

Articles

(UN)EQUAL PROTECTION: WHY GENDER EQUALITY DEPENDS ON DISCRIMINATION

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ABSTRACT—Most accounts of the Supreme Court’s equal protection jurisprudence describe the Court’s firm opposition to sex discrimination. But while the Court famously invalidated several sex-based laws at the end of the twentieth century, it also issued many other, less-celebrated decisions that sanctioned sex-specific classifications in some circumstances. Examining these long-ignored cases that approved of sex discrimination, this Article explains how the Court’s rulings in this area have often rejected the principle of formal equality in favor of broader antistatutory concerns. Outlining a new model of equal protection that authorizes certain forms of sex discrimination, *(Un)Equal Protection* advocates for one particular discriminatory policy that could dramatically promote gender equality in the decades to come. Fatherhood bonuses—laws that give families additional parental leave when fathers stay at home with their newborns—have the potential to drastically reorder gendered divisions of labor and expand women’s workplace opportunities. Countries that have experimented with fatherhood bonuses have seen women with children spend more time in paid work, advance in their careers, and earn higher wages. Applying these international models to the American context, this Article explains why fatherhood bonuses would fit comfortably within our constitutional framework, which authorizes discriminatory policies when such policies support women’s public participation. *(Un)Equal Protection* concludes by proposing a model for fatherhood bonuses in the United States that would encourage more men to perform care work, thereby advancing the goal of gender equality for both sexes.

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INTRODUCTION

What if legal feminists got it all wrong? What if sex neutrality in the law does not bring about gender equality after all? Many gender theorists of the 1970s believed that their attacks on governmental sex classifications would substantially curb sexual oppression.¹ Challenging sex-based laws as violations of equal protection, “sameness feminists” sought to ensure the equal treatment of men and women in the public sphere through targeted litigation.² At the same time, however, “difference feminists” criticized the

¹ See Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 YALE J.L. & FEMINISM 79, 86–87 (2009) (summarizing the history of the sameness–difference debate); see also Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1, 32 (2001) (discussing the equal treatment approach to equality).

² See generally Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1121–22 (1986) (summarizing the strategy of sameness feminism and questioning its value); see also David Cole, *Strategies of Difference: Litigating for Women’s Rights in a Man’s World*, 2 LAW & INEQ. 33, 55 (1984) (examining litigation brought by legal feminists).

sameness approach for ignoring women's lived realities.³ Arguing in favor of gender-specific policies such as paid maternity leave, difference feminists asserted that the law must take into account the costs that women disproportionately bear in society due to pregnancy and caregiving.⁴

After a series of historic Supreme Court decisions that adopted a sex-neutral approach to discrimination, sameness feminists declared victory.⁵ Pointing to Supreme Court rulings that struck down distinctions in education, estate administration, and public benefits, among others, they argued that the Court's aversion to governmental sex classifications signaled the demise of special treatment for women both as a matter of law and as a matter of policy.⁶

Today, however, with women still lagging far behind men in earnings, wealth, and social power, it is time to acknowledge the limitations of the sameness approach.⁷ Even though women have enjoyed formal equality under the law for decades—a central goal of sameness feminism—the glass ceiling remains stubbornly difficult to break. Although women's workforce numbers and academic accomplishments grow, they still command much lower wages than men and remain significantly underrepresented at the highest corporate rungs.⁸ Contrary to the popular claim that society is witnessing an “End of Men,”⁹ women today actually earn less than eighty

³ See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 211–14, 229–39 (1990) [hereinafter MINOW, MAKING ALL THE DIFFERENCE] (discussing debates within legal feminism); Ann C. McGinley, *Work, Caregiving, and Masculinities*, 34 SEATTLE U. L. REV. 703, 703–04 (2011) (summarizing various critiques offered by difference feminists).

⁴ For a detailed discussion of the sameness–difference debate, see *infra* Part II.A and accompanying discussion.

⁵ See generally Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the California Law Review*, 100 CALIF. L. REV. 381, 391–92 (2012); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 444 (2011) (summarizing the common claim that “by 1970, sameness feminism had won”).

⁶ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 679–81 (1973); *Reed v. Reed*, 404 U.S. 71, 76 (1971); see also Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279, 279–80 (1998) (examining the rise of formal equality).

⁷ See Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249, 251–54 (1998) (summarizing critiques of sameness feminism); Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 58–59 (2010) (discussing the gender wage gap).

⁸ See Kelli K. García, *The Gender Bind: Men as Inauthentic Caregivers*, 20 DUKE J. GENDER L. & POL'Y 1, 25 (2012) (discussing leadership and gender); Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 312–14 (2004) (examining the gender wage gap).

⁹ See generally MAUREEN DOWD, ARE MEN NECESSARY?: WHEN SEXES COLLIDE 135–66 (2006); HANNA ROSIN, THE END OF MEN: AND THE RISE OF WOMEN 4–5 (2012) (discussing workplace gains made by women).

percent of men's wages and constitute less than five percent of Fortune 500 CEOs.¹⁰ In sum, despite the promises of sameness feminism, formal equality in law has not yet yielded actual equality for working women.

If women are to overcome the remaining barriers that continue to divide the sexes, a new vision of equality is needed. This new model of equality must build upon existing debates within legal feminism while finally bringing men into the conversation. Until now, men have stood on the sidelines of the sameness–difference debate, appearing almost irrelevant to the discussion.¹¹ Yet the barriers that hold women back at work today have less to do with whether laws facially discriminate against women (few do) and more to do with men's failure to assume equal divisions of labor at home.¹²

Although men have made some strides on the domestic front, women still perform the vast majority of childcare and housework in the United States.¹³ These longstanding patterns of gendered behavior ultimately constrain women's workplace opportunities. Once they have children, most women take maternity leave, perform the majority of care work at home, and suffer lasting career damage as a result.¹⁴ In contrast, most men forego paternity leave, return to work, and pursue their careers unencumbered by familial obligations.¹⁵

¹⁰ AM. ASS'N OF UNIV. WOMEN, *THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 3* (2013), available at <http://www.aauw.org/files/2013/03/The-Simple-Truth-Fall-2013.pdf> [<http://perma.cc/V38T-WGDJ>]; *Women CEOs of the Fortune 1000*, CATALYST (June 10, 2014), <http://www.catalyst.org/knowledge/women-ceos-fortune-1000> [<http://perma.cc/73D9-BT2Y>].

¹¹ See Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 212–13 (2008) (asserting that much of feminist discourse omits men as subjects of gender analysis).

¹² Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429, 436–37 (2007) (discussing divisions of household labor); Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 HASTINGS L.J. 1267, 1283 (2012) (attributing the stalled gender revolution to differences in household contributions and wage work).

¹³ KIM PARKER & WENDY WANG, PEW RESEARCH CTR., *MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY 1* (2013), available at http://www.pewsocialtrends.org/files/2013/03/FINAL_modern_parenthood_03-2013.pdf [<http://perma.cc/7KDY-HCFS>] (reporting that mothers spend twice the number of hours per week on childcare as fathers); WENDY WANG, PEW RESEARCH CTR., *PARENTS' TIME WITH KIDS MORE REWARDING THAN PAID WORK—AND MORE EXHAUSTING 2* (2013), available at http://www.pewsocialtrends.org/files/2013/10/parental-time-use_10-2013.pdf [<http://perma.cc/339J-SG5P>] (discussing the average number of hours that mothers and fathers spend per week on childcare and housework).

¹⁴ See Harry Brighouse & Erik Olin Wright, *Strong Gender Egalitarianism*, 36 POL. & SOC'Y 360, 366 (2008) (arguing that employers expect women to experience more workplace departures than men); Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 403–04 (1999) (explaining how employers rely upon group information to make employment determinations).

¹⁵ See Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 35 (2004) (discussing male use of parental leave); Michael Selmi,

Men's reluctance to perform care work impacts *every* working woman, not simply mothers. Even young women and women who have no intention of having children feel the labor market effects that result from uneven divisions of household labor. Whether they have children or not, all women suffer from "maternal profiling"—the employer perception that women eventually will reduce their workplace commitment because of the children they currently have or those they will someday bear.¹⁶ Given the cultural force behind the concept of maternal care and the fact that women actually take far more family leave than men, many employers assume that young women pose a higher risk of exiting the labor force in comparison to similarly situated men.¹⁷ Because female applicants cannot signal their intention *not* to have children, certain employers may view all young women as riskier hires.¹⁸ Men will continue to reap the workplace benefits that flow from these presumptions until they significantly increase their leave-taking behavior, thereby diminishing employers' underlying basis for engaging in maternal profiling.

As difference feminists predicted, sex-neutral solutions to problems related to caregiving and family leave can yield sex-skewed results. But a new form of special treatment for fathers could radically disrupt this dynamic. Fatherhood bonuses—policies that give families additional weeks of paid leave if fathers stay at home with their newborns¹⁹—help facilitate coequal parenting, thereby reducing the damage maternal profiling causes.²⁰ In Germany, for example, men's use of paternity leave increased eightfold after the country recently implemented fatherhood bonuses.²¹

Family Leave and the Gender Wage Gap, 78 N.C. L. REV. 707, 755–59 (2000) (considering the reasons why few men take extended periods of parental leave).

¹⁶ See Rangita de Silva de Alwis, *Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation*, 18 DUKE J. GENDER L. & POL'Y 305, 313–14 (2011) (discussing the effects of family responsibilities discrimination); Grant Barrett, *All We Are Saying*, N.Y. TIMES, Dec. 23, 2007, at C3 (defining "maternal profiling" as "[e]mployment discrimination against a woman who has, or will have, children").

¹⁷ See Kaminer, *supra* note 8, at 313–14 (discussing the working patterns of each sex); Palazzari, *supra* note 12, at 436–37 (examining divisions of labor between the sexes).

¹⁸ See Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2169 (1994) (discussing maternal profiling).

¹⁹ INT'L NETWORK ON LEAVE POLICIES & RESEARCH, INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2013 17 (Peter Moss ed., 2013), available at http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2013_complete.6june.pdf [<http://perma.cc/8TG9-R9MQ>] (discussing the benefits of individualizing entitlements for fathers).

²⁰ See de Silva de Alwis, *supra* note 16, at 326–27 (describing European father-based incentives).

²¹ See INT'L NETWORK ON LEAVE POLICIES & RESEARCH, *supra* note 19, at 36 (reporting that German men's use of paternity leave increased from 3.3 percent in 2006 to 27.8 percent in the third quarter of 2011); see also Andrea Doucet, *For Equality, Take Fathers into Account*, N.Y. TIMES, June 14, 2012, <http://www.nytimes.com/roomfordebate/2011/07/05/how-can-we-get-men-to-do-more-at->

Likewise, jurisdictions such as Québec, Norway, Sweden, and Spain have enacted leave laws that incentivize father care.²² When this happens—that is, when men stay home with their babies even for relatively short periods of time—tectonic shifts begin to occur at work and at home: women spend more time in paid work, earn higher wages, and advance in their careers.²³ Meanwhile, leave-taking men perform a greater share of housework and spend less time at the office long after their parental leave ends.²⁴

Fatherhood bonuses in the United States would represent a form of governmental sex discrimination by favoring men over women. Nevertheless, they would fit comfortably within a constitutional framework that tolerates certain forms of sex discrimination. In order to understand why, this Article takes a fresh look at the Supreme Court’s sex equality cases. The conventional wisdom in this area holds that the Court has remained doggedly committed to formal equality in its constitutional sex discrimination rulings since the 1970s.²⁵ Yet this oversimplified take on the Court’s equal protection jurisprudence ignores the numerous instances in which the Court has allowed many sex-based laws to withstand judicial

home/for-gender-equality-take-fathers-into-account [<http://perma.cc/ZT6K-K59W>] (discussing changes in caregiving patterns among German parents).

²² INT’L NETWORK ON LEAVE POLICIES & RESEARCH, *supra* note 19, at 12–15, 37–38; Diane-Gabrielle Tremblay, *More Time for Daddy: Québec Leads the Way with Its New Parental Leave Policy*, 18 OUR SCHOOLS/OUR SELVES 223, 226 (2009) (discussing Québec’s system); Katrin Bennhold, *In Sweden, Men Can Have It All*, N.Y. TIMES, June 9, 2010, <http://www.nytimes.com/2010/06/10/world/europe/10iht-sweden.html> [<http://perma.cc/XJ5V-V9C4>] (summarizing policies in Sweden and Germany); see also Janet C. Gornick & Marcia K. Meyers, *Creating Gender Egalitarian Societies: An Agenda for Reform*, 36 POL. & SOC’Y 313, 331 (2008) (stating that fathers’ take-up rates rose significantly after implementation of fatherhood bonuses).

