, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 7 EMP. RTS. & EMP. POL'Y J. 287 (2003) [hereinafter *Litigating the Glass Ceiling*]. Williams notes that the maternal wall usually arises: (1) when a woman becomes pregnant; (2) when she becomes a mother; or (3) when she elects to work part time or to use a flextime arrangement. *Beyond the Maternal Wall, supra*. Importantly, she notes that men are also affected by the maternal wall when they utilize paternal leave or assume traditionally “feminine” caregiving roles. Thus, “[t]he maternal wall does not penalize people of a certain sex; it penalizes anyone who plays a certain role.” Williams et al., *supra*, at 79.

138. See Anderson et al, *supra* note 22, at 273; Budig & England, *supra* note 22, at 204, 219.

139. The idea is that time spent at home caring for children leads to employment disruptions (e.g., employment breaks, part-time employment) that reduce mothers' investments in wage-enhancing human capital. See Budig & England, *supra* note 22, at 205–06 (describing commonly offered explanations for the motherhood penalty).

140. Some argue that mothers may be less productive on the job because they are exhausted from or distracted by their childrearing duties. See Budig & England, *supra* note 22, at 206–07 (describing commonly offered explanations for the motherhood penalty). Importantly, Budig and England observe that this argument assumes “that non-mothers spend more of their nonemployment hours in leisure instead of in child care or other household work and that leisure takes less energy—thus leaving more energy for paid work.” *Id.*

141. Some have argued that women may choose jobs that are more amenable to childrearing, meaning they may trade off higher wages for jobs that are easier to combine with parenting. See Budig & England, *supra* note 22, at 207–08 (noting that “mothers may choose jobs that require less energy or that have parenting friendly characteristics, such as flexible hours, few demands for travel or weekend or evening work, on-site day care, or availability of a phone to check on children”).

142. Some have observed that there may be no causal effect between motherhood and wages and that “some of the same individual characteristics that cause lower earnings for mothers also lead to childbearing at higher rates.” Budig & England, *supra* note 22, at 210. Budig and England note that under this theory “some characteristic that is exogenous to both fertility and earnings affect both, thereby creating a correlation between earnings and the presence of children that is not causal.” *Id.* (offering, among other examples, the possibility that women with lower academic

examined the ways in which status bias and descriptive and prescriptive stereotyping¹⁴³ contribute to the penalty.¹⁴⁴ By some estimates, the motherhood penalty results in an average wage reduction of 5% per child for working mothers, after considering human capital inputs, unobserved heterogeneity, and other job characteristics.¹⁴⁵ Indeed, at least one study suggests that the motherhood penalty may account for a substantial amount of the male-female gender wage gap.¹⁴⁶

In addition to wage differences, working parents are also differently situated by gender with regard to flextime and leaves. While family-friendly employers are willing to adjust hours and to grant leaves to women for parenting purposes, they are less likely to grant such accommodations to men (and men are less likely to seek them) due, in part, to normative stereotypes about men as breadwinners and women as caregivers.¹⁴⁷ Indeed, research

skills may be more likely to have children early because “they know their career prospects are not good and thus think children will yield more satisfaction”).

143. Descriptive stereotyping, or beliefs about how women *are*, may lead an employer to conclude that women with children are less competent, less competitive, and less committed to work outside of the home. Prescriptive or normative stereotyping, or beliefs about how women *ought to be*, may cause an employer to conclude that women should not be working, but rather should be at home with their children. For additional discussion of descriptive and normative stereotyping, see Benard & Correll, *supra* note 22, at 617, 619–20.

144. For example, in testing the effects of status-based discrimination, Shelley Correll et al. found that “evaluators rated mothers as less competent and committed to paid work than nonmothers, and consequently discriminated against mothers when making hiring and salary decisions.” Correll, Benard & Paik, *supra* note 22, at 1332–33. These researchers also found that prospective employers called mothers back for interviews half as often as nonmothers. *Id.* In contrast, fathers were not disadvantaged in the hiring process. *Id.* Indeed, when compared to childless men, fathers were seen as more committed to paid work and were offered higher starting salaries. *Id.* For additional analysis of the relationship between discrimination and the motherhood penalty, see Benard & Correll, *supra* note 22, at 616, 639 (finding that prescriptive stereotyping disadvantaged mothers when they were evaluated by female study participants).

145. See Anderson et al., *supra* note 22, at 273, 282 (finding that even after considering human capital inputs and unobserved heterogeneity (which account for 55–57% of the gap in wages between women with children and those without), a 3–5% wage penalty remains and casting doubt on the notion that work effort explains the remaining wage gap); Budig & England, *supra* note 22, at 219–20 (finding a wage penalty of 7% per child for young American women, of which one-third was explained by years of past job experience and seniority). Budig and England also found that mother-friendly job characteristics explain little of the motherhood wage penalty, and suggested that discrimination or the effects of motherhood on productivity might account for the remaining 4% penalty. *Id.*

146. Glass, *supra* note 22, at 369.

147. See Tammy Allen & Joyce Russell, *Parental Leave of Absence: Some Not So Family-Friendly Implications*, 29 J. APPLIED SOC. PSYCHOL. 166, 185 (1999); Jennifer Berdahl & Sue Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. ISSUES 34, 35–81 (2013) (finding that fathers engaged in active caregiving experience more harassment and mistreatment than traditional fathers, who perform relatively little caregiving at home, and than men without children); Adam B. Butler & Amie Skattebo,

shows that married men who take parental leave may be penalized more harshly than their female counterparts.¹⁴⁸

In sum, working fathers benefit from the dependency advantage with regard to compensation. They are similarly situated to SWOCs regarding leaves and flextime as most men with children will not utilize these options (when they exist). Those who do may be penalized for doing so and if that penalty exceeds any decrease in compensation as a result of actual time away from work, then these men may be worse off than SWOCs.

In contrast, working mothers are more likely to ask for and to be granted flextime or employment leaves than SWOCs. Thus, at first glance, it appears that working mothers are better off than SWOCs because they can more readily adjust their schedules and take leaves for parenting purposes. The motherhood penalty, however, means that women will pay a price for utilizing these options.¹⁴⁹ Consequently, women with children (and men who utilize flextime and leaves) may be worse off than SWOCs to the extent that the motherhood penalty exceeds any diminution in compensation due to actual time away from work. These gendered outcomes are particularly harsh for single parents, the majority of whom are women.¹⁵⁰

Importantly, while the scope of the dependency advantage varies by gender with regard to compensation, flextime and leaves, parents (regardless of gender) still have access to health care and other benefits for their children for which SWOCs are ineligible. Thus, a question remains as to whether the overall benefits from family-friendly policies outweigh the costs that these policies impose on parents.

Regardless of whether parents experience a net loss or a net gain from family-friendly policies, a spillover problem remains for SWOCs because SWOCs are taking on additional work without necessarily receiving

What is Acceptable for Women May Not be for Men: The Effect of Family Conflicts with Work on Job-Performance Ratings, 77 J. OCCUPATIONAL & ORG. PSYCHOL. 553 (2004); Correll, *supra* note 22; Laurie Rudman & Kris Mescher, *Penalizing Men Who Request A Family Leave: Is Flexibility Stigma A Femininity Sigma?*, 69 J. SOC. ISSUES 322 (2013); Joseph A. Vandello, Vanessa E. Hettinger, Jennifer K. Bosson & Jasmine Siddiqi, *When Equal Isn't Really Equal: The Masculine Dilemma of Seeking Work Flexibility*, 69 J. SOC. ISSUES 303 (2013); Julie Holliday Wayne & Bryanne L. Cordiero, *Who is a Good Organizational Citizen? Perceptions of Male and Female Employees Who Use Family Leave*, 49 SEX ROLES 233, 241 (2003). In commenting on this outcome, Berdahl and Moon note that men who are actively engaged in caregiving may be seen as neither good men (invoking traditional notions of masculinity) nor good employers (as they are not prioritizing work over home). Berdahl & Moon, *supra*, at 358.

148. See Allen & Russell, *supra* note 147, at 177, 185; see also Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1050 (1994); Williams, *supra* note 137, at 101–02.

149. See Correll & Benard, *supra* note 22.

150. See Casey & Maldonado, *supra* note 27 (noting that more than 80% of single parents in the United States are women).

additional compensation or off-setting benefits. For example, assume that Alice and Ann are hired to work 40 hours a week, performing the same tasks, for \$1,000 a week. Two years later, Alice has a child and decides to go part time, reducing her work hours by 1/4. Her pay is subsequently reduced by 1/3, reflecting both the reduction in hours as well as the motherhood penalty. Alice may say this is penalty enough for utilizing the employer's part-time policy. Ann, however, still has a problem if the employer merely shifts Alice's extra work to Ann without increasing Ann's compensation. In a salaried situation, Ann may have to put in more time without additional compensation (as often happens when parents are on maternity or paternity leave). In an hourly pay situation, employees like Ann may have to assume additional duties within their normal work week. In other words (and as the recent recession has demonstrated), there is no guarantee that employers will give Ann more time to complete her additional duties.

b. Marital Status

Gender does not change the analysis regarding eligibility for health care and FMLA benefits for spouses. As to these benefits, both married men and married women experience a marital advantage over SWOCs. However, gender may play a substantial role when it comes to compensation. As established earlier, married men tend to have higher salaries than married women.¹⁵¹ Marriage seems to enhance men's workplace opportunities and compensation, in part because it is presumed that men have greater financial responsibilities after marrying. In contrast, marriage diminishes the employment opportunities of women because it is presumed that women are secondary breadwinners in the marital relationship or will value that relationship more than their commitment to work.¹⁵² Thus, the marital advantage applies to married men with regard to compensation. This advantage, however, does not appear to apply to, or is reduced with, married women as these women do not receive a salary premium, or as much of a premium, for being married.¹⁵³ Beyond the above, it is difficult to know what to make of the salary data that are available. In 2011, married men aged 18–

151. See *supra* note 54. Married men's salaries are also higher than those of single men and single women. *Id.*; see also U.S. CENSUS BUREAU, MARITAL STATUS – PEOPLE 18 YEARS OLD AND OVER, BY TOTAL MONEY INCOME IN 2011, WORK EXPERIENCE IN 2011, AGE, RACE, HISPANIC ORIGIN, AND SEX tbl.PINC-02 (2012), available at http://www.census.gov/hhes/www/cpstables/032012/perinc/pinc02_000.htm.

152. One cannot help but wonder what gendered stereotypes will apply to same-sex married couples. Will marriage enhance the incomes of all same-sex spouses? Will it only benefit same-sex partners who are male? Will it have no effect—or even a negative effect—due to homophobia and continued hostility towards LGBTQ persons and same-sex unions?

153. U.S. CENSUS BUREAU, *supra* note 151.

64 received the highest salaries, followed by married women, single men, and then single women.¹⁵⁴ This would suggest that married women are receiving a salary boost, but less of an increase than married men.

More nuanced empirical studies are required in order to evaluate with certainty the effects of gender on the marriage advantage when it comes to flexible work schedules, part-time work, and leaves. A few tentative observations, however, are possible. First, anecdotal reports suggest that a slight marriage advantage likely exists for both married men and married women when it comes to expectations regarding professional travel and overtime, weekend, and holiday work. As to more extensive leaves and part-time work, one suspects that because of lingering stereotypes concerning the respective “caregiving” roles of men and women, employers may be more accommodating of women who take leave to care for or be with a spouse, or who elect part-time work because they are married, than they may be of similar actions by men.¹⁵⁵ To be sure, employers may not welcome these requests from women if employers view caring for and spending time with a spouse as less important than caring for and spending time with children—especially when children are young. (Thus, the marital advantage may not be as strong as the dependency advantage.) If employers are inclined to grant women leave to attend to or be with a spouse (or simply to go part-time because they are married), then one suspects that women exercising this option may suffer something akin to a motherhood penalty.

Finally, it should be noted that the marriage advantage may not apply to women to the extent that marriage heightens the expectation (or fear) that women may become mothers.¹⁵⁶ Thus, married women of childbearing years may be at greater risk in the workplace of not being hired or promoted than either married men (who, according to gender stereotypes, need their jobs to care for their spouses and future offspring) or single men and women.¹⁵⁷

In sum, a marriage advantage likely exists for both men and women vis-à-vis SWOCs with regard to overtime, holiday work, professional travel, and other employment benefits (e.g., health care, social security, FMLA coverage

154. *Id.* It is unclear how the motherhood penalty factors into these data. Because the data reflect the salaries of all women over the course of their adult lives, it could be that the motherhood penalty is absorbed by considering the larger pool of married women (only some of whom are parents) over a longer time horizon. It could also be the case that the motherhood penalty is reflected in both the salaries of married women and single women with children.

155. Of course, the specter of the man who takes leave to care for his terminally ill spouse exists. This man may draw more sympathy than a similarly situated woman, especially if the couple has children.

156. See, e.g., Linda McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133 (2007).

157. See Correll & Benard, *supra* note 22.

for spouses). Because married men tend to earn higher salaries than married women,¹⁵⁸ the marriage advantage may be higher for married men than for married women with regard to compensation.¹⁵⁹ As for leaves and part-time arrangements, married men are similarly situated to SWOCs to the extent that both are penalized or discouraged from taking leaves or going part-time. Married women may experience a slight marital advantage over SWOCs, but that may be diminished if there is a penalty for taking leave or going part-time for spousal care or if employers accord less deference for leave time for non-parental, caregiving purposes.

3. Race

A detailed unraveling of the complex ways in which race affects the marriage and dependency advantages is impossible due to limited empirical data. A few facts, however, bear mention. First, African Americans are less likely to marry than any other race.¹⁶⁰ Thus, as a group they are less likely to experience a marriage advantage. In addition, even when they marry, African-American men experience a smaller marital wage premium than White men.¹⁶¹ Second, African Americans and Latino/as tend to earn less than

158. See U.S. CENSUS BUREAU, *supra* note 151 and accompanying text.

159. *Id.* Again, it is unclear whether married women are the same as, worse than, or even better than SWOCs with regard to compensation and the marriage advantage. If employers view married women's incomes as secondary and married women are penalized as a result (e.g., are offered salaries lower than unmarried persons), then they will be worse off than SWOCs. If, however, married women are treated like unmarried persons (e.g., they are offered the same salary as SWOCs), then they will be similarly situated to SWOCs. The fact that married women tend to earn more than both single men and single women suggests that there is a slight marriage advantage for women. *Id.*

160. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: MARITAL STATUS OF THE POPULATION BY SEX, RACE, AND HISPANIC ORIGIN 52 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0056.pdf>. In 2010, 38.8% of African Americans 18 and over were married, while 42.8% had never been married. *Id.* By contrast, in 2010, 58.9% of the White population was married, while only 24.3% had never been married. *Id.* Among the Latino and Asian populations, 53.8 and 65.5 were married, and 34.2 and 25.1, respectively, had never been married. *Id.*

161. See Philip Cohen, *Cohabitation and the Declining Marriage Premium for Men*, 29 WORK & OCCUPATIONS 346, 358 (2002) (finding that estimated declines in the marriage premium are overstated when unmarried cohabitators are included in the never married group); see also McKinley Blackburn & Sanders Korenman, *The Declining Marital-Status Earnings Differential*, 7 J. POPULATION ECON. 249 (1994) (finding a smaller marital premium for Black men); but see Loh, *supra* note 54, at 568–69, 588 (finding a larger marital premium for Black men after 1979). Scholars speculate that this lower premium reflects the fact that Black men perform a larger share of housework than their White counterparts and are less likely than White men to earn more than their wives. These differences would presumably affect household specialization (the idea that

Whites.¹⁶² Thus, to the extent that marriage and fatherhood boost the salaries of men, these statuses are likely to produce smaller gains for African-American and Latino men. Third, because African Americans are negatively stereotyped as lazy and because historically African-American families have been devalued by American society,¹⁶³ one would expect a higher motherhood penalty for African-American women and a lower fatherhood and marital wage premium for African-American men. While research supports the latter effects for African-American men,¹⁶⁴ surprisingly it does not indicate that African-American mothers experience a higher motherhood penalty.¹⁶⁵ Finally, although race will not render a person ineligible for health

women spend more time on housework and men spend more time in the labor force) which arguably enhances White men's productivity at work.

162. See U.S. CENSUS BUREAU, MONEY INCOME OF FAMILIES – NUMBER AND DISTRIBUTION BY RACE AND HISPANIC ORIGIN: 2009, at tbl.695 (2012), available at <https://www.census.gov/compendia/statab/2012/tables/12s0695.pdf>.

163. See, e.g., Nathalie Augustin, *Learnfare and Black Motherhood: The Social Construction of Deviance*, in CRITICAL RACE FEMINISM 144, 144–45 (Adrien Wing ed., 1997) (discussing cultural perspectives on the African-American population of “welfare mothers”); Dorothy Roberts, *The Value of Black Mothers’ Work*, in CRITICAL RACE FEMINISM 312 (Adrien Wing ed., 1997) (describing the negative influence of the stereotypical “image of the lazy Black welfare queen who breeds children to fatten her allowance”).

164. See Hodges & Budig, *supra* note 55, at 741 (finding that while a significant fatherhood bonus exists for all racial/ethnic groups, “fatherhood status combined with other valued characteristics of organizational masculinity produced larger bonuses among white men and sometimes Latinos, but African American men never experienced these amplifications”); Glauber, *supra* note 55, at 25 (finding that Black men receive a smaller fatherhood premium with regard to hourly wages and annual earning, but do not experience an increase in annual time spent at work). In commenting on these outcomes, researchers underscore the effects of race on notions of masculinity, fatherhood, and men’s employment opportunities. Glauber notes that “employers may be less likely to view Black fathers as committed breadwinners,” while “stereotypes about Latinos do not generally include notions of irresponsible fatherhood.” *Id.* In addition, she notes “the gender division of paid and unpaid labor is somewhat more equal in Black families, and Black men may not experience as much of an increase in their work productivity and annual work hours following the birth of a child.” *Id.*

165. It is difficult to know what to make of the data regarding race and the motherhood penalty. One study indicates that Black and Latina mothers experience smaller penalties than White women for the third child and subsequent births. See Budig & England, *supra* note 22, at 220. A more recent study suggests that Hispanic mothers, single African-American mothers, and married African-American mothers with fewer than three children do not experience a motherhood penalty. Glauber, *supra* note 22, at 958–59. The causes of these outcomes are unclear. While acknowledging the need for further research, Glauber suggests three possibilities: (1) because “motherhood and paid work have not been constructed as mutually exclusive [for African-American mothers], the birth of a child may increase African American women’s motivation for paid work;” (2) “[k]in support [regarding transportation, child care and financial assistance] may increase African American and Hispanic mothers’ motivations for and productivity at their paid work;” and (3) “[s]ingle African American women earn about 20% less than married White women, and their earnings may be so low that they cannot drop any further.” *Id.*

care and FMLA benefits, African Americans and Latino/as are disproportionately poor in the United States.¹⁶⁶ Thus, even if these benefits are available, African-American and Latino/a couples and parents may not be situated to utilize them. When combined, these factors suggest that race may diminish both the marriage and dependency advantages for African Americans and Latino/as. Much research, however, remains to be done on the intersection of race, gender, marital, and parental status.

In sum, the analysis of class, gender, and race in this Section demonstrates that any consideration of the effects of family-friendly policies on SWOCs must focus on the particular characteristics of the groups to which SWOCs are compared. Indeed, a more nuanced understanding of the ways in which SWOCs compare to others in the workplace requires that the chart set forth in Part II.B *supra* be further delineated as follows:

166. The poverty rate in the United States for African Americans and persons of Hispanic origin has consistently been approximately twice that of Whites. See SUZANNE MACARTNEY, ALEMAYEHU BISHAW & KAYLA FONTENOT, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011, at 3 (2013), available at <http://www.census.gov/prod/2013pubs/acsbr11-17.pdf>.

Dependency Advantage

| | SWOCs | Low-Income Workers | Working Mothers | Working Fathers | Parents of Color |
|-----------------------|--------------|---------------------------|------------------------|------------------------|-------------------------|
| Flexitime | No | No | Yes | No* | Depends |
| Part-time Work | No | No | Yes | No | Depends |
| Compensation | No | No | No | Yes | Depends |
| Other Benefits | No | Probably no | Yes | Yes | Depends |

Marriage Advantage

| | SWOCs | Low-Income Workers | Married Women | Married Men | People of Color |
|-----------------------|--------------|---------------------------|----------------------|--------------------|------------------------|
| Flexitime | No | No | Yes | No* | Depends |
| Part-time Work | No | No | Probably no | No | Depends |
| Compensation | No | No | Unclear | Yes | Depends |
| Other Benefits | No | Probably no | Yes | Yes | Depends |

*Although working fathers do not experience the dependency and marriage advantages regarding flexitime, as that term has traditionally been defined, they may benefit from an expectation that they not work as many weekends, holidays, and late nights, etc. in order to be with their families.

This further delineation shows that SWOCs in low-wage workplaces will be similarly situated to their co-workers who are married or with children. SWOCs are most likely to experience negative effects from family-friendly policies when they work in professional workplaces and when they are compared to working fathers and married men. In professional workplaces, SWOCs also appear to compare unfavorably to married women when it comes to compensation and to working mothers, when it comes to flextime and leaves. However, the motherhood penalty likely removes the net effect of any gains working mothers may experience from being able to utilize flextime, part-time work, and leaves. And finally, the net effects of race are unclear, but one suspects that race will diminish differences between SWOCs and African-American, and in some cases Latino/a, parents and married couples.

The level of complexity added by a consideration of class, gender, and race does not render the complaints of SWOCs toothless or too difficult to unravel. Intersectionality and anti-essentialism theories have effectively established that groups are not monolithic and individual group members will have different experiences.¹⁶⁷ Thus, a person's experience of racism will vary depending upon, among other things, that person's gender, class, sexuality, religion, and age. The same holds for SWOCs and the groups to whom they are compared. The mere fact that workers are differently situated due to race, gender, and class, and the fact that marital and parental status distinctions may be felt more keenly in some contexts than in others, do not mean that SWOCs are not disadvantaged by their single and childfree statuses. The question then becomes—does this treatment constitute unlawful discrimination, and if so, what if anything should be done about it?

III. SHOULD THE DISSIMILAR TREATMENT OF SWOCs CONSTITUTE UNLAWFUL DISCRIMINATION?

Because courts and legislatures have not addressed the question of whether the dissimilar treatment of SWOCs constitutes unlawful discrimination, the normative question of whether this dissimilar treatment *should* be viewed as a form of legally cognizable discrimination has triggered heated debate. SWOCs maintain that their dissimilar treatment ought to be illegal as it violates formal equality. They assert that they are doing the same

167. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

work (and in some cases *more* work) than their counterparts who are married or with children, and yet they receive less compensation and fewer benefits. This, SWOCs assert, is inconsistent with the principle of equal pay for equal work. On the other side, those who believe the dissimilar treatment of SWOCs is legal contend that SWOCs are not a suspect class and that any differences in treatment are justified because marriage and parenting are, among other things, socially valuable. In addition, this camp asserts that SWOCs have nothing about which to complain because while family-friendly policies may harm SWOCs in the short term, over the long term SWOCs too will benefit from these policies when they marry and become parents. This camp maintains that SWOCs who choose to remain single and childfree will reap the benefits of their extra investments of time through larger pay increases and more opportunities for promotion.

This Part evaluates each side's contentions. It begins by examining social utility justifications offered by those who maintain that the dissimilar treatment of SWOCs is, and should continue to be, legal. This Part concludes that incentivizing marriage is a dubious basis for according different pay levels and benefits to workers performing the same or similar work. In addition, while parenting is important, the critical nature of this function alone is insufficient to explain why SWOCs, who are doing the same work as parents within the workplace, are required to indirectly subsidize parenting.¹⁶⁸

In light of the above conclusions, the examination then turns to whether SWOCs should have a viable legal claim. This Part ultimately concludes that while SWOCs should not be viewed as a suspect class, they should, in some circumstances, be protected from discrimination on the basis of parental or marital status. Recognizing that SWOCs have rights, just like parents and married individuals, does not, however, mandate equal treatment of workers across the board. As both Congress and the courts have recognized, men and women are differently situated with regard to childbearing (i.e., only women bear children). Thus, workplace policies, like maternity leaves, designed to ensure that women workers are not penalized as a result of this difference are legitimate. Some family-friendly policies, however, extend beyond adjustments based upon childbearing responsibility and are based upon more general assumptions about the needs of married couples and working parents. These policies are more troubling because they cover a potentially broad

168. My examination of this issue benefitted greatly from previous analyses done by Mary Anne Case, Katherine Franke, and Martha Fineman. See Case, *supra* note 8; Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (1999).

swath. In addition, they involve implicit assumptions about the personal activities of SWOCs and risk perpetuating the notion that the people and activities in a SWOC's life are not as important as the people and activities in the lives of married couples or parents. To avoid these assumptions, to the extent that family-friendly policies are directed at "family-care" or childcare, this Part maintains that they should be broadened where possible to include comparable provisions for SWOCs. If they are not, then SWOCs should have a legal claim.

At the outset, it should be noted that some would argue that reproduction is not a social good, given our overcrowded planet and the effects of population growth on the environment. According to this view, having children when one has the means to do otherwise is overall socially negative.¹⁶⁹ Thus, encouraging reproduction (or making the consequences of reproduction easier for parents) is bad policy. This view is very provocative because it suggests that instead of being congratulated, parents should be berated, or at least not rewarded, for their poor decision making. Regardless of what one thinks of the merits of this view, it does not address the question of what society owes children once they, through no fault of their own, are here. It is from this vantage—recognizing that society has some responsibility for children—that this Part considers social utility arguments regarding parenting.

A. *Social Utility Arguments*

1. The Social Value of Parenting and Marriage

Several arguments are employed to justify the dissimilar treatment of SWOCs. Regarding parental status, the argument usually proceeds in two steps. First, it is asserted that parents and nonparents are differently situated because parenting involves costs that nonparents do not incur. Raising healthy and well-adjusted children to adulthood requires that children be fed, clothed, educated, emotionally nourished, and otherwise cared for. Because these tasks are expensive and time consuming, it is contended that parents merit higher salaries, greater benefits, and other family-related accommodations.

Because the cost argument cannot stand alone (as demonstrated in Part III.A.2 *infra*), it is usually coupled with an assertion that parenting is socially

169. Those propounding this view assert that one need not worry that the human species will become extinct because, in many societies worldwide, people have no access to birth control. Thus, these societies will provide the new bodies required to keep the species going.

valuable. Today's children are tomorrow's leaders, workers, innovators, and perhaps most critically, funders of Social Security and Medicare. Moreover, parenting is an essential part of a child's socialization,¹⁷⁰ and indeed it may be the most important vehicle for transmitting cultural values and principles to the next generation. Because parenting produces positive externalities that ultimately inure to the benefit of everyone in society, many contend that society at large, including SWOCs, should bear some of the costs.

A similar argument is made to justify workplace accommodations and benefits that are distributed on the basis of marital status. Indeed, the view that marriage is socially desirable, and will make people healthier, happier, better adjusted, more productive, and less dependent on the public purse is so deeply entrenched in the United States that some Americans may not be consciously aware of its existence.¹⁷¹ This view is expressed in Supreme Court cases¹⁷² and in legislation.¹⁷³ It is also reflected in the unstated, and loaded, assumption that single people, particularly women, are marking time

170. See generally McClain, *supra* note 21.

171. See ELIZABETH ABBOTT, A HISTORY OF MARRIAGE 367–72 (2010) (discussing marriage and various public policies). See generally STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE (2005) (examining the historical evolution of marriage in the United States and Western Europe).

172. For example, as far back as 1888, in *Maynard v. Hill* the Court stated that marriage is “the most important relation in life” and “the foundation of the family and of society, without which there would be neither civilization nor progress.” 125 U.S. 190, 211 (1888). In *Skinner v. Oklahoma*, the Court characterized marriage as “fundamental to the very existence and survival of the race.” 316 U.S. 535, 541 (1942). In *Griswold v. Connecticut*, the Court determined that the right to marry was part of the fundamental right of privacy implicit in the Fourteenth Amendment's Due Process Clause, stating:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

381 U.S. 479, 486 (1965). And, in *Loving v. Virginia*, the Court stated that “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” 388 U.S. 1, 12 (1967).

173. See, e.g., Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2012), *invalidated in part by* United States v. Windsor, 133 S. Ct. 2675 (2013) (defining marriage as between a man and a woman); Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) §401, 42 U.S.C. § 601(a)(2) (2012) (allowing states to use government funds to end dependency by promoting work and marriage). Although the Supreme Court recently held that parts of DOMA are unconstitutional in *Windsor*, my argument here is that the mere fact that Congress saw fit to pass federal legislation to protect marriage underscores this country's social investment in this institution. To be sure, the primary goal of DOMA supporters seemed to be “protecting” heterosexual marriage and promoting the idea that homosexuality is undesirable.

waiting for “the one” to “complete them.”¹⁷⁴ As social psychologist Bella DePaulo points out, this assumption is apparent in statements like “You are 28, you don’t have kids, and you are not married? . . . I can’t understand why you can’t find someone,”¹⁷⁵ or questions like “So, why are you single?” DePaulo correctly observes that these statements “in [their] parallel form, would be considered entirely inappropriate, ludicrous, or insulting if turned on the asker (‘So, why are you married?’).”¹⁷⁶

In addition to producing greater happiness and overall well-being for its participants, marriage proponents argue that marriage is good for social reproduction and for children. This assumes, of course, that (1) marriage leads to children and (2) that children can only thrive, or thrive best, in traditional two-parent households.¹⁷⁷

2. Why Social Utility Arguments are Unpersuasive

a. Parenting

Few would doubt that parenting is expensive,¹⁷⁸ time consuming, and valuable. Indeed, few would dispute that parenting is one of the more important obligations a person can undertake. These facts alone, however, do not explain why SWOCs should be required to subsidize parenting in the workplace. Importantly, the key considerations are neither the scale of the parental obligation (in terms of time and resources) nor its consequences. The weight and value of parenting, as a general matter, are not contested. Rather, the critical issue is when and to what extent others—and for purposes of this analysis, co-workers—should be required to share the costs of parenting.

In the employment context, the cost argument on its own is unpersuasive. Simply stated, an individual’s decision to reproduce should not influence the level at which he is compensated vis-à-vis others doing the same work. For example, if Sam Smith chooses to live in Newport Beach, California and to

174. As noted in the Introduction, one suspects that this attitude is decreasing. *See supra* note 15.

175. SINGLISM, *supra* note 12, at 54.

176. *Id.* at 14.

177. For discussion of whether children can only thrive—or thrive best—in traditional two-parent households, see *infra* notes 213–214.

178. According to the U.S. Department of Agriculture, on average, a middle-income family can expect to spend approximately \$245,340 (or \$304,480 adjusted for inflation) to raise a child born in 2013 to the age of 18. This breaks down to approximately \$12,800–\$14,970 per child per year for a two-parent household with earnings between \$61,530–\$106,540. U.S. DEP’T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2013, at 10, 26 (2014), *available at* http://www.cnpp.usda.gov/sites/default/files/expenditures_on_children_by_families/crc2013.pdf.

drive a Lamborghini, that alone would not justify paying Sam a higher salary or greater benefits than others in the workplace who are doing the same or substantially similar work and who may have chosen a less elaborate and less expensive lifestyle. If Sam's personal choices cannot justify a higher salary, then neither can the decision to have a child.

To be sure, many will assert that Sam's lifestyle is unlikely to produce societal benefits in the same way that parenting does. Indeed, Martha Fineman makes this claim in response to a similar hypothetical involving a Porsche. She notes, "I hope the society-preserving nature of children helps to distinguish that preference from the whim of the auto fan."¹⁷⁹ Putting aside for the moment the question of whether Sam's preference should be characterized as a mere "whim" (an issue addressed below), one can readily invoke other scenarios which challenge the primacy of parenting based on its social benefits. Suppose, for example, that a childfree employee needs to financially assist a sibling who has lost his job, or that this employee elects to financially support a community center in a low-income neighborhood.¹⁸⁰ These are socially valuable, society-preserving activities. Indeed, depending upon the child and the parent (not all children produce positive externalities and not all adults are good parents), the sibling/donor's activities may produce more socially valuable consequences than parenting. Should this employee now receive additional compensation because of her heightened financial responsibilities? The point is that employees engage in many socially valuable activities outside of the workplace. Merely asserting that parenting should be subsidized because it may produce positive consequences does not explain why parenting should be elevated above these other socially valuable activities. Even if one can get beyond the why question, there remains a question regarding how much society should subsidize childrearing, and through what mechanism that subsidization should occur. Few would contend that employers should implement a family wage (i.e., a salary supplement that is automatically given to all workers for each child they produce) because children produce social benefits. But, what short of that action is required?