²³ See Elly-Ann Johansson, *The Effect of Own and Spousal Parental Leave on Earnings* 1–29 (Inst. for Labour Mkt. Policy Evaluation, Working Paper No. 2010:4, 2010) (finding that fathers’ use of paternity leave positively correlated with maternal earnings); Ankita Patnaik, *Reserving Time for Daddy: The Short and Long-Run Consequences of Fathers’ Quotas* 3–4 (Oct. 14, 2014) (unpublished manuscript) (on file with Cornell University) (discussing the effects of father-targeted leave on mothers in Québec).

²⁴ See Patnaik, *supra* note 23, at 11 (noting that couples exposed to paternity leave reforms exhibited less “sex specialization” in performing household tasks); see also Nevena Zhelyazkova, *Fathers’ Use of Parental Leave. What Do We Know?* 26 (Maastricht Econ. & Soc. Research Inst. on Innovation & Tech. (UNU-MERIT), Working Paper No. 2013-022, 2013) (summarizing research on the benefits of increased male participation in parental leave policies).

²⁵ See generally Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1010–11 (1986) (discussing scholarship on the Supreme Court’s antidifferentiation approach to law); Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 774–75 (2010) (summarizing feminist critiques of Ruth Bader Ginsburg); Williams, *supra* note 6, at 279–80 (discussing the special treatment/equal treatment debate).

scrutiny.²⁶ The Article explains how these overlooked cases provide the constitutional basis for justifying the use of fatherhood bonuses.

Standing somewhere in the soft middle between rational basis review and strict scrutiny, the constitutional test for illegal sex discrimination depends on whether a sex classification substantially advances an important governmental objective.²⁷ As the Supreme Court has made clear in its more recent case law in this area, policies that rely on harmful, gender-based stereotypes will fail this test.²⁸ Conversely, the Court has approved of special treatment laws that favor one sex over the other when they effectively confront age-old gender stereotypes and advance an antisubordination agenda.²⁹ This Article explains why fatherhood bonuses would achieve both ends.

The study of masculinities informs the constitutional inquiry by highlighting the stereotypes that fatherhood bonuses would confront. Masculinities theory—an interdisciplinary field of gender studies that did not exist during the 1970s when the Supreme Court forged its modern line of sex equality cases—explains how male identity is formed through a complex set of gender-based expectations.³⁰ In contrast to certain strands of legal feminism that tend to depict men solely as static objects of domination,³¹ masculinities theory attempts to understand men as gendered beings who are simultaneously privileged and subordinated by masculinity.³² Drawing from this relatively new body of gender theory, this Article explains how the rules of manhood call on men to avoid care work, thereby saddling women with domestic chores. When applied to the Supreme Court’s test for permissible instances of special treatment, the

²⁶ See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987); *Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974).

²⁷ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

²⁸ See *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1334–35 (2012) (plurality opinion); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003); *United States v. Virginia*, 518 U.S. 515, 542–46 (1996).

²⁹ See, e.g., *Califano*, 430 U.S. at 318 (approving of sex-based classifications to combat “the socialization process of a male-dominated culture” (quoting *Kahn*, 416 U.S. at 353)).

³⁰ See Michael Kimmel, *Foreword* to *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH*, at xiv (Frank Rudy Cooper & Ann C. McGinley eds., 2012) (discussing the history of masculinities theory); Ann C. McGinley, *Ricci v. DeStefano: A Masculinities Theory Analysis*, 33 *HARV. J.L. & GENDER* 581, 585–87 (2010) (outlining the basic features of masculinities theory).

³¹ JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 144 (2010) (critiquing dominance feminism’s failure to distinguish between men and masculinity); Dowd, *supra* note 11, at 204 (commenting on the essentialized depiction of men); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 *UCLA L. REV.* 1037, 1049–51 (1996) (discussing the limited role men play in postmodern feminism).

³² See NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 2–3 (2010) (describing the “power, privilege, and the burdens of masculinity”).

study of masculinities helps explain how men's gender performances harm women, and why fatherhood bonuses satisfy the antistereotyping, antisubordination principles expressed in the Court's equal protection jurisprudence.

This Article advances the case for fatherhood bonuses in four parts. Part I explains the nature of maternal profiling and how certain countries have enacted fatherhood bonuses to combat this form of bias against both mothers and childless women. Part II considers fatherhood bonuses in light of feminist theory and the Supreme Court's often ignored cases that sanctioned sex discrimination. This Part demonstrates how the Supreme Court's focus on remediation, subordination, and stereotypes in its equal protection rulings leaves room for certain discriminatory laws that extend legal rights exclusively to men to expand workplace opportunities for women. Part III brings the study of masculinities into the discussion by explaining why the problems created by masculine stereotypes demand gender-specific solutions. Finally, Part IV offers a sketch of how fatherhood bonuses could operate in the U.S. context. Unlike the state-based grants of Europe, a U.S. system must draw from the American values of autonomy and choice in its design and implementation. To that end, a father-targeted policy ought to incentivize male caregiving without imposing disproportionate costs on employers, beneficiaries, and childless employees. The American approach must account for different parental arrangements, such as single parents and same-sex couples, while making the broader case to childless workers that by combatting maternal profiling, fatherhood bonuses advance the goal of gender equality for all workers.³³

The Supreme Court has made clear that sex discrimination is not always *illegal* discrimination.³⁴ In limited circumstances, the Court will sanction policies that combat sex-based biases even if the policies themselves are discriminatory. Father-targeted leave is one such policy. Even though women continue to make tremendous workplace strides, domestic responsibilities still hamper their progress at work. These trends will not end until men receive sufficient incentives to assume a greater share of domestic chores. In short, after all the debates over whether to extend special treatment or equal treatment to women, it turns out that gender equality depends on extending preferential treatment to men.

³³ Brighouse & Wright, *supra* note 14, at 366 (discussing employers' views of childless women).

³⁴ *See, e.g., Kahn*, 416 U.S. at 356 n.10 ("Gender has never been rejected as an impermissible classification in all instances.").

I. PROMOTING WOMEN'S PUBLIC PARTICIPATION WITH FATHERHOOD BONUSES

It might appear that women are finally beating men at their own game. Where men once dominated the workplace, women now earn more degrees than men, hold more management positions, and constitute a majority of professionals.³⁵ Despite these important advancements, however, other facts paint a different picture. For example, full-time working women still earn about twenty percent less than men each year—a number that barely has changed over the last decade.³⁶ In addition, they constitute a small minority of executives at large U.S. companies, represent just fifteen percent of equity partners at large law firms, and account for less than twenty percent of Congress.³⁷ Thus, even with the rise of women at work, men still command higher wages in the marketplace and control most of society's levers of power.³⁸

The gender revolution of the 1970s began to stall in the 1990s and has not recovered since.³⁹ In fact, women's overall workforce participation has not increased in two decades, and the percentage of U.S. mothers working outside the home has *decreased* since 1999.⁴⁰ Today, the primary obstacle

³⁵ BRAD HARRINGTON ET AL., BOS. COLL. CTR. FOR WORK & FAMILY, *THE NEW DAD: CARING, COMMITTED AND CONFLICTED* 3 (2011), available at <http://www.bc.edu/content/dam/files/centers/cwf/pdf/FH-Study-Web-2.pdf> [<http://perma.cc/3AQK-6JV3>] (discussing women's educational accomplishments); U.S. BUREAU OF LABOR STATISTICS, *WOMEN IN THE LABOR FORCE: A DATABOOK 2* (2013), available at <http://www.bls.gov/cps/wlf-databook-2013.pdf> [<http://perma.cc/EL5J-V2HF>] (listing women's workplace participation rates); Katie Ziegler, *Hitting the Glass Dome*, ST. LEGISLATURES, July/Aug. 2009, at 30 (describing gains made by women in law, medicine, business, and politics).

³⁶ INST. FOR WOMEN'S POLICY RESEARCH, *THE GENDER WAGE GAP: 2012*, at 1–2 (2013), available at <http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2012> [<http://perma.cc/95UX-MBGX>].

³⁷ CTR. FOR AM. WOMEN & POLITICS, *WOMEN IN THE U.S. CONGRESS 2014* 1 (2014), available at http://www.cawp.rutgers.edu/fast_facts/levels_of_office/documents/cong.pdf [<http://perma.cc/PDR4-WW5X>]; Vivian Chen, *The Equity Gap: Survey Shows Slow Progress for Women Partners at Big Firms*, NAT'L L.J., July 23, 2012, at 1; *Women CEOs of the Fortune 1000*, *supra* note 10 (discussing women's representation at Fortune 500 companies).

³⁸ See CHRYSIA FREELAND, *PLUTOCRATS: THE RISE OF THE NEW GLOBAL SUPER-RICH AND THE FALL OF EVERYONE ELSE* 85 (2012) (discussing men's ongoing dominance in upper management).

³⁹ See ARLIE RUSSELL HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT* (2003); Williams, *supra* note 12, at 1283 (discussing the relationship between women's workforce participation and men's household contributions).

⁴⁰ See D'VERA COHN, PEW RESEARCH CTR., *AFTER DECADES OF DECLINE, A RISE IN STAY-AT-HOME MOTHERS* 5 (2014), available at http://www.pewsocialtrends.org/files/2014/04/Moms-At-Home_04-08-2014.pdf [<http://perma.cc/6CKE-5B2B>] (reporting that the share of mothers who do not work outside the home increased from twenty-three percent to twenty-nine percent between 1999 and 2012); NEIL GILBERT, *A MOTHER'S WORK: HOW FEMINISM, THE MARKET, AND POLICY SHAPE FAMILY LIFE* 14–16 (2008); *Family Leave—U.S., Canada, and Global*, CATALYST (Mar. 22, 2013), <http://www.catalyst.org/knowledge/family-leave-us-canada-and-global> [<http://perma.cc/JXR8-5VNL>]; (discussing gender-based workforce departures); see also Stephanie Coontz, *Progress at Work, but*

holding women back at work is not a “glass ceiling” but a “maternal wall,” a barrier that casts a shadow over all female workers, including childless women.⁴¹

A. Caregiving and Maternal Profiling

Most women’s careers flatline the moment they have children. A comparison of the wages earned by mothers and others best captures this fact. Today, young men and women without children make roughly the same amount of money.⁴² In fact, childless women in their twenties now earn *more* than men in the vast majority of U.S. cities.⁴³ But as parenthood approaches, these trends reverse. The pay gap between men and women becomes dramatically wider around the age of thirty-five, which for many women is the moment when the demands of childcare, parental leave, and career advancement converge.⁴⁴

Domesticity—the belief that women should bear the brunt of domestic responsibilities and childcare obligations—still influences a great deal of each sex’s parenting behaviors.⁴⁵ Even though many women feel ambivalent about motherhood and the caregiving imperatives associated with that role, domesticity places a cultural expectation on all women to downgrade their market work and become the caregiving center of their families’ lives once they have children.⁴⁶ In fact, the majority of women adhere to this norm by departing from the workforce in whole or in part after they become mothers.⁴⁷

Mothers Still Pay a Price, N.Y. TIMES, June 9, 2013, at SR5 (reviewing data related to women’s workplace progress over the past half-century).

⁴¹ See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 77 (2003) (discussing motherhood and the glass ceiling).

⁴² See Katharine B. Silbaugh, *Deliverable Male*, 34 SEATTLE U. L. REV. 733, 736 (2011) (“[U]ntil burdened by parenthood, women have closed the wage gap.”).

⁴³ JUNE E. O’NEILL & DAVE M. O’NEILL, THE DECLINING IMPORTANCE OF RACE AND GENDER IN THE LABOR MARKET: THE ROLE OF EMPLOYMENT DISCRIMINATION POLICIES 239 (2012) (discussing childless women’s earnings); Richard Dorment, *Why Men Still Can’t Have It All*, ESQUIRE, June/July 2013, at 126.

⁴⁴ AM. ASS’N OF UNIV. WOMEN, *supra* note 10, at 12–13 (explaining how the pay gap differs by age). See generally Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World*, 12 TEX. J. WOMEN & L. 345, 352–53 (2003) (examining the relationship between women’s caregiving and workplace barriers).

⁴⁵ See de Silva de Alwis, *supra* note 16, at 308 (discussing domesticity’s restrictive features).

⁴⁶ See Lindsay R. B. Dickerson, *“Your Wife Should Handle It”: The Implicit Messages of the Family and Medical Leave Act*, 25 B.C. THIRD WORLD L.J. 429, 433–34 (2005) (reviewing SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, *THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED ALL WOMEN* 204–10 (2004)) (discussing domesticity in the media).