Professor Katherine Franke and Professor Mary Ann Case have raised similar concerns about the notion that parenting should be subsidized because

179. Fineman, *supra* note 168, at 21 n.15.

180. One can also posit scenarios that involve time costs instead of direct financial costs. For example, consider a childfree person who wishes to take time off twice a week to volunteer at a homeless shelter or a vocational training center. Because this activity is time consuming and socially beneficial, should the employee be granted additional time off?

children are a “public good.”¹⁸¹ In response to Professor Fineman, Professor Franke argues that “the normative distinction that sets up the altruism of mothers against the selfishness of Porsche drivers” confuses “the social effect of a practice and an individual’s motivation for engaging in the practice,” and offers an “impoverished account of the meanings of and relationships between social production, social reproduction, and consumption.”¹⁸² While acknowledging that society reproduces itself through biological reproduction, Franke asserts that it also reproduces itself through consumptive activities, which are both constitutive of identity and productive. For example, she notes that “[o]ne gains social status from using a gold card, carrying shopping bags from exclusive stores, and wearing brand names on the outside of your clothing.”¹⁸³ She observes that some LGBT persons and other users of the rainbow credit card believe they are “building community” and are “promot[ing] the idea that personal consumption is an effective mode of political participation”¹⁸⁴ by using the card. Similarly, she notes that “African Americans are urged to build the Black community by buying Black.”¹⁸⁵ In these ways, she argues “consumption ‘becomes the site and structure’ through which the community enacts [and produces] its very existence.”¹⁸⁶

In addition to challenging Fineman’s seeming dismissal of consumption as a form of social reproduction, Franke also takes issue with whether social preservation accurately explains how women experience reproduction and parenting. She notes that social preservation and producing positive externalities for society are not the justifications usually articulated by individuals contemplating reproduction. Quoting Professor Carol Sanger, Franke notes, “[w]omen have children because they love them or the idea of them, to keep a marriage together, to meet social, spousal or parental expectation, to experience pregnancy, or to pass on the family name, genes, or silver [S]ometimes children are conceived for the benefit of existing children: to keep someone from being an only child,”¹⁸⁷ or, Franke adds, “to

181. By “public good” I mean only to indicate that children produce benefits to the larger society. I do not use the term in the way it is employed in economics literature—that is, to reference something that is both non-excludable (meaning others cannot be prevented from using it) and non-rivalrous (in the sense that one person’s use or enjoyment of it does not decrease the use or enjoyment of another).

182. Franke, *supra* note 168, at 188.

183. *Id.* at 189.

184. *Id.* at 189–90.

185. *Id.* at 190.

186. *Id.*

187. *Id.* (quoting Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN’S STUD. 15, 48 (1992)).

provide bone marrow to a dying sibling.”¹⁸⁸ Franke concludes that “[t]o portray mothering as purely altruistic, other-regarding, and socially valuable, and sports car ownership as purely selfish and socially inconsequential, is to ignore the complex interactions between production, reproduction, and consumption, as well as the social forces that govern the ‘choices’ and priorities we set in our own lives.”¹⁸⁹

Like Franke, Professor Case also takes issue with the argument that parenting should be indirectly subsidized in the workplace because of its potential to produce positive externalities. She notes that numerous conceptual questions must be addressed before the public good argument can justify unequal employment terms and conditions for workers doing the same job. First, Case asks, precisely what is the public good to which children are contributing and how is it to be measured?¹⁹⁰ Second, if nonparents are to subsidize parenting, then what is the goal? Is it to hold parents “harmless in time and money from their decision to have children . . . to hold constant the amount of non-child-centered leisure and disposable income net of child-related expenses as between otherwise similarly situated parents and nonparents?”¹⁹¹ If parents are not to escape completely the financial and leisure costs of parenting, then how much time and how much money must society contribute?¹⁹² As Case points out, “[t]here is a vast spectrum between concluding that having children should not leave parents utterly bereft of time, money, energy, or career opportunity and concluding that parents should suffer no costs whatsoever along any of these dimensions as a result of their decision to have children. Where on that spectrum should we as a society be aiming?”¹⁹³

The above analysis is further complicated by the fact that the public, which includes SWOCs, is already subsidizing the costs of childrearing, by some estimates at a rate of 38%.¹⁹⁴ As Case notes, it is not clear in strictly financial

188. *Id.*

189. *Id.* at 190–91.

190. Case, *supra* note 8, at 1775.

191. *Id.* at 1771.

192. Professor Case poses the question more colorfully by asking, “[h]ow much time is enough time? How much money is enough money?” *Id.* at 1772.

193. *Id.*

194. Robert Haveman & Barbara Wolfe, *The Determinants of Children’s Attainments: A Review of Methods and Findings*, 33 J. ECON. LITERATURE 1829 (1995). Haveman and Wolfe estimate that in 1992, the costs for the nation’s 66.5 million children (those aged 0–18) was about \$899 billion. Of that amount, the public share totaled approximately \$333 billion, including approximately \$236 billion on education (excluding expenditures on higher education) and \$63 billion on transfer programs targeted at children in low-income families. The authors estimate that the average annual total costs per child were approximately \$13,500, of which about 35% were public expenditures.

terms that this is an investment for which the public will receive a return as “some children may not produce positive externalities in excess of this; indeed, some will produce net negative externalities.”¹⁹⁵ Given the above, she asks, what more does society owe parents? Perhaps more central to the present analysis, to the extent there are societal benefits from parenting, should the costs of these benefits be borne by the SWOC in the office next door or by the public more generally? In other words, how and through what mechanism should these costs be measured and allocated?

At this point, many people would argue that children are at stake and that the United States does not offer nearly enough support for too many of this nation’s children. As noted in the Introduction, this is a legitimate concern. It is unfortunately true that the United States lags behind most developed democracies in terms of public support for children.¹⁹⁶ This state of affairs is abysmal and regrettable. The issue being raised in this Article, however, is not whether the U.S. public as a whole should offer more support for children. It should. Rather the issue here is about the means through which that social welfare exchange takes place. Should it occur within the workplace, where SWOCs bear a higher percentage of the costs and operate at the whim of particular employers without any external checks or controls? Or should the transfer occur through more public systems (e.g., taxes, and specific governmental allocations for public education, childcare, healthcare, etc.) that have been carefully debated and to which all citizens (parents, married couples, and SWOCs) must contribute? In addition, it is important to distinguish between providing additional workplace accommodations and benefits to parents to offset the general costs of parenting and spending public funds in, as Case says, “carefully controlled and monitorable ways” to provide specifically delineated services for children (e.g., education, healthcare, food, shelter, parks, etc.).¹⁹⁷

Of course, it is unlikely that the United States will allocate more public resources for children in the near future. Thus, many will argue that Americans must make do with the system that is in place, albeit imperfect,

195. Case, *supra* note 8, at 1775.

196. See generally Casey & Maldonado, *supra* note 27.

197. See Case, *supra* note 8, at 1785 (stating that “[f]raming public responsibility for children and their care as a stop-loss possibility, as a need to reduce negative externalities from (some) reproductive activities rather than to compensate parents for positive externalities has . . . a great deal more purchase.”). Franke makes a similar argument when she points out that while “there is an enormous public interest in the labor performed by mothers—children remain the private property of their parents . . . [Thus, w]e have delegated to the private parties the task of producing and raising the next generation, and we have done so in the absence of any public accountability for what kinds of people this public service produces.” Franke, *supra* note 168, at 191–92.

and help as many children as possible. That argument assumes, however, that the present system is the best that can be devised. It avoids the hard task of looking at the costs of this system on SWOCs and asking if those costs can be minimized while simultaneously assuring that working parents have all—or at least much—of what they need.

In addition, as suggested earlier, one must also consider other activities with societal benefits that may be sacrificed if the concerns of SWOCs are dismissed. Undoubtedly, parenting is important. But so too is furthering one's education, volunteering with a homeless shelter, or working with other community organizations. Moreover, nonparents perform important caregiving functions for friends, siblings, neighbors, and other people's children, among others.¹⁹⁸ It is an open question as to whether these other activities, many of which produce significant societal benefits, should be automatically subordinate to parenting (and marriage).

Without attention to the types of questions raised in this Section, there is a dangerous problem of creep. Parenting becomes a justification for all sorts of employment accommodations (some compelling, and some less so) without attention to the costs of these accommodations on others and without sufficient concern or conversation about whether others should be shouldering these responsibilities. For example, while few SWOCs will question the legitimacy of maternity leaves or time off to attend to a sick child, some might question an implicit assumption that parents ought not be subject to geographic relocation, should not be assigned afternoon or evening shifts, should not have to attend early morning or evening meetings, should be able to work from home, should be able to leave in the middle of the afternoon for swim meets or soccer games, etc., simply because they are parents. This prioritization of parenthood is not only potentially dangerous for parents (who may feel pressured to be SuperMoms and SuperDads), and harmful to SWOCs (by reinforcing the stereotype that they have no socially valuable relationships, commitments, and activities), but as discussed further in Part VI, it has consequences for extant notions of community and the ways in which non-parental and non-spousal relationships are viewed.

Finally, it is worth noting that both Case and Franke reject the suggestion that American workers should subsidize parenting and encourage biological reproduction in order to create a future generation of workers to support the aging population.¹⁹⁹ Both scholars contend that there are alternative ways to

198. See Casper et al., *supra* note 45, at 482 (citing study showing that 35% of singles believed that their employers perceived their non-work responsibilities as unimportant, even though many singles provided financial assistance (65%) or direct care to extended family and friends (24%) or pets (57%).

199. See Case, *supra* note 8, at 1775–79; Franke, *supra* note 168, at 193.

address this matter without further burdening childfree workers. For example, Franke observes, “[t]he need to maintain a certain corps of tax-paying workers could be met through manipulation of our immigration laws—as we have done in the past to meet demand in particular sectors of the economy.”²⁰⁰ Case makes a similar observation, noting “if all we are looking for is a new generation of workers to pay my generation’s social security, it may be cheaper to import them as adults than to raise them at home.”²⁰¹ She adds that another flaw with the future workers argument is it underestimates the ways in which SWOCs subsidize parents by funding social security payments to dependent spouses. She notes:

[t]hese payments are funded, in part, by contributions from those without dependent spouses. While some of those dependent spouses have never raised a child, the bulk of them are the classic homemaker/secondary earner spouse. The system may have many flaws, but free riding by the childless on parents is the least of them.²⁰²

In sum, parenting is no doubt important. Yet, as this Section has demonstrated, that argument alone does not explain why parenting should be elevated over other socially important activities and relationships. In addition, a general observation about the importance of parenting does little to assist with determining to what extent nonparents should be required to subsidize parenting and through what mechanism that subsidization ought to occur.

b. Marriage

The marriage-as-a-public-good justification has less traction than the parenting as a public good assertion. Central to this asserted rationale for the dissimilar treatment of SWOCs are the benefits of marriage. As Professor Martha Fineman’s work demonstrates,²⁰³ marriage can potentially serve multiple functions. For individuals:

[M]arriage can be experienced as: a legal tie, a symbol of commitment, a privileged sexual affiliation, a relationship of hierarchy and subordination, a means of self-fulfillment, a societal construct, a cultural phenomenon, a religious mandate, an economic relationship, a preferred reproductive unit, a way to ensure against

200. Franke, *supra* note 168, at 193. Franke adds, “[w]ith the impending bulge in demand on the social security system precipitated by the retirement of baby boomers, more than a few policymakers have suggested that an increase in legal immigration for higher-skilled workers will replenish the system during a period of excessive demand.” *Id.*

201. Case, *supra* note 8, at 1774.

202. *Id.* at 1775–76.

203. Martha Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239 (2001).

poverty and dependency, a romantic ideal, a natural or divined connection, a stand-in for morality, a status, or a contractual relationship.

Fineman notes that marriage also serves societal functions, observing:

From the state's perspective, marriage may mean the imposition of order—necessary for record-keeping purposes (e.g., to facilitate property transfers at death). Marriage may also be viewed to provide order in a different context. It has been argued that marriage is the preferred method of containing and harnessing [male] sexuality in the interests of the larger society. Marriage can reflect the moral or religious convention of a society—a symbolic function. Marriage can also be the site where essential reproductive tasks are preformed [sic] for society. Society must reproduce itself both through the production of children and the educating and disciplining of those children into workers, voters, and productive citizens—tasks traditionally undertaken by the marital family. In this way, marriage can also be seen as serving society by taking care of the dependency and vulnerability of some members of the marital family. Finally, marriage can be the mechanism through which society distributes and delivers social goods to its citizens.²⁰⁴

Examining all of these potential meanings is beyond the scope of this Article. It is worth noting, however, that the notion that marriage makes people healthier and happier is debatable given high divorce rates²⁰⁵ and a decreasing number of first-time marriages.²⁰⁶ Indeed, though the matter is highly contested, social scientists have found that when married people are compared to people who have always been single, the differences in happiness levels are quite small and “always single people do not, on average, fit the stereotype of being lonely and miserable.”²⁰⁷

204. *Id.* at 242–43.

205. See PEW RESEARCH CTR., *supra* note 15, at 1 (noting that the share of divorced or separated persons nearly tripled from 5% in 1960 to 14% in 2008).

206. *Id.*

207. DePaulo and Morris argue that studies suggesting that married individuals are happier than singles are methodologically flawed because the single, married, and previously married people surveyed were all different people. Thus, “the people who stayed married may have been happier than the other people even before they got married.” In addition, some of the studies used to support that marriage makes people happier only compared happily married people to all single people. The former would only include people who stayed married, while the latter would include people who had never married, as well as those who were widowed or divorced. As DePaulo and Morris note, “[d]rawing conclusions based on analysis of only successful cases (happily married people) while ignoring failures (divorced or unhappy marriages) is problematic.” Bella M. DePaulo & Wendy L. Morris, *Singles in Society and in Science*, 16 PSYCHOL. INQUIRY 57–83 (2005); see also SINGLED OUT, *supra* note 19, at 28–61; Richard Lucas et al., *Reexamining*

As for the societal functions of marriage, while at one time strong connections may have existed between economic security, sex, biological reproduction, and marriage, those connections have become more attenuated. Today, more women work outside the home²⁰⁸ and are economically independent than at any point in this country's history.²⁰⁹ Advances in reproductive technologies and shifting societal mores mean that more people

Adaptation and the Set Point Model of Happiness: Reactions to Changes in Marital Status, 84 J. PERSONALITY & SOC. PSYCHOL. 527, 527 (2003).

208. See PEW RESEARCH CTR., *supra* note 15, at 6 (noting that in 1960, women were 33% of the U.S. labor force; in 2009 that number was 47%).

209. Women have made significant strides in education and in the professions. In 2009–2010, women outnumbered men in colleges and in graduate schools, earning approximately 57–58% of all bachelor's degrees and 60% of all master's degrees. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *THE CONDITION OF EDUCATION 2014*, at 112 (2012), *available at* <http://nces.ed.gov/pubs2014/2014083.pdf>; *Women Make Significant Gains in the Workplace and Educational Attainment, but Lag in Pay*, PEW RESEARCH CTR. (Mar. 8, 2013), <http://www.pewresearch.org/daily-number/women-make-significant-gains-in-the-workplace-and-educational-attainment-but-lag-in-pay/>; *The Rise of Women: Seven Charts Showing Women's Rapid Gains in Educational Achievement*, RUSSELL SAGE FOUND. (Feb. 21, 2013), <http://www.russellsage.org/blog/rise-women-seven-charts-showing-womens-rapid-gains-educational-achievement>. In 2010, women held 51.4% of all managerial and professional positions, "up from 26.1[%] in 1980." U.S. BUREAU OF LABOR STATISTICS, REPORT 1040, *WOMEN IN THE LABOR FORCE: A DATABOOK 2* (2013), *available at* <http://www.bls.gov/cps/wlf-databook-2012.pdf>; Hanna Rosin, *The End of Men*, ATLANTIC, <http://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/8135> (June 8, 2010, 9:00 AM) (citation omitted). Although the glass and marble ceilings have yet to shatter, the percentage of female doctors, lawyers, accountants, professors, U.S. senators, representatives, governors, and Forbes 500 CEOs has increased significantly. See RUSSELL SAGE FOUND., *supra* (examining the increase in professional degrees awarded to women); Bryce Covert, *The Record-Breaking Number of Women in CEO Jobs is Still Pretty Pitiful*, THINK PROGRESS (Sept. 22, 2014), <http://thinkprogress.org/economy/2014/09/22/3570450/women-ceo-highest-share/>; Alissa Scheller, *The 114th Congress Is One of the Most Diverse Ever, and That's Kinda Pathetic*, HUFFINGTON POST (Jan. 1, 2015), http://www.huffingtonpost.com/2015/01/07/most-diverse-congress_n_6430840.html (noting that Congressional diversity is still not representative of the American population); Press Release, Ctr. for American Women & Politics, Engleton Institute of Politics, 2014: Not a Landmark Year for Women, Despite Some Notable Firsts (Nov. 5, 2014), *available at* http://cawp.rutgers.edu/press_room/news/documents/PressRelease_11-05-14-electionresults.pdf (examining the number of women in Congress). In addition, although women in the aggregate still earn on average only about 80 cents on the dollar to what a similarly situated man earns, women's wages have increased over time. *Women's Earnings as a Percent of Men's in 2010*, BLS.GOV (Jan. 10, 2012), http://www.bls.gov/opub/ted/2012/ted_20120110.htm. Women's earnings increased 44% from 1970 to 2007, compared with a 6% growth rate for men. RICHARD FRY & D'VERA COHN, PEW RESEARCH CTR., *WOMEN, MEN AND THE NEW ECONOMICS OF MARRIAGE* (2010), *available at* <http://pewresearch.org/pubs/1466/economics-marriage-rise-of-wives>. Moreover, "when analyzing the incomes of single women in their 20s compared to single men in their 20s, women earn 105% of what their male counterparts earn in the average metropolitan market. That percentage approaches 120 in certain cities with a heavily knowledge-driven employment base." James Chung & Sally Johnstone, *A Glimpse into the Postcrash Environment*, URBAN LAND, Mar./Apr. 2010, at 44.

freely engage in sex outside of marriage as well.²¹⁰ The stigma associated with single parenthood, though still present,²¹¹ is less than it once was.²¹² And, despite popular assumptions, the notion that marriage produces better outcomes for children than other less traditional family arrangements is heavily disputed.²¹³ Undoubtedly children need and deserve healthy, stable, and nurturing environments, and marriage may advance these objectives.²¹⁴ But, as one commentator has noted, “stable loving homes come in different forms. Rather than trying to support children indirectly through promoting marriage, we should support children directly through access to health care, affordable child care, and in many other ways.”²¹⁵

Two additional points bear mention. First, while marriage may be an efficient economic unit for handling taxes, passing property, etc., it is not clear that goods and services cannot be effectively delivered and ordered through other mechanisms without privileging marriage. This fact has been demonstrated by civil union laws—which serve to provide a degree of economic security to same-sex partners and to structure the transfer of goods and assets through a mechanism other than traditional marriage.²¹⁶ Second,

210. The number of births to unmarried women increased from 32% in the mid-1990s to 41% in 2008. PEW RESEARCH CTR., *supra* note 15, at 64.