⁴⁷ See generally Williams, *supra* note 12, at 1283 (examining the labor market effects of motherhood).

Many employers observe these behaviors and expect that all female candidates will someday reduce their workplace involvement, regardless of the actual intent or behavior of any individual female worker.⁴⁸ Scholars dub this form of bias “statistical discrimination” and describe it as a rational form of decisionmaking due to its relative validity in predicting the behaviors of most women.⁴⁹ In a world in which employers seek to sort job applicants using convenient proxies, maternal profiling enables businesses to gauge the input costs that the average woman tends to generate for her group.⁵⁰

The primary victims of maternal profiling, of course, are mothers themselves whom employers assume lack the same level of workplace commitment as childless workers.⁵¹ Consistent with this presumption, a number of social science experiments have demonstrated that once women have children, employers extend them fewer promotions and other workplace rewards.⁵² The most famous laboratory experiment on this topic presented a group of employers with the résumés of two women applying for marketing positions and asked the employers whether they would hire each applicant.⁵³ Each woman’s résumé was functionally identical to the other; however, one listed the applicant’s parental status and PTA work, while the other résumé listed the woman’s marital status and work in the local neighborhood association.⁵⁴ In other words, one applicant was a mother, while the other was not. Even though the résumés were the same in all other respects, eighty-four percent of employers offered the childless woman a job, while only forty-seven percent of employers agreed to hire the equally qualified mother.⁵⁵ Likewise, the employers offered the mother an average of \$11,000 less in starting salary.⁵⁶

⁴⁸ See Selmi, *supra* note 15, at 744–45 (explaining how employers rely on group observations).

⁴⁹ See Dickerson, *supra* note 46, at 443–44 (discussing the function of statistical discrimination).

⁵⁰ See Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 834–38 (2001) (arguing that the law ought to restrict only “market-irrational” discrimination).

⁵¹ See Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 261–62 (2013) (discussing family responsibilities discrimination).

⁵² Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1359 (2008) (summarizing studies related to “maternal wall” discrimination); Joan C. Williams & Stephanie Bornstein, *The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1327–28 (2008) (same).

⁵³ Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1309–12 (2007).

⁵⁴ *Id.* at 1313.

⁵⁵ *Id.* at 1316 (noting that employers judged mothers as significantly less competent than childless women).

⁵⁶ *Id.*

Beyond the negative effects of statistical discrimination on mothers, however, even childless women suffer from the perception that at some point in the future they will perform the bulk of their family's work. Because statistical discrimination is based on an employee's likely behaviors, employers project expected actions onto group members even if individual members of that group have no intention of conforming to the group norm.⁵⁷ Given that maternal profiling masks over distinctions among group members, employers may even view childless women as risky employees who will someday assume excessive caregiving duties.⁵⁸ As such, the harm of maternal profiling extends not only to women with children, but also to any woman of childbearing years.

B. The Failure of Gender-Neutral Leave in the United States

Despite Americans' general skepticism of governmental interventions in the domestic sphere,⁵⁹ Congress passed the Family and Medical Leave Act (FMLA) as an explicit, policy-based attempt to combat maternal profiling by encouraging greater gender equity in the home.⁶⁰ Enacted in 1993, the FMLA contained legislative findings that noted women's disproportionate caregiving burdens and the widespread discrimination that flowed from domesticity.⁶¹ By extending family leave to both men and women, Congress attempted to remove the target that sat squarely on women's backs as the sole users of parental leave.⁶²

Unfortunately, twenty years of experience demonstrates that the FMLA has done little to break longstanding sex-based patterns of care in the United States. Recent data on men's and women's leave-taking rates show how gender-based norms continue to dictate caregiving behaviors. Today the average father in the United States leaves work for one week or less following his child's birth or adoption.⁶³ In contrast, new mothers take nearly two months more parental leave than fathers.⁶⁴ These initial

⁵⁷ See Kaminer, *supra* note 8, at 313–14 (discussing each sex's working patterns); Palazzari, *supra* note 12, at 436–37 (examining sex-based divisions of labor).

⁵⁸ See Brighthouse & Wright, *supra* note 14, at 366 (outlining gender-regulating social norms).

⁵⁹ Gayle Kaufman et al., *Post-Birth Employment Leave Among Fathers in Britain and the United States*, 8 FATHERING 321, 324 (2010) (explaining why the United States has enacted few social policies relating to the family).

⁶⁰ 29 U.S.C. § 2601(a)(5) (2012).

⁶¹ *Id.* (“[T]he primary responsibility for family caretaking often falls on women . . .”).

⁶² See *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1340 (2012) (Ginsburg, J., dissenting) (discussing the FMLA's legislative history).

⁶³ Kaufman et al., *supra* note 59, at 328; Lenna Nepomnyaschy & Jane Waldfogel, *Paternity Leave and Fathers' Involvement with Their Young Children*, 10 COMMUNITY, WORK & FAM. 427, 446–47 (2007).

⁶⁴ Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege?*, 21 YALE J.L. & FEMINISM 161, 167 (2009).

allocations of time quickly morph into long-term habits at home. Among two-parent, opposite-sex couples, a father's decision to return quickly to work automatically casts the mother as the family's caregiving expert.⁶⁵ As time goes by, each parent's level of labor specialization grows. The mother develops better caregiving skills, while losing ground in the marketplace. In contrast, the father becomes a secondary caregiver who "helps out" around the house.⁶⁶

These familiar gender roles become self-fulfilling prophecies as both mothers and fathers come to perceive the mother as the more knowledgeable, competent parent.⁶⁷ Thus, the father's lack of human capital investment during the crucial period of parental leave leads to the perception—real or imagined—that he lacks the aptitude to provide primary care during later stages of childrearing.⁶⁸ As such, the gender-based identities forged during the initial stages of parental leave yield entrenched divisions of labor as children grow older.⁶⁹ Today, for example, mothers in dual-income couples perform nearly twice the amount of childcare as fathers, while men with children spend eleven more hours per week in paid labor than mothers.⁷⁰

Scholars have tried to explain why the FMLA failed to yield more gender-egalitarian outcomes.⁷¹ They have argued, for example, that men have declined to take significant amounts of parental leave due to employer resistance, social stigma, retaliation, coverage limitations, and an inability to afford the FMLA's unpaid benefits.⁷² Although each item on this list

⁶⁵ See Iman Syeda Ali, *Bringing Down the "Maternal Wall": Reforming the FMLA to Provide Equal Employment Opportunities for Caregivers*, 27 LAW & INEQ. 181, 200–01 (2009) (explaining how fathers assume a "secondary role" in childrearing).

⁶⁶ See Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1276 (2011) (examining the connection between leave-taking patterns and gender roles).

⁶⁷ See Dickerson, *supra* note 46, at 442–43 (discussing the FMLA's effects on women).

⁶⁸ See Zhelyazkova, *supra* note 24, at 26 (discussing men's failure to develop human capital in caregiving tasks).

⁶⁹ *Id.*; see also Brighthouse & Wright, *supra* note 14, at 366–67 (explaining how each parent's perceived competences develop).

⁷⁰ PARKER & WANG, *supra* note 13, at 3–4; see also U.S. DEP'T OF LABOR, MARRIED PARENTS' USE OF TIME, 2003–06 (2008), available at <http://www.bls.gov/news.release/pdf/atus2.pdf> [<http://perma.cc/PQU4-ULP6>].

⁷¹ See, e.g., Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 95 (2000) (discussing male leave-taking rates); Dickerson, *supra* note 46, at 438–39 (noting that gendered social norms affect decisions related to both parental leave and parenting). For an examination of men's family leave usage, see Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1049 (1994).

⁷² See Bornstein, *supra* note 71, at 95 (examining structures that discourage leave-taking among men); Dickerson, *supra* note 46, at 438–39 (summarizing the scholarly debate over men's infrequent use of family leave).

undoubtedly contributes to the problem, far less attention has been paid to the FMLA's failure to target men specifically.⁷³ In contrast to the U.S. experience, in which the FMLA's gender-neutral approach has yielded gender-skewed results, other nations have begun to utilize gender-targeted policies to help equalize divisions of labor at home. After years of experimentation, these countries have found that not even generously paid leave provides men with sufficient incentives to stay home with newborns.⁷⁴ Rather, these countries have found that fatherhood bonuses represent the most effective method for counterbalancing the marketplace harms of maternal profiling.

C. *"Velvet Dad" to Every Dad: Scandinavia's Success with Fatherhood Bonuses*

Paid leave is nothing new to Sweden. Long known for its extensive support of families through early education programs, state-sponsored childcare, and generous family leave provisions, Sweden stands as a global model for providing state support to working parents.⁷⁵ For example, in 1974, Sweden became the first country in the world to offer fathers paid parental leave.⁷⁶ Soon after implementing the law, however, government officials discovered that very few men actually used the policy. Despite publicity campaigns encouraging men to stay home, less than ten percent of Swedish fathers took paternity leave, and society applied the derogatory label "velvet dads" to men who took leave.⁷⁷ Men's low use of parental leave contributed to a familiar cycle of gender-norm reinforcement in which Swedish women took leave at far higher rates and suffered wage

⁷³ See Bornstein, *supra* note 71, at 115 (discussing the FMLA's gender neutrality); Christine G. Cooper, *The Search for Sex Equality: A Perspective from the Podium on Law and Cultural Change*, 36 LOY. U. CHI. L.J. 445, 445-46 (2005) (same). For proposals advocating in favor of gender-neutral policies that encourage male leave-taking, see Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PA. J. LAB. & EMP. L. 293, 293-94 (2007); and Selmi, *supra* note 15, at 773-74. For a sex-specific proposal that targets women, see Christine A. Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15, 36 (1991).

⁷⁴ See generally INT'L NETWORK ON LEAVE POLICIES & RESEARCH, *supra* note 19, at 35-38 (describing recent attempts to incentivize fathers' use of leave).

⁷⁵ See Nancy E. Dowd, *Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL'Y 219, 234 (2004) (describing Sweden's commitment to gender equality).

⁷⁶ See Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 104 (2010) (discussing Sweden's workplace policies); Linda Haas & C. Philip Hwang, *The Impact of Taking Parental Leave on Fathers' Participation in Childcare and Relationships with Children: Lessons from Sweden*, 11 COMMUNITY, WORK & FAM. 85, 86 (2008) (same).

⁷⁷ See Bennhold, *supra* note 22 (describing Sweden's success with encouraging men to take "daddy leave").

disparities in the marketplace. Swedish men, in turn, came to believe that “velvet dads” were committing career suicide.⁷⁸

Aware that the country’s existing parental leave policy caused women to experience extended departures from the labor force, the Swedish government made parents an irresistible offer in 1995: families would receive an additional month of leave if fathers utilized thirty days of paid leave that the state reserved exclusively for them.⁷⁹ Known in Sweden as the “daddy month,” the bonus depended entirely on whether men took leave, and fathers could not transfer the bonus to their female partners.⁸⁰ This clever bit of social engineering quickly produced dramatic results. Soon after the daddy month became law, the proportion of men who took leave during their child’s first two years increased from forty percent to seventy-five percent.⁸¹ When Sweden added a second month in 2002, the rate of men taking leave jumped to ninety percent by 2006.⁸² Men spent more time away from work as well, with over half of fathers taking more than thirty days of leave, and with mothers’ use of leave *decreasing* by an average of twenty days.⁸³

It is now common to see fathers pushing strollers during the business day in cities such as Stockholm and Gothenburg. In Sweden’s famous Djurgården Park, which lies in the shadow of some of the country’s most prominent financial institutions, scores of fathers now sit chatting, changing diapers, and performing the type of domestic work traditionally associated with mothers.⁸⁴ These shifts have triggered tremendous social transformations in a remarkably short amount of time. Since 1995, when Sweden offered the first daddy month, divorce rates in the country have dropped and shared custody arrangements have increased.⁸⁵ Horizontal

⁷⁸ See *id.* (discussing social signals in Sweden).

⁷⁹ EILEEN APPELBAUM & RUTH MILKMAN, LEAVES THAT PAY: EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA 17 (2011), available at <http://www.cepr.net/documents/publications/paid-family-leave-1-2011.pdf> [<http://perma.cc/8BDW-YYVT>]; Brighthouse & Wright, *supra* note 14, at 370 n.5 (analyzing the one month of “father-only” leave). Although Sweden also introduced a nontransferable “‘mummy’ month” in 1995, men remained the primary targets of Sweden’s family leave policy. See Ann-Zofie Duvander & Mats Johansson, *What Are the Effects of Reforms Promoting Fathers’ Parental Leave Use?*, 22 J. EUR. SOC. POL’Y 319, 320–25 (2012) (stating that incentives for women had little effect on mothers’ behaviors).

⁸⁰ Doucet, *supra* note 21 (noting that Sweden offered men a second “daddy month” in 2002).

⁸¹ Duvander & Johansson, *supra* note 79, at 324–25.

⁸² Linda Haas & C. Philip Hwang, *Is Fatherhood Becoming More Visible at Work? Trends in Corporate Support for Fathers Taking Parental Leave in Sweden*, 7 FATHERING 303, 314 (2009); see also de Silva de Alwis, *supra* note 16, at 326–27 (summarizing Sweden’s father-based incentives).

⁸³ Duvander & Johansson, *supra* note 79, at 325.

⁸⁴ See Jens Hansegard, *For Paternity Leave, Sweden Asks if Two Months Is Enough*, WALL ST. J., Aug. 1, 2012, at D1 (describing political debates within Sweden over family leave).

⁸⁵ Bennhold, *supra* note 22 (noting that divorce rates in other countries increased during this time).

equity between mothers and other workers improved as well.⁸⁶ For example, one recent study of Sweden's policy showed that women's earnings increased by seven percent for every month of parental leave that fathers took.⁸⁷ Likewise, Swedish men who took longer leaves ended up spending more time with their children on work days and engaged in a greater share of certain caregiving tasks.⁸⁸ Although these outcomes merely *correlate* with Sweden's use of fatherhood bonuses—as opposed to establishing any definitive causative link—the fact that several measures of gender equity improved in Sweden after the country adopted fatherhood bonuses suggests that these policies may play an important role in narrowing gender-based gaps.

Father-targeted leave appears to have benefited families in Norway as well, which in 1993 set aside four weeks of paid leave exclusively for fathers through *fedrekvoten* (fathers' quota).⁸⁹ Since implementation of *fedrekvoten*, which recently increased the amount of leave available exclusively to fathers to twelve weeks,⁹⁰ the country has seen men's usage jump from four percent to ninety percent.⁹¹ In an experimental study comparing parents prior to and following implementation of the policy, researchers found that Norwegian parents exposed to *fedrekvoten* were eleven percent less likely to experience conflicts over divisions of labor and fifty percent more likely to equally divide the task of clothes washing.⁹²

Of course, plenty of sex discrimination still remains in these Scandinavian countries, and mothers still take significantly more leave than fathers. For example, in eighty percent of Swedish couples, men use one-third of the leave benefit.⁹³ Likewise, large segments of industries remain sex-segregated, and a significant wage gap persists.⁹⁴ Nonetheless, it is difficult to understate the transformations that have occurred in Swedish

⁸⁶ See Duvander & Johansson, *supra* note 79, at 323 (examining horizontal equity among workers).

⁸⁷ Bennhold, *supra* note 22 (discussing the relationship between a person's education level and the likelihood of taking parental leave).

⁸⁸ Haas & Hwang, *supra* note 76, at 99 (reporting that Swedish fathers who took more leave reported higher levels of satisfaction with childcare).

⁸⁹ See Andreas Kotsadam & Henning Finseraas, *The State Intervenes in the Battle of the Sexes: Causal Effects of Paternity Leave*, 40 SOC. SCI. RES. 1611, 1611 (2011) (discussing Norway's system).

⁹⁰ INT'L NETWORK ON LEAVE POLICIES & RESEARCH, *supra* note 19, at 210; Leah Eichler, *The Case for a "Daddy Quota,"* GLOBE & MAIL, Apr. 13, 2013, at B19 (summarizing data suggesting the positive effect "daddy quotas" have on women's careers).

⁹¹ INT'L NETWORK ON LEAVE POLICIES & RESEARCH, *supra* note 19, at 210.

⁹² Kotsadam & Finseraas, *supra* note 89, at 1612.

⁹³ Anca Gheaus & Ingrid Robeyns, *Equality-Promoting Parental Leave*, 42 J. SOC. PHIL. 173, 173 (2011) (explaining how women's disproportionate use of leave depresses women's lifetime earnings); Bennhold, *supra* note 22 (examining existing gender asymmetries in Scandinavia).

⁹⁴ See Dowd, *supra* note 75, at 235 (discussing gender integration in Swedish businesses); Haas & Hwang, *supra* note 76, at 90 (attributing the pay gap in Sweden to women's concentration in undervalued industries).

and Norwegian homes since the countries introduced fatherhood bonuses less than two decades ago.

Although the foregoing examples may seem inapplicable to the American context, the United States does not need to become Sweden in order to incentivize male caregiving. Indeed, countries with economic systems more analogous to the United States, such as Canada and Germany, have also successfully experimented with fatherhood bonuses. As these examples illustrate, even modest fatherhood bonuses can trigger a great deal of change in men's leave-taking behavior.

D. *The Globalization of Father-Targeted Leave*

As the first country in the world to offer maternity leave, Germany has a long history of dealing with the effects of work–family policies on divisions of household labor.⁹⁵ Although German legislators originally designed the country's parental leave system with mothers in mind, lawmakers recently began to notice how women's disproportionate use of leave negatively affected their labor force participation.⁹⁶ Indeed, during the past decade, female workers in Germany experienced higher rates of unemployment and longer periods away from their careers than women in other parts of Europe.⁹⁷ Cognizant of women's lagging workplace representation and asymmetrical divisions of labor at home, German policymakers drastically reformed the nation's parental leave policy in 2007 with the goal of getting men more involved.⁹⁸

Pursuant to the country's *Elterngeld* (parental benefit) system, families now receive two extra months of paid parental leave when fathers take leave as well.⁹⁹ There is no mandate requiring men to use Germany's leave system, but if they fail to take leave, their family loses valuable state-funded benefits. As in other countries, German men now take leave at far higher rates due to this change. Six years after Germany implemented this policy, the proportion of German fathers taking leave jumped from 3.3 percent to 27.8 percent.¹⁰⁰ The majority of leave-taking fathers in Germany now take an average of two months off from work to spend time with their children, which represents the minimum amount of time needed to earn an

⁹⁵ See Zhelyazkova, *supra* note 24, at 4 (examining the history of maternity leave in Germany).

⁹⁶ See Jochen Kluge & Marcus Tamm, *Parental Leave Regulations, Mothers' Labor Force Attachment and Fathers' Childcare Involvement: Evidence from a Natural Experiment*, 26 J. POPULATION ECON. 983, 986–87 (2012) (examining Germany's parental leave regulations).

⁹⁷ *Id.* at 987 (discussing the rationale for the *Elterngeld* system).

⁹⁸ See *id.* at 984–85 (explaining that Germany adopted fatherhood bonuses as an explicit attempt to encourage men to stay home); Zhelyazkova, *supra* note 24, at 26 (summarizing research showing that German men suffered no negative consequences from taking leave).

⁹⁹ INT'L NETWORK ON LEAVE POLICIES & RESEARCH, *supra* note 19, at 129–30.

¹⁰⁰ *Id.* at 132.

equivalent bonus for their families.¹⁰¹ These results show how paid leave combined with well-designed incentives can effectively combat gender stratification. Indeed, the fact that German fathers who utilize the policy now take nearly the same amount of parental leave as U.S. mothers demonstrates the power of these policies.¹⁰²

Fatherhood bonuses have worked in North America as well. In fact, some of the most exciting developments on this front have occurred in Québec, which recently began reserving a period of paid leave exclusively for fathers.¹⁰³ Since 2006, fathers in Québec can take up to five weeks of leave, plus additional time that they can share with their partners.¹⁰⁴ Funded through the province's Parental Insurance Plan, Québec's leave policy compensates men at higher income replacement rates than Canada's national parental leave law.¹⁰⁵ Similar to outcomes in other countries that have embraced fatherhood bonuses, the rate of fathers taking leave in Québec skyrocketed from twenty-two percent to eighty-four percent just five years after the province adopted father-targeted leave.¹⁰⁶ Attesting to the influence of the policy on fathers, Québec men take parental leave at a rate over *seventy percent* higher than the rest of Canadian men who have no father-targeted leave available to them.¹⁰⁷ As in Norway and Sweden, data related to the correlation between these policies and men's uptake of housework show how fatherhood bonuses promote gender egalitarianism. For example, a study of Québec's policy found that fathers exposed to the new law spent less time at their workplaces and increased their contributions to household work.¹⁰⁸ Likewise, mothers exposed to the reform spent more time in paid work.¹⁰⁹

Given the encouraging success stories coming from Sweden, Norway, Germany, and Canada, more countries around the world are adopting policies that promote "fatherhood by gentle force."¹¹⁰ Currently, seven nations offer some kind of bonus to fathers who take parental leave, and

¹⁰¹ *Id.* at 133–34; Kluve & Tamm, *supra* note 96, at 1004; Zhelyazkova, *supra* note 24, at 14–15 (suggesting that Germany's example shows that fatherhood bonuses work outside of the Scandinavian context).

¹⁰² See Gerstel & Armenia, *supra* note 64, at 167 (reporting that American women take seventy-six days for newborn care on average).

¹⁰³ See Tremblay, *supra* note 22, at 226–27 (comparing Québec's plan to the rest of Canada).

¹⁰⁴ *Id.* (explaining the importance of high-income wage replacement in parental leave policies).

¹⁰⁵ *Id.* at 226.

¹⁰⁶ INT'L NETWORK ON LEAVE POLICIES & RESEARCH, *supra* note 19, at 78.

¹⁰⁷ Doucet, *supra* note 21 (noting that roughly twelve percent of men take parental leave in the rest of Canada).

¹⁰⁸ Patnaik, *supra* note 23, at 4–5.

¹⁰⁹ *Id.* at 3–4.

¹¹⁰ See de Silva de Alwis, *supra* note 16, at 326–27 (discussing the expansion of fatherhood bonuses).

other countries are actively considering similar measures.¹¹¹ The United States can and should join this international movement by enacting its own fatherhood bonuses. States such as California, New Jersey, and Rhode Island now offer partially paid leave to parents,¹¹² and the United States' status as the only industrialized nation in the world without paid parental leave can last only so long.¹¹³ After all, given that international competitiveness depends largely on a country's ability to efficiently employ human capital, the United States simply cannot afford policies like the FMLA that underutilize the country's highly educated female workforce.¹¹⁴ But paid leave alone will not be enough. As the experiences in the aforementioned countries indicate, the methods by which parental leave laws allocate benefits between men and women largely determine whether such policies actually dismantle gender hierarchies or simply reconstitute them. Therefore, in order to loosen the burdens that domesticity places on women, while encouraging greater male involvement at home, a parental leave policy in the United States must target fathers.

II. CONSTITUTIONALLY PERMISSIBLE SEX DISCRIMINATION

Fatherhood bonuses would undoubtedly face a high constitutional hurdle in the United States. Were the federal government to enact a law extending additional weeks of paid leave to parents on the condition that fathers take some amount of leave time, such a law might appear facially discriminatory and thus presumptively unconstitutional under the conventional approach to equal protection.¹¹⁵ To understand why, this section examines and unpacks several misunderstood strands of equal protection jurisprudence and feminist legal theory.

¹¹¹ INT'L NETWORK ON LEAVE POLICIES & RESEARCH, *supra* note 19, at 17, 35 (describing different systems that incentivize male leave-taking).

¹¹² See Brigid Schulte, *States Make Moves Toward Paying for Family Leave*, WASH. POST, Dec. 30, 2013, at A3 (discussing different jurisdictions that have enacted paid leave legislation); see also Nanette Fondas, *Why Paid Family Leave Is Good for Everyone (Even People Who Don't Use It)*, ATLANTIC, July 8, 2013, <http://www.theatlantic.com/sexes/archive/2013/07/why-paid-family-leave-is-good-for-everyone-even-people-who-dont-use-it/277577/> [<http://perma.cc/FZE4-ZTBH>] (discussing the connection between family leave legislation and workplace bias against women).

¹¹³ See Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies*, 8 J.L. & FAM. STUD. 1, 1 (2006) (critiquing the FMLA).

¹¹⁴ See Catherine Rampell, *Lean In, Dad*, N.Y. TIMES MAG., Apr. 7, 2013, at 18 (outlining the economic case for father-targeted leave).

¹¹⁵ See Ayanna, *supra* note 73, at 299 (discussing the "questionable constitutionality" of mandatory paternity leave); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 438–39 (2001) (discussing the prominence of formal equality in legal decisionmaking and highlighting its limitations).