211. This is especially true for poor women and for women of color. See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1650 (2005) (critiquing public programs designed to “civilize” poor women, especially women of color, who depend on public assistance”) (citation omitted).

212. Thus, failing to incentivize marriage will not necessarily reduce the amount of sex people enjoy or the number of children on the planet (though the latter may not necessarily be undesirable given overpopulation statistics).

213. See MARY PARKE, CTR. FOR L. & SOC. POL’Y, ARE MARRIED PARENTS REALLY BETTER FOR CHILDREN? WHAT RESEARCH SAYS ABOUT THE EFFECTS OF FAMILY STRUCTURE ON CHILD WELL-BEING, 2–3 (2003), available at http://www.clasp.org/admin/site/publications_archive/files/0128.pdf.

214. See Karen Smith Conway & Minghua Li, *Family Structure and Child Outcomes: A High Definition, Wide Angle “Snapshot”*, 10 REV. ECON. HOUSEHOLD 345, 345 (2012) (examining the impact of less common family structures, such as single fathers and grandparent-headed households, on behavioral, educational, and health outcomes); James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 118 PEDIATRICS 349, 349 (2006) (arguing for extension of civil marriage to same-sex couples, noting that “marriage can help foster financial and legal security, psychosocial stability, and an augmented sense of societal acceptance and support [for children]”).

215. Ann Schranz, *Singled Out: The Lives of Single People*, in SINGLISM, *supra* note 12, at 77; see also Fineman, *supra* note 203, at 244–45.

216. I am not suggesting that civil union laws are ideal for same-sex couples as symbolically they fail to secure treatment equal to that afforded opposite-sex couples. My point is merely that there are vehicles other than traditional marriage which can be utilized to more equitably transfer assets.

marriage has not been a bastion of glory for many of its participants.²¹⁷ Indeed, marriage as a social institution has perpetuated, normalized, and legitimized some of the worst forms of gender inequality and abuse in this country and elsewhere.²¹⁸ To be sure, there are happy marriages. But, there appears to be little justification for treating married people any worse or any better than singles in the workplace given the troubled history of marriage and given the level of doubt about whether marriage alone can serve, or best serves, the societal functions set forth above.

B. Stop Whining! Family-Friendly Policies Ultimately Benefit SWOCs

In addition to the social utility arguments set forth above, many people frequently assert that SWOCs have nothing about which to complain because any harm they experience in the short term will be redressed over the long term in one of two ways. First, SWOCs will garner additional compensation and opportunities to advance from their greater investments of time and energy in the workplace. In other words, because SWOCs are able to work longer hours and take on additional responsibilities, they are more likely than parents and married individuals to receive pay increases and promotions (e.g., a career boost). Second, SWOCs will also benefit from family-friendly policies when they marry or decide to parent. Thus, any harm SWOCs experience is temporary and present costs will be repaid with future benefits.

There are several problems with these assertions. Regarding the first argument, little empirical support exists for the proposition that SWOCs are or will be compensated in the future for the additional demands to which they are subject today. Indeed, part of the impetus for the chorus of complaints being leveled by SWOCs is that they are not being compensated for these

217. This is why I have always found it curious that the battle over sexual equality has focused on marriage. See R.A. Lenhardt, *Integrating Equal Marriage*, 81 *FORDHAM L. REV.* 761, 761–62 (2012) (arguing that the way in which the marriage equality debate has been framed could have adverse consequences for people of color and other groups that might partner with the LGBTQ community). To be sure, I understand that part of the issue is the symbolic value of marriage. To the extent that advocates for the rights of LGBTQ persons recognize that marriage confers tangible spousal benefits (e.g., regarding health insurance, social security, pension benefits, FMLA leaves, inheritance tax exemptions), then they are similarly situated to SWOCs. The only difference is some marriage equality advocates embrace marriage as an institution, while SWOCs may want to abolish it (or at least marriage-based benefits).

218. See ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* 113–20 (2012) (summarizing feminist critiques of marriage); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 *CALIF. L. REV.* 1373, 1413–42 (2000) (examining women’s historical efforts to abolish legal protections for marital rape and modern debates over marital rape exemptions); Melissa Murray, *Marriage as Punishment*, 112 *COLUM. L. REV.* 1, 1–2 (2012) (examining the use of marriage as both punishment and cure for the crime of seduction).

demands. To test the validity of the career boost argument, one would need to compare over time the hours worked, compensation levels, and promotion rates of SWOCs to the hours worked, compensation levels, and promotion rates of married employees and parents who utilize family-friendly policies. Research for this Article uncovered no such longitudinal studies. The salary data that are available do not indicate that the compensation rates of singles as a group increase as they age when compared to the compensation rates of married employees.²¹⁹ To be sure, there are prominent SWOCs who have extraordinary achievements (e.g., Oprah Winfrey, Sonia Sotomayor, Elena Kagan, Condoleezza Rice, and Tyra Banks). Yet, there are many married individuals or persons with children who have similar achievements (e.g., Katie Couric, Meredith Vieira, Nancy Pelosi, Hillary Clinton, Ruth Bader Ginsburg, Madeleine Albright, Kathleen Sebelius, and Elizabeth Warren). It could be said that the former group had an easier time reaching the top than the latter group because they were not hindered by family responsibilities. Yet, this buys in to the very assumption being challenged by this Article (that absent a spouse or child, SWOCs have no meaningful social commitments, relationships, or other constraints on their time). In short, while more systematic empirical data would be helpful, it does not appear that SWOCs are disproportionately represented in the highest echelons of American society or that SWOCs are benefiting from their greater expenditure of time in the workplace.

In addition to the above, the career boost argument does not address the larger question of whether it is fair to impose additional, unrequested work on SWOCs because they are not married and do not have children. To be sure, some SWOCs (like many non-SWOCs) are driven by professional ambition and may choose to spend the entirety of their lives in the office. These workers may welcome additional workplace responsibilities. But, some SWOCs may value other life activities (e.g., volunteer work, time with family and friends, solitude) and may prefer not to spend every minute working. A critical question thus becomes, should these workers nonetheless be required to do so? The career boost argument does not respond to this concern.

The second argument—SWOCs too will benefit when they marry and parent—is equally unavailing as many SWOCs will not marry and will not

219. According to the most recent U.S. Census CPS Annual Social and Economic Supplement, among 25–44 year-old full-time, year-round workers, singles who had never married made significantly less than married workers of both genders. Among the older cohort of full-time, year-round workers age 45–64, singles *still* earned less than marrieds within each gender; differences in earnings between all women and single men were not significant. U.S. CENSUS BUREAU, *supra* note 151.

parent. Indeed, as pointed out in the Introduction, today more people are deciding to remain single and childfree than at any point in recent history.²²⁰ Even those who expect to marry and to parent sometimes find that their lives work out differently.²²¹ These SWOCs will not experience the benefits of family-friendly policies in the future. The sow-now-reap-later argument also assumes that SWOCs who marry or parent will either remain with their current employer for an extended period of time or move to a workplace that is similarly family-friendly in the future. Both assumptions are questionable. First, most workers today do not spend the majority of their adult lives with one employer and indeed most spend less than five years with an employer.²²² Second, because there are substantial differences in policies and practices across workplaces, it cannot be assumed that benefits available in one employment setting will necessarily exist in another. Thus, heightened investments in one workplace may not pay off in a second workplace. For all of these reasons, a casual assertion that SWOCs will benefit over the long haul from their sacrifice is an insufficient response to their dissimilar treatment.

Given that social utility arguments fail to justify the dissimilar treatment of SWOCs, and given the failure of the future benefits argument set forth above, the question arises as to whether SWOCs should have a legal claim under existing law.

220. See *supra* notes 15–18.

221. Thus, twenty-something employees, who are assuming that they will work like crazy now and reap benefits later, need to consider how they will feel if in twenty years they are still working like crazy and reaping no benefits.

222. The Bureau of Labor Statistics reports that in January 2012, the median number of years that wage and salary workers had been with their current employer was 4.6. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYEE TENURE SUMMARY (2012), available at <http://www.bls.gov/news.release/tenure.nr0.htm>. Among men, 30% of wage and salary workers had 10 years or more of tenure with their current employer; among women, the figure was 28%. Persons born at the end of the baby boom (between 1957 and 1964) held 11.3 jobs from the ages of 18 to 46. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, NUMBER OF JOBS HELD, LABOR MARKET ACTIVITY, AND EARNINGS GROWTH AMONG THE YOUNGEST BABY BOOMERS: RESULTS FROM A LONGITUDINAL SURVEY 1 (2012), available at www.bls.gov/news.release/pdf/nlsoy.pdf. Although half of these jobs were held from age 18 to 24, there was still substantial movement even as people aged. *Id.* The BLS reports that “baby boomers held an average of 5.5 jobs while ages 18 to 24. The average fell to 3 jobs from ages 25 to 29, to 2.4 jobs from ages 30 to 34, and to 2.1 jobs from ages 35 to 39 and also from ages 40 to 46.” *Id.* Even when one adjusts for educational attainment, substantial movement still occurred. *Id.* at 2 (reporting that “[o]n average, men without a high school diploma held 13.1 jobs from ages 18 to 46, while men with a bachelor’s degree and higher held 11.4 jobs between these ages. In contrast, women without a high school diploma held an average of 10.1 jobs from ages 18 to 46, while women with a bachelor’s degree and higher held 12.2 jobs between these ages.”).

C. Legal Standards

Given the dearth of actual cases, it is unclear whether treating SWOCs differently from parents and married employees on the basis of parental or marital status will be deemed to violate federal or state law. Indeed, the answer to this question may ultimately turn on where the claim is brought and how courts interpret existing statutory provisions. This lack of clarity leaves open the larger question of whether the dissimilar treatment of SWOCs *ought* to be unlawful. This issue provides the focus of the remainder of this Part. Section III.C.1 considers arguments in favor of and against the extension of protected class status to SWOCs for purposes of constitutional analysis. It ultimately concludes that SWOCs should not be viewed as a protected class. Section III.C.2 examines statutory claims and concludes that, as an initial matter, SWOCs should receive no less protection than married couples and parents under existing statutes. This conclusion, however, does not mandate the elimination of all family-friendly policies. As pointed out in Part IV, these policies, and their disparate effects on SWOCs, are lawful when they further anti-subordination goals.

1. Protected Class Analysis

Under federal constitutional law, certain classifications are protected or deemed suspect or semi-suspect (e.g., race, national origin, sex).²²³ Governmental decisions on these bases are considered suspicious and are subject to close judicial scrutiny to ensure they are not invidiously motivated.²²⁴ A number of factors have been used in the past as gatekeepers to protected class status, including immutability, minority status, visibility, and a history of pervasive discrimination.²²⁵ In a recent law review article examining the rights of asexuals, Professor Elizabeth Emens offers a more

223. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (race); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (gender).

224. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439–42 (1985) (explaining why certain classifications are subject to strict scrutiny).

225. *See Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (using visibility, past history of discrimination, immutability, and political vulnerability to compare gender to other suspect classifications); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (using these same factors to distinguish socio-economic class). For critiques of the existing constitutional framework for determining protected class status, see Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1059 (2011); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 481–94 (2004); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 493–98 (1998).

nuanced articulation of these factors. She outlines eight criteria that have been used in determining whether to grant legal protection to a group:

- (1) identity beyond the individual's control or thought too deeply rooted to ask people to alter;
- (2) identity characterized by a visible trait or distinct behavior;
- (3) identity associated with a salient social group;
- (4) identity associated with a widely known social movement;
- (5) negative public attitudes toward the group;
- (6) limiting or demeaning stereotypes attached to the group;
- (7) history of explicit or direct legal burdens; and
- (8) history of implicit or direct legal burdens.²²⁶

Utilizing these factors, it could be argued that being single and childless are not immutable characteristics—at least in the limited sense in which that term is typically used. The decision not to marry is largely a matter of personal choice,²²⁷ at least for heterosexual couples.²²⁸ Similarly, the decision not to parent is in most cases, excepting infertility, a matter over which an individual has some control given advances in contraception methods over the last forty years. In addition, single and childfree statuses are not necessarily visible, except by the absence of a wedding ring or photographic

226. Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 377 (2014).

227. See *Maynard v. Hill*, 125 U.S. 190, 213–14 (1888). That choice may be influenced by economic circumstances, religious beliefs, citizenship, and a variety of other factors, but the decision is ultimately for the individual to make. Unlike other parts of the world, in the United States today one does not read frequent reports of people, primarily women, being forced into marriage. Indeed, under U.S. law such action would be unlawful and the resulting marriage would be void or voidable. *Marriage to Which Consent of One of Parties Was Obtained by Duress as Void or Only Voidable*, 91 A.L.R. 414 (originally published in 1934). This is of course with the exception of certain religious sects. See James C. McKinley, Jr., *Polygamist Sect Leader Convicted of Sexual Assault*, N.Y. TIMES, Nov. 5, 2009, <http://www.nytimes.com/2009/11/06/us/06polygamy.html?ref=warrensjeffs> (reporting on the conviction of Raymond Jessop); see also *Texas: Polygamist Leader Gets Life Sentence*, N.Y. TIMES Aug. 9, 2011, http://www.nytimes.com/2011/08/10/us/10brfs-POLYGAMISTLE_BRF.html?ref=warrensjeffs (reporting on the conviction of Warren Jeffs); *Colorado Woman Escapes Forced Marriage*, ARIZ. ATTORNEY GEN. (Jan. 22, 2013), <https://www.azag.gov/press-release/colorado-city-woman-escapes-forced-marriage>.

228. Marriage is subject to state restrictions. Age requirements, waiting periods, and bans on consanguinity are common. In addition, fourteen states prohibit or do not recognize marriages between same-sex couples. *Same-Sex Marriage Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx> (last updated Jan. 15, 2015).

displays of one's kids in the workplace (neither of which accurately conveys status). It could also be argued that single and childfree persons do not appear to be politically vulnerable²²⁹ or at risk of having their interests neglected by majoritarian political processes. Outside of the employment arena (and perhaps certain social circles), one would be hard pressed to identify areas where single and childfree persons have been systematically treated as a disfavored class. Finally, under Emens' formulation, SWOCs have not been identified with or actively engaged in a widely known social movement.

While these arguments are facially appealing, they ultimately are unpersuasive. As others have noted, immutability should be abandoned as a gatekeeper to protected status.²³⁰ To be sure, few would contest the unfairness of penalizing persons for traits they cannot change. The immutability theory, however, implies that decisions based on mutable traits are somehow less pernicious and therefore merit less attention, presumably because groups can escape harm by electing to change the trait. Yet, as Professor Kenji Yoshino has noted: "Jews generally can change or conceal their religion, while blacks generally cannot change or conceal their race. This surely does not make anti-Semitic legislation more legitimate than racist legislation."²³¹ By analogy, just because most SWOCs can change their marital and parental status (by getting married or parenting), it does not follow that they should do so or that

229. In *United States v. Carolene Products, Co.*, the Supreme Court suggested that it would be less deferential to congressional legislation involving politically vulnerable groups. 304 U.S. 144, 152 (1938). In footnote four of the opinion, the Court stated that its decision did not address nor decide the issue of whether "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 152 n.4. As noted earlier, singles constitute 44.1% of the adult U.S. population and are over 60% of the labor force. *See supra* notes 13–14. Of course, it seems silly to focus on sheer numbers, unless numbers are indicative of political powerlessness. Today, women constitute approximately 50.8% of the U.S. population. LINDSAY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION: 2010, at 2 tbl.1 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>. Thus, technically women are not a minority. In some states, people of color are no longer a numerical minority. Robert Longley, *Number of "Majority-Minority" States Grows*, ABOUT.COM (Aug. 2005), <http://usgovinfo.about.com/od/censusandstatistics/a/minmajpop.htm>. Yet, few would argue that legal protections for women or people of color should be eliminated. To some extent these concerns were addressed in *Frontiero v. Richardson*, when the U.S. Supreme Court expanded the conception of political powerlessness to include consideration of whether a group is underrepresented in the nation's decision making councils and lacks political influence. *See* 411 U.S. 677, 684 n.13 (1973).

230. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 503 (1994); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 9 (1994); Yoshino, *supra* note 225, at 490, 493–98 (critiquing judicial reliance on immutability and visibility).

231. Yoshino, *supra* note 225, at 505.

their dissimilar treatment in the workplace is any less objectionable.²³² And, indeed, as discussed more fully in Part VI, the suggestion that SWOCs should change their single, childless statuses includes an implicit, perhaps unconscious, belief that these statuses lack value or positive meaning for SWOCs, which often is untrue. This seems to violate prong 1 of Emens's criteria, or what has been referred to as the "new immutability," which incorporates traits that "society deems too important to ask anyone to change."²³³

Although immutability, visibility, and political salience are insufficient bases upon which to reject the extension of protected class status to SWOCs, it is still difficult to argue that SWOCs should be considered a protected class like women, or racial and religious minorities. Childlessness has not historically resulted in the exclusion of childless individuals from meaningful social, political, or economic opportunities. In short, although childfree persons are sometimes subject to negative stereotypes, there has not been the same history of discriminatory behavior on the basis of childlessness that there has been with race, sex, religion, national origin, etc. Similarly, singles have not been excluded from employment, educational, economic, and political opportunities on the same scale or to the same extent as people of color, women, religious minorities, etc. To be sure, single women above a certain age have been subject to social stigma (e.g., stereotyped as "spinsters" and "old maids"),²³⁴ and very young people (who are more likely to be single) sometimes garner a reputation for being rowdy and unruly (which may limit their access to certain goods—like housing opportunities). Yet, as Bella DePaulo acknowledges, as far as we know:

[N]o persons have ever been dragged to their death at the back of a pickup truck simply because they were single. There are no 'marrieds only' drinking fountains, and there never were. The pity that singles put up with is just not in the same league as the outright hatred conveyed to blacks by shameless racists or the unbridled disgust heaped upon gay men or lesbians by homophobes.²³⁵

232. In short, the immutability analysis misses the mark because the ability or inability of a group to avoid negative action reveals little about whether that action is legitimate and whether a group merits protection. The immutability analysis also ignores the costs of conversion, of changing one's status. As Professor Yoshino notes, change or conversion may not be a real option for those who will see the loss associated with a change of status as greater than the gains from escaping discrimination. Yoshino, *supra* note 225, at 510.

233. Emens, *supra* note 226, at 378; see also Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1412–19 (2009) (examining the "new immutability").

234. See *supra* note 87.

235. SINGLED OUT, *supra* note 19, at 10.

2. Statutory and Fundamental Rights Analysis

To conclude that SWOCs should not be a suspect or semi-suspect class for constitutional purposes does not mean that they should be subject to less legal protection than parents and married persons. The latter are not protected classes, yet they are nonetheless afforded some legal protection under both constitutional and statutory law.²³⁶ Constitutional law treats marriage²³⁷ and parental autonomy as fundamental rights.²³⁸ Under federal statutory law, the Civil Service Reform Act of 1978 prohibits federal employers from discriminating on the basis of marital status,²³⁹ and Executive Order 13152²⁴⁰ prohibits these employers from discriminating on the basis of parental status. No federal statutes bar *private* employers from discriminating on these bases.²⁴¹

In addition to the foregoing, approximately twenty states have statutes relating to marital status discrimination,²⁴² and two states prohibit

236. For additional analysis of legal protections on the basis of marital and parental status, see Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 334 (2004) (arguing that an accommodation approach, modeled after section 701(j) of Title VII, would address the needs of working parents more effectively than existing law); Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1, 4 (2000) (arguing that Title VII should be amended to include marital status as a protected category); Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569, 569 (2002) (arguing that existing legal protections for parents, which are based on formal equality, are inadequate and calling for a reasonable accommodation approach to address parental needs); John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415, 1415–16 (1991) (arguing for a more expansive, or inclusive, interpretation of marital status discrimination in order to protect the rights of unmarried same-sex and opposite-sex couples).

237. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating Virginia's anti-miscegenation statutes); see also *Zablocki v. Redhail*, 434 U.S. 374, 391 (1978) (invalidating a Wisconsin statute that prohibited persons who were behind in support obligations from marrying).

238. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

239. 5 U.S.C. § 2302(b)(1)(E) (2012). The Act protects federal employees and applicants for employment from discrimination on the basis of race, color, national origin, religion, sex, age or disability. § 2302(b)(1)(A). In addition, the Act provides that certain personnel actions cannot be based on attributes that do not affect employee performance, like marital status and political affiliation. § 2302(b)(1)(E).

240. Exec. Order No. 13,152, 3 C.F.R. 264 (2000) (amending Executive Order 11,478 of 1969 to include parental status in the list of covered categories).

241. In general, federal law bars private employers from discriminating on the basis of race, color, religion, sex, national origin, age, and disability. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–e17 (race, color, religion, sex, national origin); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–633a (age); Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (disability).

242. See ALASKA STAT. ANN. § 18.80.220 (West 2014); CAL. GOV'T CODE § 12940 (West 2014); CONN. GEN. STAT. ANN. §§ 10-153, 46a-60 (West 2014); DEL. CODE ANN. tit. 19, § 711

discrimination on the basis of parental status.²⁴³ Importantly, these statutory provisions are usually directed at protecting the rights of parents or married individuals. For example, Alaska has one of the most expansive laws in the country, including both marital status and parenthood in its general prohibition against discrimination.²⁴⁴ After the initial prohibition, however, Alaska's statute provides that "[n]otwithstanding the prohibition against employment discrimination on the basis of marital status or parenthood . . . an employer may, without violating this chapter, provide greater health and retirement benefits to employees who have a spouse or dependent children than are provided to other employees."²⁴⁵ Other states have similar exceptions to their statutory prohibitions.²⁴⁶ Thus, many of these statutes explicitly countenance the sort of dissimilar treatment about which SWOCs are complaining.

Case law is also of limited use in advancing the legal claims of SWOCs. Most marital status cases generally involve instances where a person has been subjected to harm because she is, or wants to be, married, not because she is, or wants to remain, single.²⁴⁷ That is to say, the right being protected is usually

(West 2014); FLA. STAT. ANN. § 760.10 (West 2014); HAW. REV. STAT. § 378-2 (West 2014); 775 ILL. COMP. STAT. ANN. § 5/1-102 (West 2014); IND. CODE ANN. § 20-28-10-12 (West 2014); MD. CODE ANN., STATE GOV'T § 20-606 (West 2014); MICH. COMP. LAWS ANN. § 37.2202 (West 2014); MINN. STAT. ANN. § 363A.08 (West 2014); MONT. CODE ANN. § 49-2-303 (West 2014); NEB. REV. STAT. ANN. § 48-1104 (West 2014); N.H. REV. STAT. ANN. § 354-A:7 (West 2014); N.J. STAT. ANN. § 10:5-12 (West 2014); N.M. STAT. ANN. § 28-1-7 (West 2014); N.Y. EXEC. LAW § 296 (McKinney 2014); N.D. CENT. CODE ANN. § 14-02.4-03 (West 2014); OR. REV. STAT. ANN. § 659A.030 (West 2014); VA. CODE ANN. § 2.2-3900 (West 2014); WASH. REV. CODE ANN. § 49.60.180 (West 2014); WIS. STAT. ANN. § 111.321 (West 2014).

243. ALASKA STAT. ANN. § 18.80.220(a)(1) (West 2014) (prohibiting discrimination on the basis of parental status, among other things); CONN. GEN. STAT. ANN. § 46a-60(a)(9) (West 2014) (prohibiting "an employer . . . to request or require information from an employee, person seeking employment . . . relating to . . . the individual's familial responsibilities"). A number of cities and local governments have legal prohibitions in place. See ASPEN, COLO., MUNICIPAL CODE, § 15.04.570 (2013); D.C. CODE § 2-1401.01 (2014); DADE COUNTY, FLA., CODE OF ORDINANCES § 11A-1 (2014); ATLANTA, GA., CODE OF ORDINANCES, ch. 5, § 3-502 (2014); CHI., ILL., MUNICIPAL CODE § 2-160-030 (2014); HARRISBURG, PA., CODE § 4-105.1; TACOMA, WASH., MUNICIPAL CODE § 1.07.030(A).

244. ALASKA STAT. ANN. § 18.80.220(a)(1) (West 2014) (stating "it is unlawful for an employer . . . to discriminate against a person . . . in a term, condition, or privilege of employment because of the person's . . . marital status . . . or parenthood when the reasonable demands of the position do not require distinction on the basis of . . . marital status . . . or parenthood.").

245. *Id.* § 18.80.220(c)(1).

246. See, e.g., CAL. GOV'T CODE § 12940(a)(5)(B) (West 2014); DEL. CODE ANN. tit. 19, § 711(i) (West 2014); MONT. CODE ANN. § 49-2-303(5)(a) (West 2014).

247. Our search revealed very few cases addressing claims similar to the ones asserted by SWOCs. The closest case was *Russ v. City of Troy*, an unpublished opinion out of the state of Michigan. 2001 WL 689537 (Mich. Ct. App. Apr. 6, 2001). In that case, the plaintiff unsuccessfully sought to be promoted to the position of police sergeant. *Id.* at *1. He argued that

framed in the affirmative; the law protects an individual's right to *marry* or *to be married* without negative consequence or external interference. Cases that challenge an employer's prohibition against spouses working together (i.e., no-spouse rules) fall within this genre.²⁴⁸ Other marital status cases focus on elevating the rights of unmarried couples (e.g., people who are legally single, but socially coupled) to the same stature as married couples. Illustrative cases involve same-sex couples (in states where they are not allowed to marry) seeking to be treated the same as opposite-sex couples,²⁴⁹ or cases where a single employee has been penalized for cohabiting with a romantic partner.²⁵⁰ Importantly, in the vast majority of these cases, the primary focus has been married individuals and the socially coupled, not singles per se.²⁵¹

Similar to marital status cases, the principal concern to date in parental status cases seems to be that individuals are being harmed because they are parents, not because they are childless. Parental or family autonomy cases generally deal with attempts to interfere with a parent's determination as to how to rear her child. For example, in *Troxel v. Granville*, the U.S. Supreme Court upheld a mother's right to determine the amount of visitation time to afford paternal grandparents, observing "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their

he was not promoted because he was unmarried and that this violated Michigan's Civil Rights Act. *Id.* In reversing the trial court's grant of summary judgment to the defendant, the Michigan Court of Appeals found "there is no 'protected class' of married or unmarried people. As our Supreme Court has made clear, marital status itself is the protected class and discrimination is prohibited based on whether a person is married. Consequently, plaintiff's marital status, that being unmarried in this case, is protected by the Civil Rights Act." *Id.* at *3 (citations omitted).

248. For discussion of these cases and the disparate effects that no-spouse rules may have on women, see Porter, *supra* note 236, at 7–33. There have been cases where employers refused to hire women who were married, but these cases were struck down as an unlawful form of sex discrimination as the employer's marriage ban usually did not encompass men. See, e.g., *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199 (10th Cir. 1997); *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971).

249. For a discussion of these cases, see generally Beattie, *supra* note 236. See also *United States v. Windsor*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (discussed *supra* at notes 93–97).

250. For a discussion of these cases, see generally Beattie, *supra* note 236.

251. Outside of the employment context, there are some cases where single status appears to be more directly implicated and merits greater scrutiny in future research. These are cases dealing with adoption and fertility treatments, where married couples are given priority over single individuals. See, e.g., Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 19, 43–47 (2013); Andrea D. Gurmankin, Arthur L. Caplan & Andrea M. Braveman, *Screening Practices and Beliefs of Assisted Reproductive Technology Programs*, 83 FERTILITY & STERILITY 61 (2005); Lynn D. Wardle, *Comparative Perspectives on Adoption of Children by Cohabiting, Nonmarital Couples and Partners*, 63 ARK. L. REV. 31 (2010).

children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”²⁵² In the employment realm, parental status cases usually involve instances where an employee is harmed because employers believe or assume that family obligations will interfere with job requirements or performance.²⁵³ Both lines of cases protect the right to be a parent or to parent without negative consequence or penalty, not the right to be childless.

To be sure, much can be said for extending anti-discrimination protection to groups (e.g., married persons or parents) that have been marginalized and subject to discriminatory treatment in the past—for focusing on classes instead of classifications. Yet, this approach has been rejected in contemporary anti-discrimination law.²⁵⁴ For example, the law protects individuals against discrimination on the basis of sex and race. The former includes not just women, but also men,²⁵⁵ and the latter includes people of

252. 530 U.S. 57, 65 (2000); *see also* *Wisconsin v. Yoder*, 406 U.S. 205, 230–35 (1972) (upholding the rights of Amish parents to refuse to send their children to school after the eighth grade); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing the right of parents to teach languages other than English to their children).

253. For example, in *Phillips v. Martin Marietta Corp.*, an employer’s refusal to accept job applications from women with pre-school-aged children was found to be illegal (though the case was technically remanded for consideration of the bona fide occupational qualification defense). 400 U.S. 542, 543–44 (1971). Although the restriction in question was targeted at women who were parents, the case can be interpreted as a straightforward case of gender discrimination, not parental discrimination. The employer penalized women with pre-school-aged children, but not men with similarly aged children. Had the employer penalized all parents, then the case would look like one of parental status discrimination. For additional discussion of parental status cases in the employment context, see Smith, *supra* note 236.

References to an employee’s childless state periodically arise in cases involving sex discrimination or harassment. In these cases, the harasser or perpetrator of the discriminatory behavior views parenting as a constitutive aspect of “adulthood” or “womanhood” and seeks to punish or to disparage the plaintiff for violating this norm. *See, e.g.*, *Still v. Roberts*, No. 00-0150-CB-C, 2001 U.S. Dist. LEXIS 8751, at *9 (S.D. Ala. May 9, 2001) (sexual harassment case where plaintiff alleged, among other things, that harasser told another employee (not the plaintiff) that “she was going to be an old, wrinkled up, childless woman”); *Ponticelli v. Zurich Am. Ins. Group*, 16 F. Supp. 2d 414, 422 (S.D.N.Y. 1998) (sexual harassment claim in which the plaintiff alleged that defendant’s Assistant Vice President called plaintiff a “slut and a stupid, air head, miserable childless person”); *Redpath v. City of Overland Park*, 857 F. Supp. 1448, 1453 (D. Kansas 1994) (discrimination claim in which plaintiff alleged that fellow employees referred to plaintiff and her husband “(whose nickname was Spud) as ‘Spud’ and ‘Spudless’ because they had no children”).

254. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (in which four justices suggested that any governmental distinctions based on race, even for benign purposes, would violate equal protection principles).

255. *See, e.g.*, *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669 (1983) (male bringing sex-based challenge to employer benefits policy); *Craig v. Boren*, 429 U.S. 190 (1976) (involving a man’s challenge to a gender-based statute).

color as well as whites.²⁵⁶ Moreover, once a right has been deemed fundamental, the law has protected both affirmative and negative expressions of it. Thus, with religion, those who believe are protected as well as those who do not (i.e., atheists).²⁵⁷ By extension, if discrimination on the basis of parental status is prohibited, then the law must protect those who are parents against adverse action as well as those who are not. Similarly, marital status protections must include those who marry as well as those who do not.²⁵⁸

It is important to recognize that this demand for a baseline of equal treatment does not rest solely on the theoretical appeal of symmetrical treatment. In other words, the argument is not simply that if one protects parents one must also protect those who are childfree. Rather, the argument is based on a recognition that social relations are fluid and with changed circumstances previously unrecognized or invisible classes and statuses may become visible. If the classifications within which these classes or statuses are located (e.g., race, gender, marital and parental status) have been used as bases for discrimination in the past, then policy makers must listen to these new claimants and be open to a re-examination of existing norms and practices. This is because the classification or status itself has proven to be

256. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

257. Title VII generally prohibits discrimination on the basis of both religious belief as well as the absence of belief. See, e.g., *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1038 (10th Cir. 1993) (affirming grant of summary judgment for defendant, but recognizing that plaintiffs may bring religious discrimination claims if they were adversely treated because they did not conform to the employer's religious beliefs); *EEOC v. Townley Eng'g*, 859 F.2d 610 (9th Cir. 1988) (involving claim of atheist challenging employer's requirement of mandatory attendance at weekly devotional service); *Young v. Sw. Savings & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975) (holding that an atheist need not participate in religious activities of secular employer); *Tillery v. ATSI, Inc.*, 242 F. Supp. 2d 1051, 1058 (N.D. Ala. 2003) (reiterating that Title VII protects persons who are not members of organized religious groups as well as atheists). Establishment Clause cases are more mixed. While courts have afforded some protection to atheists, they tend to offer more protection to religious groups. Cf., *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that the Constitution prohibits states from barring those who refuse to profess a religious belief from holding office); *Greece v. Galloway*, 134 S. Ct. 1811 (2013) (allowing local clergy to open local council meeting with sectarian (Christian) prayer did not violate the First Amendment's Establishment Clause); *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding display of the Ten Commandments on the grounds of the Texas state capitol did not violate the First Amendment's Establishment Clause); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Ohio program providing vouchers to attend public and private schools, including those with religious affiliations, did not violate the First Amendment's Establishment Clause). Indeed, in a series of recent speeches, Justice Scalia has argued that the Constitution protects religion, not the absence of religious belief. See Shadee Ashtari, *Antonin Scalia Says Constitution Permits Court to 'Favor Religion Over Non-Religion'*, HUFFINGTON POST (Oct. 2, 2014), <http://www.msn.com/en-us/news/politics/antonin-scalia-says-constitution-permits-court-to-favor-religion-over-non-religion/ar-BB75vV4>.

258. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (holding the both married and unmarried persons have the right to use birth control devices).

socially salient or connected to sufficiently important rights. Applying this reasoning to SWOCs, if the underlying goal of marital and parental status protections is to allow individuals to structure their private relations with a degree of autonomy and liberty, free from external interference or control, then SWOCs make a compelling case that their dissimilar treatment in the workplace should be taken as seriously as the concerns of parents and married individuals. Their claim is not that they must be treated the same in the abstract; it is that their dissimilar treatment implicates the same core principles and values involved with the dissimilar treatment of married couples or parents. As Part VI demonstrates, the problem with the discussion of SWOCs is an absence of appreciation and respect for the negative²⁵⁹ statuses of being single or childfree. Because they are the opposite of, and potentially threatening to, prevailing norms, being single and childfree receive less respect than being married or a parent. A negative, or less common and less familiar, expression of a right does not, however, eliminate the right. To be sure, the posture and context in which the right or status is asserted matters (just as posture and context matter when white men assert discrimination claims), but they do not render the underlying claim moot.

IV. THE LIMITS OF FORMAL EQUALITY: FAMILY-FRIENDLY BENEFITS AND ANTI-SUBORDINATION THEORY

The conclusions set forth in Part III.C fit squarely within the most compelling argument for regarding the dissimilar treatment of SWOCs as unlawful discrimination: this treatment violates formal equality, and more specifically, the principle of equal pay for equal work. The Equal Pay Act (EPA),²⁶⁰ which codifies this principle, only applies to discrimination on the basis of sex.²⁶¹ In attempting to establish a legal basis for their concerns, however, SWOCs argue by analogy that if it is unfair for Tom Smith to earn more than Mary Jones, when both are performing the same job, then it is

259. Use of the word “negative” is not ideal as it can potentially imply that something is less than or inferior to something else. In this context, it is merely being used to connote the opposite of the affirmative decision to marry or to parent. To be sure, many SWOCs affirmatively decide not to parent and not to marry, while others end up single and childless by circumstance. Because society has structured marriage and parenting as the norm, being single and childfree are described in opposition to that baseline. A negative status should not be confused with a negative right, which is the right to carry on one’s activities without the interference of others. Thus, single and childfree, like marriage and parenting, implicate the negative right to structure one’s private relations without interference by others.

260. 29 U.S.C. § 206(d)(1) (2012). Passed by Congress in 1963, the Equal Pay Act forbids employers from engaging in wage discrimination on the basis of sex.

261. *Id.* (stating that the Act does not apply to “a differential based on any factor other than sex”).

equally objectionable to require that SWOCs work longer hours for less pay and fewer benefits than their counterparts who are married or with children.²⁶² Again, as pointed out in Part III.C, this argument is premised on the assertion that SWOCs' privacy, autonomy, and liberty interests in being single and childfree are as important as the interests of married couples and parents.

This argument is facially appealing and provides a good baseline from which to start the analysis. It, however, does not go far enough as it rests upon a limited conception of discrimination and a narrow reading of the EPA's history. That statute was enacted against a backdrop of widespread discrimination by employers against women. Legislation was required because women were treated as second-class citizens and were subject to unequal wages, job segregation, refusals to hire, and other forms of adverse treatment in the labor market. In response to sustained advocacy by women's groups and others, numerous statutory provisions were passed to address these conditions, including Title VII of the Civil Rights Act of 1964,²⁶³ the EPA,²⁶⁴ and the Pregnancy Discrimination Act (PDA).²⁶⁵ While a model of equal treatment was adopted in some of these statutes, a primary goal was anti-subordination—that is, a fundamental transformation of the institutional structures and belief systems that produced decreased opportunities for women. Treating women the same as men was one path to this objective, and certainly equal treatment proved effective in circumstances where employers viewed women differently from men when in fact they were similarly situated (e.g., an employer who assumed women lack the leadership skills necessary to be a police captain or who believed that women should not serve as firefighters or mechanics).²⁶⁶ While arguing for equal treatment, equality advocates also recognized that anti-subordination efforts would sometimes require that women be treated differently. Affirmative action programs were developed to redress the effects of prior discrimination and to create a more equal playing field.²⁶⁷ Maternity leave and part-time policies were also proposed in recognition of the fact that reproductive and childbearing

262. Because the EPA does not apply to differences based on factors other than sex, SWOCs would not have a claim under that statute. They could, however, use the above reasoning to advocate for passage of new legislation. The enactment of such legislation is not the goal of this Article. Rather, the primary objective is merely to raise awareness about some of the collateral consequences of family-friendly policies for SWOCs and to invite conversation among various constituencies about whether and how to ameliorate some of these effects.

263. 42 U.S.C. § 2000e (2012).

264. 29 U.S.C. § 206(d)(1) (2012).

265. 42 U.S.C. § 2000e(k).

266. Moran, *supra* note 19, at 271–72.

267. *Id.*; see, e.g., Johnson v. Transp. Agency of Santa Clara Cnty., 480 U.S. 616 (1987) (discussing gender-based voluntary affirmative action plan).

responsibilities fall disproportionately on women and limit women's employment opportunities.²⁶⁸ Thus, while U.S. law has come to embrace an equal treatment vision of discrimination, where merely treating someone differently is treated as unlawful discrimination, this has not been the sole, or perhaps even the ultimate, goal of equality activists.²⁶⁹ Their efforts were directed at achieving equity²⁷⁰ and eliminating the subordination of women, people of color, and others relegated to the margins of society.²⁷¹ It is within this larger context that one must place the concerns and arguments of SWOCs.

If one accepts anti-subordination as a key objective of anti-discrimination law, then merely treating SWOCs differently than married individuals or parents does not lead inexorably to the conclusion that unlawful discrimination is occurring. One must ask whether there is an acceptable justification for the dissimilar treatment. As noted in Part III.A.2, generalized assertions that society benefits from marriage and parenting are inadequate. Marriage is a dubious basis for allocating benefits exclusively to married couples. Stated differently, there is little justification for privileging marriage over other types of relationships. And while few would dispute that parenting is important, there are also other socially important functions, including

268. Moran, *supra* note 19, at 271–73.

269. Reasonable people will differ about whether the long-term objective of anti-discrimination law is formal equality. Certainly, some people aspire to this goal. Others have some skepticism about a goal that requires blindness to all gender differences. Indeed, ignoring gender differences in a culture that is gendered to its core seems impossible. Even the Supreme Court, whose members have advocated for formal equality under the rubric of colorblindness in the context of race, does not seem to embrace this objective when it comes to gender. Rather than ignore gender differences, one might instead hope for a society in which these differences, while recognized, are not used to disadvantage women, men, and all the people falling between these extremes. For example, recognition of the fact that only women can bear children would not lead to women's relegation to second-class work and inferior wages.

270. Equal treatment and equity are not synonymous. Treating differently situated individuals the same may produce equal treatment, but not equity. Equity is a guarantee of equal access to opportunity—of an equal playing field—and requires attention to the ways in which groups are dissimilarly situated. Thus, equity may demand the creation of remedies, like affirmative action, that redress historic barriers, like discrimination, that have prevented equal access in the first place. Similarly, equity would require that policy makers be attentive to the ways in which the treatment of pregnancy by employers has limited the opportunities of working women.

271. Unfortunately, as Rachel Moran has effectively demonstrated, the second-wave liberal feminists who led these efforts “forgot” about single women. See Moran, *supra* note 19. She notes that “liberal reformers presumed that women would marry and have children, forcing them to juggle a career and responsibilities at home. To enable women to have it all, second wave feminists pressed for increased control over reproduction, maternity leave, and government support for child care.” *Id.* at 261. Although single women benefited from some of these initiatives, Moran points out that they “remained a relatively invisible constituency systematically overshadowed by the ‘superwoman’ with a career and a family.” *Id.*

caregiving, served by individuals who are not parents. Parenting in the abstract should not be privileged over other relationships to the extent that parents automatically receive better employment terms and conditions than nonparents.²⁷² Rather, one must provide a more specific and clearer justification for this differential treatment. This Part maintains that the goal of reducing and eliminating obstacles to the employment and advancement of women provides sufficient justification. In other words, the key question that needs to be asked is whether a workplace benefit, policy, or practice is designed to increase employment opportunities for women by addressing the ways in which women as women are differently situated from others in the workplace.

With this focus, employment benefits and accommodations extended on the basis of marital status should be eliminated unless there is a comparable benefit that is available to unmarried persons. Offering higher compensation, flexible schedules, and greater benefits simply because an employee is married does not reduce limitations on the opportunities of women or serve any other legitimate purpose that cannot be furthered without dissimilarly treating employees.

Maternity leave policies, on the other hand, are presumptively legitimate. Women are uniquely capable of giving birth, and this responsibility has created an uneven playing field that has impeded women's employment opportunities. Maternity leave policies directly address this particular obstacle. In addition to maternity leave, lactation rooms and accommodations for women who experience complications associated with pregnancy (e.g., time off for bed rest, tardiness due to morning sickness)²⁷³ would also be justified under an anti-subordination approach because they are directed at

272. Certainly, there are ends served by parenting that might justify treating parents and nonparents differently in the workplace (e.g., alleviating dependency, socializing the next generation). Yet, identifying these objectives alone does not answer the hard line-drawing questions raised by Case and others, see *supra* Part III.A.2, as to what type of accommodations and benefits are required, how they are structured, and whether they should be more inclusive. For example, the need to care for those who cannot care for themselves may justify the extension of health care benefits to children, but it may not justify differential wages. Taken to an extreme, the socialization function served by parenting might justify a system that would permit parents not to work, while being compensated, if their children are under the age of majority. One suspects that few Americans, however, would subscribe to this notion.

273. This does not, however, appear to be the trend in some jurisdictions. See, e.g., *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994) (finding that termination of a pregnant woman did not violate the PDA because "employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees."). For a critique of this decision and a formal equality-based approach to gender discrimination, see Peggie Smith, *supra* note 236. The U.S. Supreme Court will address the issue in its 2014–2015 term in *Young v. United Parcel Service*, 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2892 (2014) (involving pregnant worker whose employer refused to accommodate her request not to lift heavy packages).

obstacles borne uniquely by women which directly interfere with women's employment opportunities.

On the other end of the spectrum, there appears to be no justification consistent with anti-subordination goals for things like tuition benefit programs (e.g., programs that reimburse employees for some portion of their children's college tuition at other institutions). These programs are used to recruit and retain prospective or current employees who happen to be parents. Their aim is not to avoid placing women (or parents) in the position of having to choose between a job and a family or to address the decreased workplace opportunities women experience because they are required to juggle the responsibilities of childbearing and work. Tuition benefit programs are merely added compensation for parents because they are parents. To the extent these programs are implemented to increase educational opportunities for young people consistent with the mission of institutions of higher learning, there must be better ways for educational institutions to obtain this objective,²⁷⁴ and include a broader swath of children, without in essence granting a subset of employees higher compensation than others doing the same work.

In the middle of the spectrum are part-time and flexible leave policies, which are more difficult to analyze. Parenting is hard work and important. Yet, investing in one's education and volunteering with civic organizations also involve hard work and are important. In addition, traditional parenting is not the only form of caregiving.²⁷⁵ Nonparents perform important caregiving functions for friends, family members, and other people's children, among others. Without some theory related to anti-subordination goals, it is unclear that the needs of SWOCs should be secondary to the needs of parents—or that SWOCs should be carrying more of the load when it comes to part-time and flextime arrangements.

One could argue that due to socially constructed gender roles,²⁷⁶ women bear disproportionate responsibility for not only childbearing but also for

274. For example, universities could extend their need-blind admissions programs and establish additional scholarship funds distributable on the basis of need.

275. See generally Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008); see also Casper et al., *supra* note 45.

276. In the not-so-distant past, and the present, some employers deemed women with children unfit for certain job opportunities and paid them lower wages than men in comparable positions for a number of reasons. Some feared that women would prioritize their families over their work commitments. See *Litigating the Glass Ceiling*, *supra* note 137, at 287 (describing cases in which employers thought women were less dependable due to their family obligations). Others operated out of a normative belief that women "should" stay at home with their children. See *id.* (describing cases in which employers believed that women should stay at home to take care of their families). And some believed that women were secondary breadwinners to men and consequently were less

childrearing in this country,²⁷⁷ and that part-time and flextime policies are required to reduce the negative effects of this responsibility on women's employment opportunities. Paternity leave policies thus could also be justifiable under an anti-subordination approach because affording more opportunities for men to parent could potentially change normative stereotypes that adversely affect women and that ultimately contribute to the maternal wall and the motherhood wage penalty. (In other words, if more employers see both men and women as having responsibilities for caregiving, then over time they will be less likely to penalize either men or women on this basis.)

While appealing, these arguments could potentially justify all dissimilar treatment of SWOCs and parents—from paternity leave and requests to care for a sick child, to requests to leave early to attend soccer matches or to go trick-or-treating. As Professor Peggie Smith points out in her work, there are any number of parental obligations that may conflict with an employee's work duties. However, all of these obligations are not equally compelling. For example, Smith distinguishes between an employee's need to leave work because her children will be unaccompanied at home (compelling) from an employee's desire to leave early to attend his child's softball game, or to accompany the child's first-grade class on a field trip (not compelling).²⁷⁸ This spectrum of activities of course raises the proverbial question of "where to draw the line." Is there a way to give parents what they need without being unfair to and ignoring the needs of other workers?

One way to address this issue without eliminating accommodations for parents would be for employers to adopt policies that all employees can use. Instead of thinking in terms of "family-friendly" policies, employers would aim to design workplaces that produce greater work-life balance for all

deserving and less desirous of the best positions and competitive wages. See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

277. See Benard & Correll, *supra* note 22, at 621 (summarizing studies documenting the continuation of a "separate spheres" ideology).

278. Peggie Smith, *Accommodating Routine Parental Obligations in An Era of Work-Family Conflict*, 2001 WIS. L. REV. 1443, 1471. Drawing on cases dealing with religious accommodations under Title VII, Smith sets up a procedural framework that would require employers to accommodate compelling parental obligations that conflict with employment requirements. *Id.* at 1465–66. Part of her proposal also requires that parents make an earnest effort to overcome or to resolve the conflict before seeking an accommodation. *Id.* at 1472 (offering as an example, an employee who made no effort to seek weekend childcare after being notified that he would be required to work on weekends a month in advance).

workers.²⁷⁹ With this focus, to the extent that an employer accommodates the caregiving needs of parents, it would accommodate the caregiving needs of SWOCs. Thus, part-time and flexible leave arrangements would be available to manage any caregiving obligations, not just those that are related to spousal or childcare.²⁸⁰ In addition, if workers are needed to work overtime, then they would be adequately compensated for their additional effort.

The strength of this approach is that it may decrease some of the frustration SWOCs are expressing and stem some of the backlash against policies that primarily benefit parents and married workers. In addition, extending benefits to all workers has the potential to foster collaboration (as opposed to division) among workers and to create a space in which SWOCs, parents, and employers can work together to develop work-life programs for all workers, instead of being pitted against each other in zero-sum battles. And, finally, this approach has the potential to decrease the stigma associated with “family-friendly” programs. If more people are able to utilize flexible employment arrangements for a wider array of purposes, then over time, one would expect and hope that mothers (and fathers) who use these policies will be less often subject to a motherhood penalty.

V. BUT WHAT ABOUT EMPLOYERS?

To the extent that family-friendly policies are part of the modern workplace, two entities are potentially subject to harm: SWOCs, who may be required to pick up the slack while married workers and parents are away from the workplace; or employers, who may have to hire more workers or pay existing workers additional compensation to do the extra work. Thus far, this Article has focused on decreasing the negative effects on SWOCs. This Part considers whether the costs imposed on employers (both in time, money, and autonomy) are too high, and, if so, how these costs can be minimized.