Most accounts of the Supreme Court’s modern sex discrimination rulings describe the Justices’ rigid commitment to formal equality.¹¹⁶ According to this view, whenever the Justices encounter a law that treats similarly situated men and women differently, they strike it down. Corresponding to this narrative is a related description of ongoing debates within legal feminism. As this story goes, the issue of whether to adopt public policies designed specifically for women has split feminists between two hostile camps: one group committed to formal equality that advances the “equal treatment” of women (sameness feminists), the other favoring policies that aim for equity by extending “special treatment” to women such as paid maternity leave (difference feminists).¹¹⁷ Most gender theorists now conclude that sameness feminists have won the debate in practice, even though difference feminists outnumber them.¹¹⁸

This section critiques the foregoing debate for failing to properly delineate the actual boundaries of permissible “special treatment” as defined by the Supreme Court’s rulings in this area. Rather than utilize a formalist, line-drawing approach to equal protection, the Court has focused on whether certain laws perpetuate negative stereotypes about women that further their subordination.¹¹⁹ In instances where the Court has allowed the state to act upon sex-based differences, it has carefully distinguished between laws that presume women’s domesticity and those that do not.¹²⁰ By analyzing how these decisions define the parameters of acceptable discrimination, a new vision of the Court’s sex equality jurisprudence begins to take form.

A. *Feminist Theory and Special Treatment*

By the late 1970s, feminism in the United States stood at a strategic crossroads. Following a decade of legislative victories in which Congress had outlawed sex discrimination in pay¹²¹ and employment,¹²² for example, advocates for women’s rights had to decide whether to continue advancing a legislative agenda focused exclusively on the similarities between the

¹¹⁶ See Colker, *supra* note 25, at 1010–11 (summarizing the conventional narrative on the Court’s sex equality jurisprudence).

¹¹⁷ See Dinner, *supra* note 5, at 444 (criticizing the oversimplified depiction of the sameness–difference debate).

¹¹⁸ See Williams, *supra* note 6, at 279 (calling for greater analytical distinctions in summaries of certain debates within legal feminism).

¹¹⁹ *United States v. Virginia*, 518 U.S. 515, 533 (1996) (barring Virginia from relying upon “overbroad generalizations about the different talents, capacities, or preferences of males and females” (citations omitted)).

¹²⁰ *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987) (affirming the legislative goal of “guarantee[ing] women the basic right to participate fully and equally in the workforce”).

¹²¹ 29 U.S.C. § 206(d) (2012).

¹²² 42 U.S.C. § 2000e (2012).

sexes, or instead pursue a more nuanced course that recognized certain differences between men and women.¹²³ The heated debate over this question created fissures within legal feminism that persist to this day.¹²⁴

Adopting the rhetoric of equality and liberalism, sameness feminists argued that the law should combat discrimination against similarly situated equals.¹²⁵ According to this view, women ought to enjoy all the rights and privileges afforded to men, and no more.¹²⁶ If women received special protection for the unique burdens placed upon them by pregnancy, for example, sameness feminists feared that such legislation would only fragilize women and reinforce existing biases against them. The call to formal equality required advocates to downplay certain biological and socially constructed differences between the sexes.¹²⁷ In the process, proponents of formal equality articulated an intuitively attractive, justice-oriented appeal: treat each sex the same, and women will prosper.¹²⁸

Difference feminists, on the other hand, sought to highlight women's distinct experiences.¹²⁹ They pointed out that even though the country expressed an official commitment to treating women equally through laws such as Title VII¹³⁰ and the Equal Pay Act,¹³¹ formal equality in the law did

¹²³ See *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1340–42 (2012) (Ginsburg, J., dissenting); Williams, *supra* note 1, at 86–87 (discussing the different strategies of legal feminists).

¹²⁴ See Arnow-Richman, *supra* note 44, at 350 n.16 (listing scholarly contributions to the sameness–difference debate); Williams, *supra* note 6, at 281; Linda Hassberg, Comment, *Toward Gender Equality: Testing the Applicability of a Broader Discrimination Standard in the Workplace*, 40 BUFF. L. REV. 217, 222–29 (1992) (outlining divisions within legal feminism).

¹²⁵ See Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 867–68 (1997) (examining arguments in favor of formal equality); see, e.g., Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985) [hereinafter Williams, *Equality's Riddle*].

¹²⁶ See Bartlett, *supra* note 5, at 392 (commenting on formal equality's rhetorical appeal); see also John E. Morrison, *Viva La Diferencia: A Non-Solution to the Difference Dilemma*, 36 ARIZ. L. REV. 973, 974 (1994) (arguing that the sameness–difference debate focused on the meaning of equality).

¹²⁷ See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 37 (1995) (discussing the prevalence of formal equality arguments within feminist debates).

¹²⁸ See Bartlett, *supra* note 5, at 392–93 (describing the tactics used by advocates of formal equality); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 603–04 (2010) (summarizing the case made by sameness feminists).

¹²⁹ See, e.g., Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 514–18 (1983); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1291–1301 (1987).

¹³⁰ 42 U.S.C. § 2000e (2012).

¹³¹ 29 U.S.C. § 206(d) (2012).

not necessarily yield substantive equality at home or at work.¹³² They contended that equal treatment ended up benefiting very few women because it ignored real differences between women's lives and men's.¹³³ According to this view, neutral rules aided only the rare woman whose life was identical to a man's, but did little to assist the vast majority of women who encountered structural, gender-based barriers throughout society.¹³⁴

Even though scholars often framed the sameness–difference debate in normative terms (i.e., should women enjoy sex-specific rights?), the conflict was actually more about strategy than ideology.¹³⁵ Proponents of both strands of feminism shared the common goal of counteracting the negative effects of domesticity.¹³⁶ They simply disagreed as to whether special treatment would compensate women for gender-based harms or, instead, reinscribe underlying stereotypes. Despite the robust scholarly debate over whether the law ought to favor women in certain instances, however, the design of the female-specific rights involved in the debate remained surprisingly deemphasized. Thus, even though feminists engaged in a legislative and legal dispute over the proper policies for promoting gender equity, the discussion did not yield many concrete proposals as to how women might actually enjoy special treatment in the real world.

The few legislative proposals that did emerge, however, say quite a bit about the limited vision of special treatment that each side had in mind—one that focused on pregnancy and entailed three distinct legislative enactments: (1) the Pregnancy Discrimination Act (PDA),¹³⁷ (2) state laws granting mothers unique rights; and (3) the FMLA.¹³⁸

¹³² See, e.g., Krieger & Cooney, *supra* note 129, at 541–42 (critiquing the equal treatment approach); Littleton, *supra* note 129, at 1302 (characterizing an assimilationist model of feminism as “fatally phallogocentric”).

¹³³ See generally MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 2–6* (1991) (discussing special treatment in the context of family law); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 12 (1982) (discussing men's and women's different moral systems); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 17–18 (1988) (examining how cultural feminism characterizes women's caregiving).

¹³⁴ See Bartlett, *supra* note 5, at 392–93 (noting that the issue of pregnancy crystallized the debate over special treatment); see also Abrams, *supra* note 125, at 869–70 (discussing the appeal made by difference feminists).

¹³⁵ See Dinner, *supra* note 5, at 444 (outlining strategic differences between different feminist camps); Williams, *supra* note 6, at 284–85 (examining various branches of the sameness–difference debate).

¹³⁶ See Dinner, *supra* note 5, at 444 (calling for a more nuanced understanding of the sameness–difference debate).

¹³⁷ Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)).

¹³⁸ 29 U.S.C. § 2601(a)(5) (2012).

B. *The Legislative Evolution of Equal Treatment*

Passage of the PDA in 1978 created a moment of convergence in the sameness–difference debate. At the time of the PDA’s enactment, many U.S. employers maintained a regular habit of firing pregnant women.¹³⁹ After the Supreme Court ruled that federal law did not prohibit this practice,¹⁴⁰ both sameness feminists and difference feminists found an issue that they could agree on: pregnancy should not enable employers to issue pink slips to women. Accordingly, both sides galvanized support for passage of the PDA, which prohibited pregnancy discrimination in employment and compelled businesses that already offered disability plans to extend disability benefits to pregnant women as well.¹⁴¹ The PDA constituted a victory for sameness feminists who convinced Congress to mandate “pregnancy-blindness” throughout American companies.¹⁴² That is, the law did not require employers to provide pregnant women with pregnancy leave.¹⁴³ Rather, employers had to cover pregnant women only if they allowed other employees to take disability leave as well.¹⁴⁴

In the early 1980s, however, sameness and difference feminists began to part ways when some state legislators went a step further and enacted legislation that forced businesses to provide leave benefits to new mothers.¹⁴⁵ Supporting these laws, difference feminists attempted to distinguish modern, mother-specific enactments from the paternalism of an earlier era.¹⁴⁶ They recalled the Supreme Court’s history of utilizing sexist rationalizations to restrict women’s workplace opportunities during the late nineteenth and early twentieth centuries.¹⁴⁷ For example, in 1872, the Court affirmed a state ban on female lawyers in *Bradwell v. Illinois* because, according to Justice Bradley, “The natural and proper timidity and delicacy

¹³⁹ See Grossman, *supra* note 128, at 610 (discussing pregnancy discrimination in the United States).

¹⁴⁰ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

¹⁴¹ Pub. L. No. 95-555, 92 Stat. at 2076.

¹⁴² Grossman, *supra* note 128, at 610.

¹⁴³ See Bartlett, *supra* note 5, at 393 (noting that the PDA reflected the equal treatment position).

¹⁴⁴ Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L.J. 61, 77 (1997) (arguing that “[t]he PDA is, at most, an equal treatment model for pregnant women”); Issacharoff & Rosenblum, *supra* note 18, at 2181–82 (noting that the PDA never mandated leave for women).

¹⁴⁵ See Littleton, *supra* note 73, at 24 (asserting that the “salutary nature” of the debate broke down soon after the PDA’s passage); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 193 (1982) (noting that all feminist groups supported passage of the PDA).

¹⁴⁶ See Suk, *supra* note 7, at 47–49 (discussing the relationship between second wave feminism and employment legislation).

¹⁴⁷ See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a ban on female bartenders); see also ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 186–214* (1982) (summarizing the protective legislation of the early twentieth century).

which belongs to the female sex evidently unfits it for many of the occupations of civil life.”¹⁴⁸ Similarly, the Court’s 1908 decision in *Muller v. Oregon* upheld a state law that limited the hours of female laundry workers due to women’s “physical structure and the performance of maternal functions.”¹⁴⁹ The shadow of *Bradwell* and *Muller* loomed over the maternity leave debates of the 1980s.

Although the older forms of protective legislation ended up “protecting” women out of the workforce, difference feminists contended that modern maternity leave laws actually advanced women’s careers by allowing them to keep their jobs once they became mothers.¹⁵⁰ They argued that, at the very least, society should recognize real biological differences in the area of reproduction.¹⁵¹ According to this view, if society wanted men and women to enjoy equal access to market work, then the law ought to equalize women’s starting positions by compensating them for short workplace departures that result from pregnancy.¹⁵²

Meanwhile, sameness feminists predicted that these protective laws would actually reinscribe the strictures of domesticity.¹⁵³ They argued that history was on their side because special treatment had too often served as a proxy for exclusion.¹⁵⁴ If parental leave became known as a “women’s issue,” coworkers would resent mothers and employers would feel more comfortable relegating women to lower-tier jobs.¹⁵⁵ In essence, critics feared that maternity leave laws would recast women, once again, as less-than-ideal workers who should remain at home.¹⁵⁶

Ruling in favor of sex-specific rights, the Supreme Court sided with difference feminists by holding that state legislatures could in fact require

¹⁴⁸ 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

¹⁴⁹ 208 U.S. 412, 421 (1908).

¹⁵⁰ See Littleton, *supra* note 73, at 27 (examining the historical context of protective legislation); Williams, *Equality’s Riddle*, *supra* note 125, at 334 (discussing the harms caused by protective legislation).

¹⁵¹ See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955 (1984) (criticizing an approach to equality that denies biological differences between the sexes).

¹⁵² Issacharoff & Rosenblum, *supra* note 18, at 2198–99; Hassberg, *supra* note 124, at 223 (discussing the limitations of formal equality).

¹⁵³ See *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1341–42 (2012) (Ginsburg, J., dissenting) (summarizing the debate within legal feminism over sex-specific leave legislation).

¹⁵⁴ See Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA’s Pregnancy Exclusion*, 27 WIS. J.L. GENDER & SOC’Y 1, 18–19 (2012) (noting that sameness feminists preferred to highlight the commonalities between male and female workers).

¹⁵⁵ See Williams, *Equality’s Riddle*, *supra* note 125, at 353, 371 (“Accommodation to parental needs and obligations should penetrate to the core of the workplace rather than remain a peripheral ‘women’s issue.’”).

¹⁵⁶ See Alemzadeh, *supra* note 154, at 17–18 (describing the historical connection between protective legislation and modern maternity leave laws).

employers to provide maternity disability leave benefits.¹⁵⁷ This decision gave rise to what Martha Minow famously called the “dilemma of difference.”¹⁵⁸ Discussing the conundrum maternity leave laws created, she said, “[W]e may recreate difference either by noticing it or by ignoring it.”¹⁵⁹ For example, any law that overlooks the stereotypes mothers face at work might actually strengthen those biases. Conversely, the more that the law recognizes differences between women and men, the greater the risk that existing forms of discrimination will solidify.

Following the Supreme Court’s approval of state maternity leave laws, sameness feminists turned to Congress for a national, gender-neutral solution.¹⁶⁰ Broadening the issue beyond the topic of maternity leave, the question presented to Congress in the late 1980s and early 1990s was whether parental leave rights should cover mothers only. This time, sameness feminists won the debate when Congress passed the FMLA and extended family leave benefits to men and women on equal terms for a variety of caregiving reasons.¹⁶¹

Consistent with the FMLA’s approach to equality, the concept of equal treatment appears to dominate today’s legal and judicial landscape.¹⁶² From family law,¹⁶³ to disability protections,¹⁶⁴ to antidiscrimination guarantees,¹⁶⁵ Congress has crafted nearly all rights in gender-neutral terms.¹⁶⁶ Mirroring these legislative outcomes, most summaries of the Supreme Court’s sex discrimination decisions assert that, like Congress, the

¹⁵⁷ See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987); see also *infra* Part II.C and accompanying discussion of the Supreme Court’s special treatment jurisprudence.

¹⁵⁸ MINOW, MAKING ALL THE DIFFERENCE, *supra* note 3, at 20; Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 12 (1987) [hereinafter Minow, *Justice Engendered*].

¹⁵⁹ Minow, *Justice Engendered*, *supra* note 158, at 12.

¹⁶⁰ See *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1340 (2012) (Ginsburg, J., dissenting) (summarizing the FMLA’s legislative history); Williams, *supra* note 6, at 279 (explaining how equal treatment advocates mobilized support for the FMLA).

¹⁶¹ See Gerstel & Armenia, *supra* note 64, at 163 (noting that FMLA supporters celebrated the law’s universalism).

¹⁶² See Dinner, *supra* note 5, at 444 (summarizing the perception that equal treatment feminism had prevailed in the debate over women’s rights); Williams, *supra* note 6, at 279 (discussing the prevalence of equal treatment arguments in public policy debates).

¹⁶³ See Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 78–79 (2003) (discussing the “best interests of the child” standard in custody disputes).

¹⁶⁴ 29 C.F.R. § 1630.2(g) (2013); see also Alemzadeh, *supra* note 154, at 5 (examining the treatment of pregnancy in the Americans with Disabilities Act).

¹⁶⁵ 42 U.S.C. § 2000e-2(a) (2012); see also Arnow-Richman, *supra* note 44, at 350–51 (outlining Title VII’s commitment to formal equality).

¹⁶⁶ *But see* Davis, *supra* note 163, at 76 (discussing Congress’s limited deviations from sex-blind policymaking).

Court has placed the equality principle above all others.¹⁶⁷ But despite the legislative and judicial bent toward formal equality, the Court has also left room for certain sex-based classifications to coexist with the country's more celebrated examples of equal treatment.

C. *The Supreme Court's Sex Discrimination Canon*

The Supreme Court first held that a governmental sex classification violated the Equal Protection Clause of the Fourteenth Amendment in 1971 with its ruling in *Reed v. Reed*.¹⁶⁸ Despite the momentous nature of this decision, however, the Court took decades to define the precise contours of the constitutional test for sex discrimination. For example, in *Frontiero v. Richardson*, the Court came within one vote of adopting a strict scrutiny test.¹⁶⁹ Three years later, the Court settled on intermediate scrutiny in *Craig v. Boren*.¹⁷⁰ In 1996, the Court appeared to raise the standard even higher when it required states to articulate an “exceedingly persuasive justification” to enact legislation based on sex.¹⁷¹

The foregoing chronology represents the classic telling of the Supreme Court's sex-based equal protection jurisprudence. The narrative suggests that in striking down sex-based classifications during the latter half of the twentieth century, the Court expressed an ever-growing commitment to formal equality. Unfortunately, this version of the sex equality canon tells only half the story. Just as the Court rejected numerous governmental sex classifications during this period, it also permitted many others to stand.¹⁷²

Reading the Court's celebrated equal treatment cases in conjunction with its overlooked special treatment decisions provides a far more nuanced understanding of sex equality. In fact, the Court never based its decisions solely on whether laws created formal groupings, but rather if

¹⁶⁷ See Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 HARV. J.L. & GENDER 1, 2 (2011) (summarizing the Court's “anticlassification” approach to equal protection); Monica Diggs Mange, *The Formal Equality Theory in Practice: The Inability of Current Antidiscrimination Law to Protect Conventional and Unconventional Persons*, 16 COLUM. J. GENDER & L. 1, 16 (2007).

¹⁶⁸ See 404 U.S. 71, 76 (1971); see also Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 487 (2008) (discussing the history of *Reed*).

¹⁶⁹ 411 U.S. 677 (1973); see also Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 740 (2002) (discussing Justice Brennan's desire to apply a strict scrutiny standard to sex discrimination).

¹⁷⁰ 429 U.S. 190 (1976).

¹⁷¹ *United States v. Virginia*, 518 U.S. 515, 531 (1996); see also Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149, 1161 (2010) (arguing that the Court's standard of review for sex discrimination “reached its zenith” in *Virginia*).

¹⁷² See, e.g., *Califano v. Webster*, 430 U.S. 313, 317 (1977); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975); *Kahn v. Shevin*, 416 U.S. 351, 355 (1974); see also Buchanan, *supra* note 171, at 1163 (discussing limited instances of special treatment).

legal classifications relied upon stereotypes that hampered women's advancement.¹⁷³ This commitment to antistereotyping, antistatutory principles can be found both in the Court's special treatment decisions and in the more well-known formal equality rulings. With these common legal principles distilled from the canonical cases and the neglected special treatment decisions, a new understanding of sex discrimination emerges—one that allows for equality-promoting sex classifications such as fatherhood bonuses.

1. Stereotyping, Subordination, and Equal Treatment.—The breadwinner–homemaker stereotype stands at the center of many of the Supreme Court's most prominent formal equality rulings. In fact, a close examination of these decisions reveals a Court less concerned with formalism than with combatting sex-role stereotypes and status-based harms. For example, in *Frontiero v. Richardson*, the Court assailed the male-as-breadwinner stereotype by striking down an armed services rule that granted servicemen benefits to support their wives but denied the same automatic allotments to female soldiers.¹⁷⁴ According to Justice Brennan's famous observation in *Frontiero*, “[S]uch discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”¹⁷⁵ In many ways, *Frontiero* mirrored the sentiments the Court expressed two years earlier in *Reed v. Reed*, which struck down an Idaho statute that favored men over women as estate administrators.¹⁷⁶ Whereas the state law in *Reed* presumed that men controlled capital, the armed services rule in *Frontiero* presumed that women controlled the home. Both stereotypes reinforced gender roles that limited women's advancement. In each case, the Court mandated formal equality not as a means unto itself but as part of the larger objective of dismantling gender hierarchies.

But even as the Court rooted out invidious governmental stereotypes in these equal treatment decisions, it also left open the possibility that other special treatment laws might withstand judicial scrutiny. For example, the *Frontiero* Court gave a nod to special treatment when it noted that the armed services rule at issue did “not in any sense . . . rectify the effects of past discrimination against women.”¹⁷⁷ The Court implied, however, that it

¹⁷³ See Franklin, *supra* note 76, at 88 (calling for a reexamination of Ruth Bader Ginsburg's approach to sex equality).

¹⁷⁴ 411 U.S. 677, 679–81 (1973).

¹⁷⁵ *Id.* at 684.

¹⁷⁶ 404 U.S. 71, 76 (1971).

¹⁷⁷ *Frontiero*, 411 U.S. at 689 n.22.

might have ruled differently if the law *had* rectified those effects.¹⁷⁸ Similarly, in striking down Mississippi's exclusion of male nursing students in *Mississippi University for Women v. Hogan*, the Court noted that "a gender-based classification favoring one sex *can be justified* if it intentionally and directly assists members of the sex that is disproportionately burdened."¹⁷⁹

The Supreme Court emphasized the continued relevance of special treatment when it struck down the Virginia Military Institute's (VMI) exclusion of female cadets in *United States v. Virginia*.¹⁸⁰ Justice Ginsburg's majority opinion acknowledged that once women began attending VMI, the school would have to perform "alterations necessary to afford members of each sex privacy" and to "adjust aspects of the physical training programs."¹⁸¹ Thus, the Court permitted special treatment for a physical, sex-based reason ("training programs") as well as for a socially constructed, gender-based rationale ("each sex[']s privacy").¹⁸² These minor changes, the Court presumed, would remove barriers that harmed women without altering the school's fundamental character.¹⁸³ But Justice Ginsburg's acceptance of special treatment went well beyond tinkering with VMI's specific educational program. In a forceful defense of special treatment, she explained how "[s]ex classifications may be used to compensate women for particular economic disabilities they have suffered, . . . to promote equal employment opportunity, . . . [and] to advance full development of the talent and capacities of our Nation's people."¹⁸⁴ In other words, even though the *Virginia* decision itself applied equal treatment to advance antisubordination principles, Justice Ginsburg simultaneously recognized the power of special treatment to achieve the same objective.

Seven years after *Virginia*, the Court extended its sex equality analysis to the realm of family leave in *Nevada Department of Human Resources v. Hibbs*.¹⁸⁵ There, Justice Rehnquist wrote for the majority in holding that Congress could expose states to monetary liability for certain FMLA

¹⁷⁸ See *id.*; Colker, *supra* note 25, at 1025–26 (analyzing the Court's use of heightened scrutiny in *Frontiero*).

¹⁷⁹ 458 U.S. 718, 728 (1982) (emphasis added) (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975)).

¹⁸⁰ 518 U.S. 515, 519 (1996).

¹⁸¹ *Id.* at 550 n.19.

¹⁸² *Id.*

¹⁸³ See Candace Saari Kovacic-Fleischer, *United States v. Virginia's New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 862–63 (1997) (analyzing the melding of equal treatment and special treatment in *Virginia*).

¹⁸⁴ *Virginia*, 518 U.S. at 533–34 (brackets, citations, and internal quotation marks omitted).

¹⁸⁵ 538 U.S. 721 (2003).

violations.¹⁸⁶ Much like other decisions in the Court’s formal equality canon, *Hibbs* addressed the value of gender neutrality but also emphasized broader equal protection principles as well.¹⁸⁷ Justice Rehnquist noted that many states at the time had granted maternity leave to women for periods of time far longer than fathers received.¹⁸⁸ By establishing mothers as default caregivers, such provisions reaffirmed the notion that “women are mothers first, and workers second.”¹⁸⁹ Justice Rehnquist presumed that the FMLA’s grant of family leave to both sexes on equal terms would advance gender equality.¹⁹⁰ Although this presumption has not stood the test of time,¹⁹¹ *Hibbs* never considered whether special treatment for fathers might produce a better result. Nevertheless, Justice Rehnquist’s critique of the “stereotype that caring for family members is women’s work” remains directly relevant to the ongoing problem of maternal profiling.¹⁹²

Finally, in its most recent FMLA decision, *Coleman v. Court of Appeals of Maryland*,¹⁹³ the Court again addressed the connection between family leave and sex discrimination. Unlike *Hibbs*, which involved FMLA’s family care provisions, *Coleman* considered whether allowing individual employees to take leave for their own personal medical conditions also combatted sex-role stereotypes.¹⁹⁴ Declining to find such a connection, Justice Kennedy’s plurality opinion concluded that the FMLA’s self-care provision addressed “discrimination on the basis of illness, not sex.”¹⁹⁵ In dissent, Justice Ginsburg recounted the history of the sameness–difference debate and explained why the FMLA’s various provisions worked together to “challenge stereotypes of women as lone childrearsers.”¹⁹⁶ But even though both sides disagreed on the empirical question of whether employers discriminated against women who took leave to care for themselves, both Justices Kennedy and Ginsburg agreed that Congress could enact legislation to counteract gender stereotypes that hindered women’s workplace advancement. The plurality found “scant evidence” that the FMLA provision at issue in *Coleman* achieved this end,

¹⁸⁶ *Id.* at 724–25.