279. Good suggestions for starting this process have been made. *See, e.g.*, Alicia Grandey, *Family-Friendly Policies: Organizational Justice Perceptions of Need-Based Allocations*, in *JUSTICE IN THE WORKPLACE: FROM THEORY TO PRACTICE* 145–73 (Russell Cropanzano ed., 2d ed. 2001) (proposing that employers offer work-life benefits as part of a cafeteria-style package, where employees are provided an equal number of credits to purchase benefits).

280. Of course, implementation would be extraordinarily important. It would do no good to have a policy that on paper is open to all, but that in reality “everyone knows” is meant only for parents or married employees. *See* Casper et al., *supra* note 45, at 496 (emphasizing the importance of having managerial support for work-life programs).

A. Employer Pushback

Employers have never been quick to embrace family-friendly policies. Many existing marital and parental benefits are the products of decades of advocacy by groups committed to making the workplace more accommodating for workers with families. Employers often responded to these efforts by arguing that the adoption of family-friendly policies would be expensive, administratively difficult, and disruptive. For example, when maternity leave policies were proposed in the 1970s,²⁸¹ employers argued that the costs of these policies would increase the burden on other employees and the burden on small businesses.²⁸² Similar arguments were employed when the legislation that ultimately became the Family and Medical Leave Act was proposed in the 1990s. Many employers asserted that FMLA leave would be cost prohibitive as either temporary replacements for absent employees would need to be hired and trained, or schedules would need to be rearranged and projects reassigned in order to avoid hiring new workers.²⁸³ In addition, employers maintained that the additional cost of having women in the workplace would discourage employers from hiring women at all.²⁸⁴

In light of this history, it would be shocking if employers did not respond to the concerns of SWOCs in a similar fashion. One would expect that any argument for an extension of work-life benefits to SWOCs would be met with cries that such action will threaten the continued viability of businesses. Employers will argue that offering flextime, leaves, and part-time arrangements to SWOCs will be administratively difficult and time consuming because managers will be forced to expend even more time juggling schedules to ensure that essential positions are covered, that responsibilities are evenly distributed, and that work is completed in a timely

281. In the early 1970s, few employers offered maternity leave and many required pregnant women to resign. Erin Kelly & Frank Dobbin, *Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies*, 105 AM. J. SOC. 455, 456 (1999). In 1972, however, the Equal Employment Opportunity Commission (EEOC) issued guidelines stating that employers offering leave for disabling medical conditions must also offer maternity leave. Guidelines on Discrimination Because of Sex, 29 C.F.R. pt. 1604, app. (1972). Although the Supreme Court disagreed with the EEOC's position in *General Electric Co. v. Gilbert*, 429 U.S. 125, 145 (1976), the EEOC guidelines had already changed the playing field. A 1973 survey found that 58% of large employers had implemented new maternity leave policies. Marilyn Bender, *Many Companies Revising Maternity Leave Policies*, N.Y. TIMES, Dec. 10, 1973, at 61-62. And, in 1978, Congress enacted the Pregnancy Discrimination Act, which modified Title VII to provide that the term "sex" includes distinctions based on "pregnancy, childbirth, or related medical conditions." Pregnancy Discrimination Act, 42 U.S.C. § 2000(e)(k).

282. Cynthia L. Remmers, *Pregnancy Discrimination and Parental Leave*, 11 BERKELEY J. EMP. & LAB. L. 377, 407 (1989).

283. *Id.* at 410-11.

284. *Id.*; see also *supra* note 8.

fashion.²⁸⁵ They will further argue that extending work-life benefits to SWOCs will be unduly expensive because there will be times when new employees will need to be hired (in the case of extended leaves and part-time work). Filling a vacant position requires that an employer advertise for the position, interview applicants, and train hirees. Even if an existing employee is called upon to occupy a vacant position (which might then require filling that person's position), that employee would need to be trained if she is not already familiar with the position, or offered additional compensation for the added work through a salary increase or overtime wages (which are generally higher than normal wages).

Employers will make similar objections to the extension of other benefits (e.g., additional health insurance coverage or tuition assistance) to SWOCs. Not only would the extension of such benefits involve tedious administrative paperwork (e.g., checking eligibility requirements),²⁸⁶ it would require more out-of-pocket expenses for employers due to the larger number of covered employees. When one factors in that singles are 60% of the labor force, employers will maintain that the costs will be exorbitant.

B. *Employer Benefits*

The above concerns are legitimate, although frequently overstated. In the past, dire predictions of doom and gloom have not come to pass either because fewer employees than anticipated chose to take advantage of flexible employment arrangements²⁸⁷ or the administrative costs were lower than expected.²⁸⁸ For example, in a comprehensive survey prepared for the Department of Labor in 2012, researchers found that three-quarters of

285. See *ADVANCING WORKPLACE FLEXIBILITY*, *supra* note 38, at 2 (anticipating many of these arguments).

286. To be sure, much of this administrative work would occur at the time eligibility is established and annually thereafter. Once eligibility has been established, health insurance payments and tuition assistance grants are generally processed automatically.

287. See *FMLA TECHNICAL REPORT*, *supra* note 120, at ii, 161 (finding that 13% of all employees took FMLA leave in 2011, a rate that is unchanged from 2000, and that nearly half of all leaves lasted 10 days or less); see also Han & Waldfogel, *supra* note 122, at 191–200 (finding that the FMLA has not had a significant effect on leave taking or leave length due in part to financial pressures that render unpaid leave unfeasible).

288. See *FMLA TECHNICAL REPORT*, *supra* note 120, at 48, 162 (finding that a majority of worksites covered by the FMLA found administering the Act was easy and had either a positive effect or no noticeable effect on employees and their businesses). To be sure, these factors are related. It could be that administrative costs are lower than expected because fewer employees than expected have taken FMLA leaves.

worksites covered by the FMLA said that administering the law was easy.²⁸⁹ Very few covered worksites reported experiencing negative effects on business profitability and on “employee productivity, absenteeism, turnover, career advancement, and morale.”²⁹⁰ Only 2.5% said they suspected employees had misused the FMLA.²⁹¹

Even if employer expenditures are much lower than anticipated, work-life benefits still exact costs on employers, and these costs will likely increase with a larger number of covered employees and potential requests. The question is whether these costs are outweighed by advantages employers may experience. While one cannot answer this question definitively for all employers,²⁹² it is important to keep in mind that numerous studies have shown that employers benefit from work-life policies. For example, researchers at the Families and Work Institute found that more flexible work arrangements lead to greater employee job satisfaction, a stronger commitment to the employer, higher retention rates, and less interference from non-work-related events that impair productivity.²⁹³ Researchers have also found that the extension of work-life benefits to singles produces similar returns in terms of reduced employee turnover, and increased job satisfaction and productivity.²⁹⁴ Including a wider range of employees in work-life programs may also attract a more diverse pool of applicants²⁹⁵ and produce positive financial returns for businesses.²⁹⁶ As Joe Wallis, the Senior Diversity Program Manager for Microsoft Military Recruiting, noted recently, “since we’ve implemented workplace flexibility, company data indicate that operating costs have gone down and sales have increased, and

289. *Id.* Large employers report higher administrative costs than smaller employers, with only 68% of the former saying that complying with the FMLA was somewhat easy, very easy, or had no noticeable effect. *Id.*

290. *Id.* at 162. Again, a higher percentage of large employers reported adverse effects.

291. *Id.* at 156; *see also* D. CANTOR ET AL., WESTAT, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS (2000), *available at* <http://www.dol.gov/whd/fmla/toc.pdf> (reporting similar findings from a 2000 survey).

292. As Mary Secret notes, a problem with many of the studies is they do not examine employee utilization and do not answer the question of whether the actual use of benefits, or the mere existence of the benefit options within a company, are responsible for positive employer outcomes. Secret, *supra* note 36, at 218.

293. BOND & GALINSKY, *supra* note 115, at 6–7.

294. *See* Casper et al., *supra* note 45, at 497.

295. *See id.*; ADVANCING WORKPLACE FLEXIBILITY, *supra* note 38, at 14 (quoting Maggie Leedy, Director of Workforce Development, TransCen, Inc., noting that “workplace flexibility . . . increases the relative universe of people you can recruit from. Workers are more attracted to an employer that has a flexible work environment.”).

296. Casper et al., *supra* note 45, at 497.

employee retention and job satisfaction have also improved. We can point to the return on investment related to workplace flexibility.”²⁹⁷

In light of the above, the extension of work-life programs to SWOCs should not be rejected out of hand. These programs need not be viewed as a net loss for employers. Instead, as researchers at the Family and Work Institute found, they should be seen as “strategic management tool[s] that can produce positive business results.”²⁹⁸

VI. CHALLENGING NORMATIVE COMMITMENTS

Thus far, this Article has: (1) reviewed the growing body of evidence to support that SWOCs are subject to dissimilar treatment in the workplace; (2) considered the persuasiveness of explanations offered to justify this treatment; and (3) evaluated whether SWOCs might seek redress in the law. Yet, underlying this topic is a larger question about the types of relationships this society values and the ways in which norms are perpetuated. Consider the following:

In the spring of 2012, my aunt, who was unmarried and childless, was in Duke Hospital being treated for a pernicious form of leukemia. The repeated rounds of chemotherapy to which she was subject at times created life-threatening complications. Because I was emotionally close to my aunt and was also the family member nearest Duke Hospital (others were at least 2.5 hours away), I spent many evenings and, in the event of a crisis, entire days at Duke Hospital. As months of intensive caregiving began to take a toll on me physically and emotionally, I realized that I could not perform my job to my usual standards and simultaneously attend to my aunt. When expressing my concern, frustration, and fatigue to a friend, I was taken aback when she replied “Well, it’s not like she’s your child.” It was quite clear that my friend was telling me to prioritize my professional responsibilities, since this woman whom I loved deeply was, after all, just an aunt.²⁹⁹

297. ADVANCING WORKPLACE FLEXIBILITY, *supra* note 38, at 14.

298. BOND & GALINSKY, *supra* note 115, at 7.

299. My friend’s statement implied that if my aunt were my child, then any negative impact on my professional life would be acceptable. A professor at another institution had this to share when she learned of this project. “My father was seriously ill a few years ago. I could not include him on my health insurance, nor did my colleagues think that adjustments to my schedule so that I could travel to attend to his needs were justified, even though they were constantly taking time off and asking to have schedule adjustments made to care for their children. It just struck me as unfair as it suggested that the relationship with my father was not as important as their relationship

Conversations like the one described above demonstrate the ways in which some Americans, perhaps unconsciously, privilege certain relationships over others. Indeed, at the heart of SWOCs' dismay is the normative view that marriage and parenting are more important than other life commitments and relationships. These beliefs are particularly frustrating when they become more than generalized views, and are embodied in laws and employment practices (which serves to further legitimize and entrench them).³⁰⁰ Frustration is heightened when the activities of SWOCs approximate some of the activities that are commonly used to justify parental and marital benefits (e.g., caregiving). This Part analyzes how marriage and parenting came to be privileged in the United States³⁰¹ and some of the broader costs of the aforementioned normative prioritization.

A. *The Construction of Marriage and Parenting in the United States*

In an illuminating article, *How Second-Wave Feminism Forgot the Single Woman*, Rachel Moran observes that “America has always been a very married country.”³⁰² She notes that in the colonial era and the early years of the republic, when population growth was critical, “White women’s civic virtue was largely defined by early marriage and high rates of childbearing.”³⁰³ Women were confined to the domestic sphere and their identities were subsumed within their husbands’.³⁰⁴ Laws reinforced

with their kids.” Conversation between Trina Jones and Professor A (Feb. 8, 2013) (name withheld to protect identity).

300. See Laura Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007) (demonstrating the ways in which family law ignores non-marital adult intimate relationships and as a result reinforces traditional gender role expectations rather than alleviating them); Laura Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL’Y 117 (2011) (examining the significance of friendship ties in the workplace); see also ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* (2012) (arguing that marital benefits and restrictions on marriage constitute “amatonormative discrimination” or discrimination against non-amorous or non-exclusive caring relationships such as friendships, adult care networks, polyamorous groups, or urban tribes).

301. This inquiry differs from the question of why people feel that marriage and parenting ought to be privileged, which was explored in Part III.A, *supra*. To be sure, the longstanding nature of a norm will influence people’s views about its correctness.

302. Moran, *supra* note 19, at 223.

303. *Id.* at 225. This definition of civic virtue did not extend to women of color, who were generally deemed unfit for marriage. *Id.* at 240. In addition, as noted historian John Hope Franklin points out, slavery did not create conditions in which Black families could flourish. Franklin notes: “[t]oo seldom did the owner recognize the slave family as an institution worthy of respect, and frequently the blind forces inherent in the system operated to destroy it.” JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 137–38 (7th ed. 1994).

304. Moran, *supra* note 19, at 229–31.

women's subservient and dependent status, and limited their sexual autonomy as well as their economic and political opportunities.³⁰⁵ In this era, few women remained single. Indeed, Moran notes that "permanent singlehood was a suspect status," and unmarried women were viewed as "social anomalies," subject to a "pity bordering perilously on scorn."³⁰⁶

Industrialization and urbanization, however, brought new opportunities for women. Wage labor, the movement of women to cities, and increased educational prospects created forms of independence that few women had previously experienced.³⁰⁷ These changes affected both the frequency of marriage and the age at which women married.³⁰⁸ From the late 1800s until the early 1900s, women began to delay getting married, and many began to make demands for greater economic and political rights. Indeed, single women played a prominent role in first-wave feminism and the quest for the ballot. This period of women's burgeoning independence and autonomy was short-lived, however, as many White, middle-class women found it expedient to emphasize their happily married status as a way to neutralize the threat that single women and demands for women's liberation posed to existing institutions and norms.³⁰⁹ Thus, while these feminists were willing to press for greater political rights, they were unwilling to destabilize a social structure that placed a premium on women's roles as wives and mothers.³¹⁰

Around the turn of the twentieth century, the age at which women first entered marriage began to decline and by 1960 had "reached a low 'reminiscent of the colonial period for women and even lower for men.'"³¹¹ The number of marriages also increased from the 1930s until around 1970. In short, more women were marrying and at younger ages. By the 1960s and 1970s, most of the women who participated in the second-wave liberal

305. *See id.* at 230–31, 238–40 (discussing ways in which laws prevented women from conveying property, entering into contracts, and initiating lawsuits); *see also* Laura A. Rosenbury, *Marital Status and Privilege*, 16 J. GENDER RACE & JUST. 769, 778 (2013) (arguing that "[s]tates originally recognized legal marriage in order to provide incentives for white men to privatize the dependency of white women and their children").

306. Moran, *supra* note 19, at 235, 237. Moran states that the stigma associated with being unmarried was not limited to women, noting "males achieved full manhood only when they could earn a living, marry, and support a family." *Id.* at 235. She states that it was not until after the Civil War that bachelorhood became a respectable status. *Id.* at 247.

307. *Id.* at 242–44.

308. *Id.* at 242–43. Moran also notes that during this time divorce and marital separations increased. *Id.* at 242.

309. *Id.* at 225.

310. Moran points out that in addition to married women, male policymakers also responded negatively to the threat posed by single women. *See id.* at 255–56.

311. *Id.* at 261 (quoting Michael R. Haines, *Long-term Marriage Patterns in the United States from Colonial Times to the Present* 15, 27 (Nat'l Bureau of Econ. Research, Working Paper No. h0080, 1996), available at <http://ssrn.com/abstract=190420>).

feminist movement were White, middle-class, and married. Because these feminists presumed that women would marry and have children,³¹² their primary objective was to reconcile women's work and family responsibilities so that women could "have it all." Per Moran, "having it all" meant providing the conditions for "women to balance marriage, motherhood, and work"³¹³ With this goal in mind, second-wave liberal feminists pushed for things like maternity leave, greater protections against sex-based workplace discrimination, increased control over reproductive rights, and greater support for childcare.³¹⁴ While these advances were positive, this approach further entrenched the prioritization of marriage and parenting and reinforced the idea that "singlehood was a mere way station on the way to a committed relationship."³¹⁵ Importantly, feminists did not create this normative structure. But they did little to fundamentally challenge it.

The privileging of marriage and parenthood continues today. Indeed, marriage and parenting are among the few personal relationships recognized and supported by the state. As Laura Rosenbury notes:

States define family most obviously by determining who is a legal spouse or a legal parent and then extending the benefits, obligations, and default rules of marriage and parenthood only to those individuals who qualify. States also define family in more subtle ways. For example, if an individual fails to validly execute a will prior to death, states distribute that individual's property to statutorily defined family members in an order—or hierarchy—determined by the state governing the probate proceedings. Legal spouses are always at the top of this hierarchy, although they often must split the estate with the legal children of the decedent, or, in a

312. Moran, *supra* note 19, at 261, 263.

313. *Id.* at 226. This focus did not end with second-wave liberal feminism. It continues today. For example, in *Lean In*, Sheryl Sandberg devotes an entire chapter to how women can balance their work and parental responsibilities. This is not to say that this type of advice is unnecessary or unwarranted. For many women, it is essential. The point of this Article is to demonstrate that balancing parental and work obligations should not be the sole focus as there are many women whose struggles are different. SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* 121–39 (2013). Sandberg acknowledges this possibility, in passing, in one paragraph. *See id.* at 132.