¹⁸⁷ *Id.* at 728 n.2 (noting that Congress ensured “that leave is available . . . on a *gender-neutral basis*” (alteration in original) (quoting 29 U.S.C. § 2601(b) (2000))).

¹⁸⁸ *Id.* at 731.

¹⁸⁹ *Id.* at 736 (citation omitted).

¹⁹⁰ See Grossman, *supra* note 15, at 59 (discussing the role that formal equality played in *Hibbs*).

¹⁹¹ See *Hibbs*, 538 U.S. at 736; see also *supra* Part I.B and accompanying discussion of leave-taking differentials between men and women.

¹⁹² *Hibbs*, 538 U.S. at 731.

¹⁹³ 132 S. Ct. 1327 (2012).

¹⁹⁴ *Id.* at 1332 (plurality opinion).

¹⁹⁵ *Id.* at 1335.

¹⁹⁶ *Id.* at 1339–45 (Ginsburg, J., dissenting).

but acknowledged the constitutional power to solve such problems when they exist.¹⁹⁷ Likewise, Justice Ginsburg reaffirmed the importance of “reduc[ing] sex-based inequalities in leave programs” to make it “feasible for women to work while sustaining family life.”¹⁹⁸ In this way, both Justices underscored the constitutional validity of public policies that attempt to root out sex-based biases against caregivers.

As the foregoing account demonstrates, the Court’s celebrated equal treatment decisions in fact focus less on line-drawing and more on combatting stereotypes that limit women’s full participation in the public sphere. According to the Court, the key distinction between permissible and impermissible sex classifications is not whether a law constitutes “special treatment” or “equal treatment” but whether “official action . . . closes a door or denies opportunity to women (*or to men*).”¹⁹⁹ Although the formal equality decisions presumed that equal treatment would open more doors, at other times the Court has recognized the potential for special treatment to achieve the same end.

2. *Rediscovering Special Treatment.*—The Supreme Court’s special treatment decisions have become the forgotten stepchildren of equal protection. Despite the lack of critical attention paid to this case law, the fact remains that at the same time that the Court announced its famous equal treatment decisions, it continued to approve of certain sex-based classifications as well.²⁰⁰ Thus, despite the prominence of the formal equality narrative, this parallel, less-known history reveals how the Court has rejected pure formalism in favor of a more malleable notion of equality.

a. *Stereotype-neutral special treatment.*—The most recognized exception to the Supreme Court’s commitment to treating men and women equally occurred in the realm of reproduction.²⁰¹ The Court’s decision in *Geduldig v. Aiello* represents a memorable example of this type of decision.²⁰² In *Geduldig*, the Court considered whether a state disability plan could exclude pregnancy from a list of covered impairments even though it covered other physical problems.²⁰³ Despite the separation of

¹⁹⁷ *Id.* at 1334 (plurality opinion).

¹⁹⁸ *Id.* at 1350 (Ginsburg, J., dissenting).

¹⁹⁹ *United States v. Virginia*, 518 U.S. 515, 532 (1996) (emphasis added).

²⁰⁰ See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987); *Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974).

²⁰¹ See, e.g., Franklin, *supra* note 76, at 128 (discussing the Supreme Court’s special treatment precedent); Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1879 (2006) (discussing Justice Rehnquist’s belief that pregnancy was a “site of real physical difference” between the sexes that justified special treatment).

²⁰² 417 U.S. 484 (1974).

²⁰³ *Id.* at 488–90.

pregnancy—a condition that obviously affects only women—from other disabilities, the Court held that the state was not discriminating based on sex because the program distinguished between “pregnant women” and “nonpregnant persons.”²⁰⁴ As the Court stated, “While the first group is exclusively female, the second includes members of both sexes.”²⁰⁵ More than thirty years later, the distinction between “pregnant” and “nonpregnant persons” still elicits “pained laughter” from law students.²⁰⁶

Today, *Geduldig* stands for the proposition that pregnancy discrimination is not sex discrimination under the Equal Protection Clause.²⁰⁷ But this is an oversimplification. Rather than announce a wholesale exclusion of pregnancy from equal protection, the *Geduldig* Court simply rejected the broad proposition that “every legislative classification concerning pregnancy [was] a sex-based classification.”²⁰⁸ In fact, *Geduldig* suggested that the Court would have struck down a law that used pregnancy as a proxy for sex discrimination.²⁰⁹ The decision criticized “distinctions involving pregnancy [that] are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.”²¹⁰ Although the outcome in *Geduldig* certainly did not benefit women, the decision still established the crucial doctrinal point that the Court will vet laws affecting pregnant women for any evidence of invidious intent.

The Court applied a similar screen to special treatment in *Michael M. v. Superior Court*, which affirmed a California statutory rape law that exposed men, but not women, to criminal liability.²¹¹ As in *Geduldig*, the Court found that the law did not perpetuate “invidious” sex discrimination, but rather protected young women from the harm of rape-induced pregnancies—a risk unique to them.²¹² Although the decision is laden with paternalism, its affirmation of special treatment nevertheless was based on the Court’s own empirical assumption (however flawed) that by

²⁰⁴ *Id.* at 496 n.20.

²⁰⁵ *Id.*

²⁰⁶ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 782 (2011).

²⁰⁷ See Siegel, *supra* note 201, at 1891 (discussing the common perception of *Geduldig* as permitting pregnancy discrimination).

²⁰⁸ *Geduldig*, 417 U.S. at 496 n.20 (emphasis added).

²⁰⁹ *Id.*; see also Siegel, *supra* note 201, at 1891; Siegel & Siegel, *supra* note 25, at 793 (discussing the *Geduldig* Court’s acknowledgment that pregnancy discrimination can constitute invidious sex discrimination at times).

²¹⁰ *Geduldig*, 417 U.S. at 496 n.20.

²¹¹ 450 U.S. 464 (1981).

²¹² *Id.* at 469–70.

criminalizing male-perpetuated rape only, the state law at issue could counteract women's subordination.²¹³

Twenty years later, the Court again authorized biologically based differential treatment in *Nguyen v. INS*.²¹⁴ Affirming a federal immigration law that required fathers but not mothers to prove their biological connection to nonmarital children, the *Nguyen* Court stressed that the decision had nothing to do with sex-role stereotypes, boldly declaring that “[t]his is not a stereotype.”²¹⁵ Instead, the immigration law at issue simply reflected the government’s “recognition that at the moment of birth . . . the fact of parenthood [has] been established [for the unwed mother] in a way not guaranteed in the case of the unwed father.”²¹⁶ Just as it had done in *Geduldig* and *Michael M.*, the *Nguyen* Court required the state to satisfy certain preconditions before approving of the government’s sex-based classification.

Each of these decisions sanctioned sex discrimination and produced outcomes that were not particularly favorable to women: *Geduldig* segregated pregnant women from other disabled workers; *Michael M.* emphasized the fragility of teenage girls; and *Nguyen* reinforced the old notion of mothers as default caregivers.²¹⁷ But the Court’s rhetorical commitment to antistereotyping, antisubordination principles bears noting. *Geduldig* and its progeny made clear that the Court would strike down pregnancy laws that reflect gender bias. Likewise, the Justices in *Michael M.* explained how the criminal regulation at issue expanded women’s opportunities. And despite a vigorous disagreement between the majority and dissent in *Nguyen*, both sides agreed about the impermissibility of sex stereotyping.²¹⁸

At the same time, it would be a stretch to categorize these body-based special treatment cases as affirmatively advancing an antistereotyping agenda. At most, they reflect a “do no harm” approach to sex-based classifications. *Geduldig* and *Michael M.* emphasized the *lack* of invidiousness in the state laws at issue. *Nguyen* gave repeated assurances that the Court was *not* reinforcing traditional stereotypes about mothers and

²¹³ See Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 8 (1990) (critiquing the sex-based presumptions in *Michael M.*).

²¹⁴ 533 U.S. 53 (2001).

²¹⁵ *Id.* at 68; see also Franklin, *supra* note 76, at 147–48 (discussing the *Nguyen* Court’s insistence that its holding did not reflect stereotypical views of mothers and fathers).

²¹⁶ *Nguyen*, 533 U.S. at 68.

²¹⁷ See Cunningham-Parmeter, *supra* note 51, at 276–77 (examining the treatment of mothers and fathers in *Nguyen*); see also Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1273–74 (2005) (criticizing the *Nguyen* Court’s gendered presumptions).

²¹⁸ Franklin, *supra* note 76, at 148–49.

fathers. Thus, these decisions embraced what could be called a “stereotype-neutral” approach to special treatment. When the Court recognizes physical differences between the sexes, it will sanction discriminatory policies that reflect those differences, but only after verifying that the government has not actually advanced invidious sex stereotypes. Yet such a commitment, although important to preventing gender-based subordination, fails to advance the transformative potential of special treatment.

Fortunately, the Supreme Court has not limited its special treatment decisions to stereotype-neutral laws that involve the female body. Indeed, numerous special treatment decisions have allowed states to enforce sex-based classifications that affirmatively combat gender stereotypes. Under this view, the Court employs equal protection principles not only as a shield to protect women from illegitimate laws, but also as a sword to affirm those laws that fundamentally disrupt existing systems of gender-based oppression. Fatherhood bonuses represent this new vision of special treatment.

b. Equality-enhancing special treatment.—The law can do more than merely swat away offensive stereotypes. In a series of decisions that condoned special treatment for women, the Supreme Court at times has embraced governmental attempts to address socialized, gender-based differences between the sexes. For example, in *Califano v. Webster*, the Court authorized the Social Security Administration to enforce a rule that compensated women for past wage discrimination.²¹⁹ Backing this form of special treatment, the Court explained why the law was not an “accidental byproduct of a traditional way of thinking about females” but instead represented a deliberate legislative attempt to counteract the “economic disabilities suffered by women” due to “the socialization process of a male-dominated culture.”²²⁰ According to the Court, because gender norms caused women to opt out of the workforce and perform a disproportionate share of domestic work, the Social Security Administration could compensate women for the depressed earnings that resulted from those gender-based strictures. All nine Justices of the Supreme Court embraced this broad concept of special treatment—a decision that the Court has never repudiated.²²¹

In the realm of sex-based affirmative action, the Court has repeatedly eschewed formalism in favor of equality-enhancing special treatment.²²²

²¹⁹ 430 U.S. 313 (1977).

²²⁰ *Id.* at 318–20 (citations omitted).

²²¹ Levinson, *supra* note 167, at 9; *see also* Kahn v. Shevin, 416 U.S. 351 (1974) (affirming a Florida tax exemption favoring widows).

²²² Brighouse & Wright, *supra* note 14, at 361–62 (utilizing a similar formulation to categorize parental leave policies).

Thus, in *Schlesinger v. Ballard* the Court allowed the Navy to treat men and women differently under its up-or-out policy.²²³ Pursuant to this rule, the Navy forced retirement on male officers who had not received any promotions in nine years, whereas women received thirteen years to prove their worth.²²⁴ Mirroring the screen for invidious intent in *Geduldig* and *Michael M.*, the *Schlesinger* Court found no evidence of “archaic and overbroad generalizations” in the law.²²⁵ Instead, the Court allowed the government to recognize “the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service.”²²⁶

The Court again authorized the state to promote women over men in *Johnson v. Transportation Agency*.²²⁷ There, a public employer hired the first woman ever to work as a road dispatcher over a man who had earned a higher interview score.²²⁸ Deciding the matter under federal antidiscrimination law, Justice Brennan noted that the “limited opportunities that have existed in the past” for women could justify special treatment.²²⁹ According to the Court, if a stereotype about women’s place at work (such as a belief that women should not manage road crews) caused differential workplace outcomes (such as the entire omission of women from a particular field) then the government could utilize sex-based classifications. Describing special treatment in terms that extended beyond pure remediation, however, Justice Brennan predicted that the affirmative action plan at issue would “effect[] a gradual improvement” in women’s workforce representation.²³⁰ Under this view, a state can employ special treatment not only as a means of filling current sex-based gaps but also to expand workplace opportunities for women in the future.

Perhaps more than any other case, the Court’s decision in *California Federal Savings & Loan Ass’n v. Guerra* reflects the transformative potential of special treatment.²³¹ In *Guerra*, the Court held that federal law did not prevent states from requiring pregnant women to receive disability

²²³ 419 U.S. 498 (1975); see also Buchanan, *supra* note 171, at 1163 (analyzing sex-based distinctions in *Schlesinger*).

²²⁴ See Holly A. Williams, Note, *Reaching Across Difference: Extending Equality’s Reach to Encompass Governmental Programs That Solely Benefit Women*, 13 UCLA WOMEN’S L.J. 375, 395 (2005) (discussing the Navy’s advancement rule in *Schlesinger*).