314. Moran, *supra* note 19, at 262. As Moran points out, some of these reforms benefited single women. She notes, for example, that "regardless of marital status, women benefited from anti-discrimination laws and the ability to make choices about reproduction." *Id.* at 261. Yet, "[d]espite these shared gains, single women remained a relatively invisible constituency systematically overshadowed by the 'superwoman' with a career and a family." *Id.* Moran later notes that "[o]ne of the great ironies of second-wave feminism is that it ignored single women as a distinct constituency while creating the conditions that increasingly enabled women to forego marriage." *Id.* at 270.

315. *Id.* at 226.

few states, they must split the property with the decedent's parents or siblings if the decedent left no children. In almost all states, individuals who function as spouses yet do not enjoy the legal status of spouse, such as cohabiting partners not registered with the state, have no right to make claims against the deceased spouse's estate. Moreover, if the decedent has no surviving family members, as defined by the state, their estates are given, or "escheat," to the state, even when the decedent left behind friends and other loved ones at death.³¹⁶

B. A New "Single [and Childfree] Blessedness"

As the above analysis shows, marriage and parenting must be examined "not just as . . . individual choice[s] but as part of a social structure that has traditionally preferred marriage and family as the means to social respectability and financial security for women."³¹⁷ Yet, the rising number of single and childfree individuals is challenging this structure. As Moran notes, "singlehood has arrived, with or without a formal movement to recognize it."³¹⁸ One might also note the arrival of childfree existences.

To be sure, people are unmarried and childfree for many reasons. Some singles are divorced. Some are widowed. Some childfree individuals are infertile and are unwilling or unable to adopt. Some single and childfree persons desire to be married and to parent, but for one reason or another, are never presented with those opportunities.³¹⁹ Importantly, however, for many people, being single and childfree are positive, deliberately chosen, affirmative statuses. They are not empty, lonely, unsatisfactory defaults. Recognizing that their options are not merely marriage and parenting, many SWOCs are choosing a single (and childfree) blessedness³²⁰ for a variety of

316. Rosenbury, *supra* note 305, at 781–82.

317. Moran, *supra* note 19, at 288.

318. *Id.* at 284.

319. See, e.g., Sandler, *supra* note 17, at 42 (discussing how the dearth of suitable Black men may influence some Black women's reproductive choices).

320. "Single blessedness" describes those who chose to embrace singlehood in the nineteenth century. Moran, *supra* note 19, at 242. Moran notes:

[S]ingle blessedness noted the transitory nature of 'domestic bliss' and encouraged the search for eternal happiness through the adoption of a 'higher calling' than marriage. Whether moral or intellectual in nature, such a vocation was considered 'thrice blessed': blessed to the individual because it guarded the integrity of her soul; blessed of God because through it she committed her life to His work; and blessed to those for whom her efforts ensured a better life.

reasons. Focusing, for example, on the decision not to parent, some childfree persons prize the personal freedom they feel without parental obligations.³²¹ Some love children, and interact with them as aunts, uncles, and teachers, but have concluded that they do not need to “own one.”³²² Some choose not to parent in order to make time to cultivate spousal relationships. Some do it to limit their environmental footprint.³²³ Some seek to avoid the professional and financial costs that parenting involves.³²⁴ Some elect to remain childfree for the peace and quiet.³²⁵ And others simply proclaim that they have no desire to parent³²⁶ and like their lives as they are.³²⁷ Similarly, for myriad reasons, many people elect not to marry. Some value their independence and autonomy. Some express a desire to embrace a range of relationships, instead of having one predominate. Others value solitude. In sum, many SWOCs have taken Moran up on her call to redefine “having it all” to mean, at minimum, having a choice among a “wide array of options related to careers and personal relationships.”³²⁸ For many SWOCs, single and childfree statuses, like marriage and parenting, are legitimate avenues that can lead to a full and happy life.

Accepting single and childfree statuses as legitimate choices, equal to marriage and parenting, has the potential to produce positive benefits not just

Id. at 253–54. By use of the term “single blessedness,” this Article does not assert that singles have a duty to devote themselves to a religious or other noble cause.

321. For example, one childfree woman told Lauren Sandler, “I get to do all sorts of things: buy an unnecessary beautiful object, plan trips with our aging parents, sleep in, spend a day without speaking to a single person, send care packages to nieces and nephews, enroll in language classes, go out for drinks with a friend on the spur of the moment . . . I know all of this would be possible with kids, but it would certainly be more complicated.” Sandler, *supra* note 17, at 42.

322. *See id.*

323. Lisa Hymas argues that “[t]he climate impact of having one fewer child in America is almost 20 times greater than the impact of adopting a series of eco-friendly practices for your entire lifetime, things like driving a high-mileage car and using efficient appliances and CFLs.” Lisa Hymas, *Time Magazine Catches on to the Childfree Movement, Misses the Green Angle*, GRIST.ORG (Aug. 3, 2013), <http://grist.org/living/time-magazine-catches-on-to-the-childfree-movement-misses-the-green-angle/>; *see also* Lisa Hymas, *I Decided Not to have Children for Environmental Reasons*, GUARDIAN ENV’T NETWORK (Sept. 27, 2001), <http://www.theguardian.com/environment/2011/sep/27/not-have-children-environmental-reasons>.

324. Sandler, *supra* note 17, at 43.

325. *See, e.g.*, Belkin, *supra* note 32 (describing a childfree individual’s search for quiet and privacy); *Childfree-Living*, N.Y. TIMES, Apr. 13, 1982, *available at* <http://www.nytimes.com/1982/04/13/nyregion/child-free-living.html> (commenting on the desire of many residents of the Villas, a child-free apartment complex, for quiet and calm).

326. Belkin, *supra* note 32 (recording conversations with women who expressed no desire to parent).

327. Sandler, *supra* note 17, at 40.

328. Moran, *supra* note 19, at 288.

for SWOCs, but also for married individuals and parents. First, increased respect for single status may lead to greater emotional autonomy among Americans and reduce the pressure that many people feel to marry, or to stay married in situations where the latter is unhealthy or unfulfilling.³²⁹ Similarly, respect for childfree status may alleviate the obligation that some women (and men) feel to reproduce. Thus, it may reduce the number of people parenting who would prefer not to be. In both cases, individuals who desire to be single and childfree, but who feel pressured to marry and reproduce, can use their creative skills and energies in other personally fulfilling pursuits, some of which may have socially valuable consequences, including community service and civic engagement (as many parents and spouses find it difficult to make time for these activities).

Fostering emotional autonomy and valuing non-marital, non-parental relationships may also produce additional benefits. The American idealization of “motherhood” and “marriage” places tremendous pressure on some women to be “perfect moms” or “perfect spouses” often to the detriment of their independent selves. Encouraging emotional autonomy invites women to attend to their own needs, while simultaneously attending to the needs of their spouses and children. For some women, this may mean carving out an hour of daily solitude. For others it may mean working without guilt because the emotional fulfillment work brings is acknowledged as important and vital to their well-being. Similarly, valuing a broader range of relationships may empower married women (and men) and parents to cultivate other supportive networks (without feeling guilt-ridden) as an essential aspect of a balanced and fulfilling life.³³⁰

Greater acceptance of single and childfree statuses may also lead to a heightened appreciation of different types of relationships. Importantly, being single and childfree should not be defined merely by the absence of a spousal or parental relationship, but rather by the presence of different, but nonetheless meaningful, relationships (e.g., friendship, collegial, and extended kinship bonds). For many SWOCs, these relationships are every bit

329. Moran makes a similar argument. She notes that “both married and unmarried women have paid a significant emotional price” due to second-wave feminism’s failure to offer a vision of women’s intimate lives outside of marriage and motherhood. *Id.* at 282. She states: “Wives have had to adopt strategies of downsizing and asceticism to cope with unequal marriages because single life is not a salient option. Meanwhile, never-married females question their prospects for achieving happiness and fulfillment outside of marriage.” *Id.*

330. See, e.g., KJ Dell’Antonia, *Can Parents Stay Friends with the Child-Free?*, N.Y. TIMES MOTHERLODE BLOG (Aug. 6, 2013), http://parenting.blogs.nytimes.com/2013/08/06/can-parents-stay-friends-with-the-child-free/?_php=true&_type=blogs&_r=0 (examining why the author tends to associate with other parents, questioning whether her husband has made the same choices, and querying whether the author “may be cheating [herself] out of a broader social circle”).

as important as spousal and parental relationships. For example, in discussing the value of non-spousal friendships, Laura Rosenbury notes that many “people prefer to experience personal connection, and give and receive care, through friendship rather than family.”³³¹ She notes that “friends are often capable of sustaining such connections while simultaneously maintaining aspects of individual autonomy and equality that can be elusive in domestic coupling.”³³² In other work, Rosenbury argues for a more sophisticated understanding of workplace relationships. She points out that:

[m]any adults spend half or more of their waking hours at work, in the process forming relationships with supervisors, co-workers, subordinates, customers, and other third parties. Although such relationships are at times primarily transactional, at other times they take on intimate qualities similar to those of family relationships or friendships. Workplace friends . . . may serve as trusted sounding boards or otherwise may help workers get through daily experiences of job stress and anxiety.³³³

Others have noted that workplace friendships may help to eradicate discrimination as the workplace is one site, in a still segregated society, where individuals can potentially engage in meaningful ways across differences.³³⁴

Beyond expanding existing conceptions of relationships that matter, accepting single and childfree as legitimate statuses also creates the possibility for a broader understanding of the types of activities that SWOCs perform. For example, and as has been well documented, numerous people (beyond spouses and parents) engage in important forms of caregiving that are not acknowledged or supported by existing legal regimes and employment practices. Friends care for friends. Neighbors look out for each other. Same-sex partners care for each other in states that deny them marital equality. And, family love is not solely directed at spouses, parents, and children, but includes aunts, uncles, siblings, and cousins. To the extent that the law and employment policies privilege marriage and parenting and ignore other intimate relationships that are often just as deep, they render more

331. Rosenbury, *Friends with Benefits?*, *supra* note 300, at 209.

332. *Id.*

333. Rosenbury, *Working Relationships*, *supra* note 300, at 119, 140. Although Rosenbury observes that workplace friendships may increase the possibility of on-the-job success, she acknowledges that these relationships also have the potential to undermine equality efforts. *See id.* at 123–29 (examining scholarly debates on this issue). Importantly, Rosenbury points out that workplace intimacy exists not just in hierarchical “supervisor-supervisee relationships, upon which critics of favoritism focus, but also in co-worker relationships, relationships with customers and vendors, and the like.” *Id.* at 141.

334. *See* CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 105–24 (2003).

difficult non-parental and non-spousal forms of caregiving. This has the potential not only to increase levels of governmental dependency; it also reinforces a conception of community in which individuals are less likely to value each other and to see one another as parts of a collective whole.

Some will argue that parenting is different from caregiving for adults. Children are potentially vulnerable and dependent in a way that an ill, middle-aged adult is not. For example, young children do not possess the cognitive skills and abilities to live independently. They cannot work. They need a place to stay, food to eat, and someone to provide them with healthcare and emotional support. The same, however, holds true when a severely ill relative, neighbor, or friend, with few economic resources, can no longer work and loses health care coverage and the ability to live independently (either through cognitive or physical decline, or both). Moreover, the argument does not explain why a SWOC cannot attend the parent-teacher conference of the child next door or designate his or her tuition benefit to that child when the child's parents either drop the ball or cannot carry the parental baton.

Others will assert that even if society wants to, it is simply administratively impossible to widen the array of benefits to include more caregiving relationships. This argument cannot be summarily dismissed. But one need not automatically accept it at face value. With just a few minutes of thought, one can imagine alternatives to the current system that are at least worth discussing. For example, an employer might consider in some situations adopting a "plus-one" system. If parents and spouses are allowed to put a spouse and children on their health insurance policy, then SWOCs would be allowed to add at least one person to their policy. If an employer grants tuition benefits, then the employer might allow SWOCs to designate one person to receive his or her benefit. If an employer offers flextime, then the employer might allow SWOCs, as well as parents and spouses, to use it for caregiving purposes. These suggestions do not create a perfectly even playing field, but one suspects that in many cases, the offer of "something" will at least remove the cloak of invisibility in which many SWOCs exist and reduce the problematic assumption that their life commitments and relationships do not matter. At day's end, it may be that these and similar proposals are unworkable. There may be no easy solutions. But Americans must nonetheless constantly challenge norms that minimize the significance of non-parental and non-marital relationships. We must examine when we can do more, rather than assuming out of hand that we can and should do nothing.

CONCLUSION

*"I would love to see employers . . . become friendly to the personal realities of all their employees. So a single person who has made a commitment to care for an elderly neighbor once a week gets the same level of respect as a married employee who has made a commitment to coach their kids' soccer team once a week."*³³⁵

This Article has demonstrated that the workplace experiences of single workers without children (SWOCs) merit examination and study. Although images of SWOCs have been part of the American popular landscape for decades (particularly in TV shows like the Mary Tyler Moore Show, Three's Company, Charlie's Angels, Living Single, Murphy Brown, Ally McBeal, Seinfeld, Friends, Will and Grace, Sex & the City, and Scandal), scholars have only recently begun to more systematically investigate what it means to be single and childfree in a society that prioritizes marriage and parenting. Social science data and anecdotal evidence suggest that SWOCs are subject to negative stereotypes and assumptions about their lives that may lead to longer hours, less pay, and fewer workplace benefits than married workers and parents.³³⁶ SWOCs maintain that this treatment is discriminatory as it violates the principle of equal pay for equal work. In response, many have argued that the dissimilar treatment of SWOCs is justified because of the social importance of parenting and marriage. At heart, this debate raises the very difficult question of who should bear the costs of socially significant activities: the general public (through taxes), employers, employees who benefit from family-friendly policies, or their co-workers (i.e., SWOCs). Because governmental benefits for parents and children are unlikely to increase in the near future, this Article has focused on ways to improve the allocation of benefits distributed through the workplace.

At first glance, SWOC arguments based upon formal equality principles seem persuasive. If it is unfair to pay men more than women who are doing the same or similar work, then it is equally unfair to pay parents and married individuals more than SWOCs who are doing the same, or more, work. This Article, however, recognizes that treating dissimilarly situated individuals the same does not always produce fair outcomes. It thus calls for further evaluation of the purposes served by the policies about which SWOCs complain. It argues for the continuation of employment policies that are

335. Schranz, *supra* note 215, at 3.

336. Although SWOCs may work longer hours than working mothers, because of the motherhood penalty, they may not be compensated less than this group. See *supra* discussion at Part II.C.2.

specifically designed and implemented to eliminate the subordination and marginalization of working mothers. However, practices that serve legitimate public ends may have adverse effects on subsets of workers. While these effects cannot all be eliminated, some may be minimized by hiring additional workers, by making certain benefits, or comparable benefits, available to all workers, and by paying workers additional compensation or offering comparable time off when they are required to do extra work. Reframing the underlying issue in terms of work-life balance, as opposed to family-friendly benefits, invites consideration of this larger pool of interests.

It is important to note that economic status is a critical undercurrent in the analysis of family-friendly benefits and merits additional study. As pointed out in Part II.C.1, many of the benefits about which SWOCs complain are only available to high-wage workers. Thus, to the extent that the challenged policies are purportedly designed and implemented to incentivize marriage and to support parents, one must ask why they do not extend to those who are least likely to marry (poor people) and to those who are arguably most in need of assistance (poor parents). Are these policies in effect perpetuating a kind of elite privilege?

Examination of the experiences of SWOCs raises larger questions. If law has an expressive function, then laws governing the employment relationship will not only affect the lives of individual workers, but they will also reflect deeper normative assumptions and understandings about the ways in which a society ought to function. If left unchallenged, laws and practices that privilege spousal and parent-child relationships risk reinforcing traditional norms over other types of arrangements. This is regrettable because these norms may leave Americans less open to broader conceptions of community and family. Taking the concerns of SWOCs seriously requires that Americans consider recognizing and respecting the needs of seniors who are acting as each other's caregivers, of siblings and extended family members, and of close friends in non-conjugal relationships who serve as each other's primary support, among others. Examining the concerns of SWOCs not only forces reexamination of the ways in which laws and practices transmit ideas about relationships; this analysis tests and exposes assumptions Americans may hold about autonomy and solitude.

While much work remains to be done, this Article has sought to open a critical dialogue among SWOCs, parents, employers and persons interested in securing greater work-life balance for all employees. It will no doubt cause many readers discomfort and frustration at various points. Discussions that push us beyond our comfort zones are difficult and potentially painful. Yet, they are necessary if we are to create workplaces that are friendly to all workers and not just to some. To be sure, law cannot do everything for

everyone, but we can at least have a conversation about where and upon what basis to draw the lines.