²²⁵ *Schlesinger*, 419 U.S. at 508.

²²⁶ *Id.*; see also Sullivan, *supra* note 169, at 753 (commenting that the Court has “approved affirmative action for women, but not affirmative action for ladies”).

²²⁷ 480 U.S. 616, 620 (1987).

²²⁸ *Id.* at 622–26.

²²⁹ *Id.* at 634.

²³⁰ *Id.* at 616, 639 (describing the government employer’s plan to “attain a balanced work force, not to maintain one”).

²³¹ 479 U.S. 272 (1987).

benefits beyond what other workers received. Approving of this form of special treatment, Justice Marshall's majority opinion emphasized that the California law at issue applied "only [to a woman's] period of *actual physical disability* on account of pregnancy."²³² Consistent with this language, commentators and courts have described *Guerra* as a body-based example of special treatment.²³³ But beyond physical differences, *Guerra* also referenced the gender-based demands that caregiving placed on mothers. Lillian Garland was the woman at the center of the debate. Working as a bank receptionist in Los Angeles, Garland took disability leave due to complications from a cesarean-section delivery.²³⁴ After her employer fired her following her return from leave, Garland could not afford housing and eventually lost custody of her daughter.²³⁵ As Garland's brief to the Supreme Court noted, "[T]he plight of Ms. Garland is not unique; she is one of the several thousand working mothers in the United States' labor force who faces the risk of losing her job after childbirth"²³⁶

The *Guerra* decision alluded to these broader gender-based burdens when Justice Marshall observed that pregnancy discrimination "is a social phenomenon encased in a social context."²³⁷ Lillian Garland suffered not only from her physical limitations but also from a confluence of forces related to caregiving and economic hardships. As a single parent, Garland was primarily responsible for caring for her daughter until she lost custody.²³⁸ Thus, in the weeks while Garland took "physical" disability leave, she took "caregiver" leave as well. According to *Guerra*, if employers allowed men to have children and keep their jobs, then the law could ensure the same right to women through mother-specific rights.²³⁹ As Justice Marshall noted, "The entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce"²⁴⁰ As such, although *Guerra* technically involved a

²³² *Id.* at 290.

²³³ See Schafer v. Bd. of Pub. Educ., 903 F.2d 243 (3d Cir. 1990); Issacharoff & Rosenblum, *supra* note 18, at 2187; Kathryn Frueh Patterson, Comment, *Discrimination in the Workplace: Are Men and Women Not Entitled to the Same Parental Leave Benefits Under Title VII?*, 47 SMU L. REV. 425, 433–34 (1994) (examining the breadth of *Guerra*).

²³⁴ Brief Amicus Curiae of Lillian Garland, *Guerra*, 479 U.S. 272 (No. 85-494), 1985 WL 670263, at *5; Amy Wilentz, *Garland's Bouquet: A Landmark Supreme Court Ruling Supports Pregnancy Leave*, TIME, Jan. 26, 1987, at 14.

²³⁵ Wilentz, *supra* note 234, at 14.

²³⁶ Brief Amicus Curiae of Lillian Garland, *supra* note 234, at *2.

²³⁷ *Guerra*, 479 U.S. at 289 (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 159 (1976)).

²³⁸ See Wilentz, *supra* note 234, at 14 (discussing the factual history of the case).

²³⁹ *Guerra*, 479 U.S. at 289; see also Issacharoff & Rosenblum, *supra* note 18, at 2183 (examining the equality principle enunciated in *Guerra*).

²⁴⁰ *Guerra*, 479 U.S. at 289 (first alteration in original) (quoting 123 CONG. REC. 29,658 (1977)).

physical disability law, its reference to the “social phenomenon” of pregnancy discrimination also pointed to the broader, gender-based barriers that limited women’s advancement. These concerns remain relevant today, even though the Court decided *Guerra* and many other special treatment decisions years ago. Indeed, the Court reaffirmed the legislative importance of combatting sex-role stereotypes this decade,²⁴¹ and no case has reversed the earlier decisions discussed here that authorized the use of equality-promoting special treatment.

Laws can enhance stereotypes, counteract them, or at least avoid promoting them. Most of the Court’s equal treatment decisions involved stereotype-enhancing laws that the Court struck down for relying upon stereotypical assumptions about women’s domestic roles. In other decisions, the Court left intact laws that treated women differently than men based not on stereotypes, but rather on the biological or physical differences between the sexes. But the Court’s sex equality jurisprudence extended beyond stereotype-enhancing laws and stereotype-neutral laws to laws that counteracted the historically harmful effects of sex-role stereotypes. Permitting laws that favored women in certain instances, this approach to sex-based classifications created the legal space for more ambitious forms of special treatment for men as well.

III. BUILDING THE CONSTITUTIONAL CASE BY DECONSTRUCTING MASCULINE STEREOTYPES

Because the Supreme Court sanctions certain discriminatory policies that challenge gender stereotypes, the constitutional argument for fatherhood bonuses begins with understanding the gender stereotypes that shape male behavior and cause women harm. The Supreme Court has occasionally alluded to these gendered forms. For example, it has castigated “traditional, often inaccurate, assumptions about the proper roles of men and women”²⁴² and challenged governmental actions that “den[y] opportunity to women (*or to men*).”²⁴³ Building on these concerns, an effective analysis of masculine gender norms would seek to understand how the rules of manhood limit women’s workplace opportunities. Unfortunately, legal feminism cannot fully meet this need. This is not to say that feminist scholarship has ignored men altogether; indeed, a large body of empirical and theoretical feminism has scrutinized the masculine

²⁴¹ *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012) (plurality opinion).

²⁴² *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) (emphasis added).

²⁴³ *United States v. Virginia*, 518 U.S. 515, 532 (1996) (emphasis added).

bias of legal rules and institutions.²⁴⁴ Yet despite the value in exposing the oppressive force of male power, legal feminism has rarely presented men as gendered beings themselves.²⁴⁵ Instead, the dominant feminist critique of patriarchal privilege tends to depict men in an undifferentiated light: privileged, unified, and singular.²⁴⁶ This essentialized presentation leaves little room for understanding how gender norms affect men's behaviors or how power disparities among men can harm certain men as well as women.²⁴⁷

Fortunately, a different model of gender analysis stands ready to explain how cultural norms shape men's gendered identities. The study of masculinities attempts to understand the social construction of manhood.²⁴⁸ Whereas feminism explains what men do, masculinities theory explains how and why they do it. Originating primarily from psychology, feminist theory, queer theory, and sociology, masculinities theory presents men as gendered beings who attempt to prove their gender to other men.²⁴⁹

Although masculinities theory rose to prominence in the humanities and social sciences during the 1980s, it did not attract a great deal of critical attention from the legal academy until the 1990s—well past the time when the Supreme Court had articulated its antistereotyping approach to equal protection.²⁵⁰ Despite this gap in time, however, the study of masculinities represents a crucial tool for advancing the Court's sex equality jurisprudence and understanding the role fatherhood bonuses can play in expanding opportunities for both sexes. The three concepts of status, stereotyping, and subordination that derive from masculinities theory help explain why fatherhood bonuses would satisfy the Court's test for permissible instances of special treatment.

²⁴⁴ See Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431, 437 (2010) (analyzing the representations of men in feminist scholarship).

²⁴⁵ See Levit, *supra* note 31, at 1041 (discussing feminism's goals); Ann C. McGinley & Frank Rudy Cooper, *Masculinities, Multidimensionality, and Law: Why They Need One Another*, in *MASCULINITIES AND THE LAW*, *supra* note 30, at 1–2 (examining feminist theory's tendency to essentialize men).

²⁴⁶ See DOWD, *supra* note 32, at 16 (critiquing the characterization of men as a universal category).

²⁴⁷ See McGinley & Cooper, *supra* note 245, at 2 (discussing the limited vision of men in certain feminist strands).

²⁴⁸ See Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 683–84 (2009) (outlining the tenets of masculinities theory); McGinley, *supra* note 3, at 705–06 (same).

²⁴⁹ See Ann C. McGinley, Ricci v. DeStefano: *A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 585–86 (2010) (summarizing the basic precepts of masculinities theory).

²⁵⁰ See RICHARD COLLIER, *MASCULINITY, LAW AND THE FAMILY* 1 (1995) (commenting on the shortage of texts covering masculinity and the law); DOWD, *supra* note 32, at 6 (noting that most theoretical work on masculinities exists outside of legal studies).

First, masculinities theory teaches that men constantly seek to establish their status as men, engaging in never-ending competitions to outman each other.²⁵¹ Given the importance of status to men, governmental policies can send a signal to men (who can then send a signal to one another) that a decision to take parental leave actually conforms to behavior that society has identified as culturally and morally beneficial.²⁵² Applying this knowledge to the Supreme Court's special treatment test, the significance of status to men means that a policy targeting men specifically has a more substantial relationship to the "important governmental objective" of combatting women's subordination than a gender-neutral approach.²⁵³

Second, masculinities theory provides a method for highlighting the stereotypes that compel men to avoid domestic work. By focusing on these rules of manhood, the study of masculinities can, as the Supreme Court has suggested, scrutinize "fixed notions concerning the roles and abilities of males and females."²⁵⁴

Third, and perhaps somewhat surprisingly, masculinities theory explains how gender norms subordinate men as well as women. Although men enjoy a great deal of social power and privilege, the "straightjacket of conventional masculinity" also causes them to engage in behaviors that harm their health and emotional well-being.²⁵⁵ These behaviors injure women who must fill in the gaps created by the masculine norm of detached parenting.²⁵⁶ In this way, an examination of masculine gender norms helps explain how fatherhood bonuses would expand women's opportunities by incentivizing male caregiving.

²⁵¹ See Cooper, *supra* note 248, at 688 (discussing men's need to express dominance over other men).

²⁵² See Gheaus & Robeyns, *supra* note 93, at 187–88 (examining the power of default rules in establishing governmental signals); see also *infra* Part IV and accompanying discussion of the need for gender-specific targets.

²⁵³ United States v. Virginia, 518 U.S. 515, 532–33 (1996); see also Miss. Univ. for Women v. Hogan, 458 U.S. 718, 722–25 (1982); Selmi, *supra* note 15, at 774 n.246 (arguing that mandated paternity leave would serve the important governmental interest of promoting gender equality).

²⁵⁴ Hogan, 458 U.S. at 724–25.

²⁵⁵ See DOWD, *supra* note 32, at 19 (examining the harms caused by adherence to masculine norms); WILLIAMS, *supra* note 31, at 81 (discussing the role gender plays in men's lives).

²⁵⁶ See generally R.W. CONNELL, MASCULINITIES 77 (2d ed. 2005) (outlining the concept of "hegemonic masculinity").

*A. Status: The Need for Governmental Signaling Through
Male-Specific Targets*

At its core, masculinity is fundamentally an anxious endeavor.²⁵⁷ This anxiety derives largely from the fact that most men try and fail to attain “dominant” or “hegemonic” masculinity.²⁵⁸ Establishing an unattainable standard for men, hegemonic masculinity ranks men according to how well they conform to its definition of “perfected” manhood.²⁵⁹ Although the precise attributes of hegemonic masculinity differ among groups, its common features include strength, aggression, competition, lack of emotion, and heterosexuality.²⁶⁰ Beyond these qualities, though, hegemonic masculinity’s central organizing principle requires the rejection of any conduct associated with femininity.²⁶¹ Enforcing these requirements, hegemonic masculinity calls on men to repudiate contrasting figures such as women and gay men.²⁶²

Men draw from masculinity’s list of idealized qualities to prove their manhood to other men.²⁶³ According to Michael Kimmel, a leading masculinities theorist, these gender-based performances attest to masculinity’s “homosocial” nature.²⁶⁴ That is, men engage in masculine performances to demonstrate their manhood to other men. As Kimmel states, “We test ourselves, perform heroic feats, take enormous risks all because we want other men to grant us our manhood.”²⁶⁵

Given the current associations between parental leave and feminine behavior, masculinities theory suggests that men’s fear of losing traction in their intragroup competitions will continue to prevent them from taking

²⁵⁷ See Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 18 (2010) (discussing the constant call men feel to prove their masculinity).

²⁵⁸ See R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC’Y 829, 832 (2005) (examining the cultural relevance of hegemonic masculinity).

²⁵⁹ See Cunningham-Parmeter, *supra* note 51, at 271–74 (exploring how idealized masculinity makes men feel insecure).

²⁶⁰ See Cooper, *supra* note 257, at 18; Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. 1151, 1163 (2008) (discussing normative masculinity in the American context).

²⁶¹ See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 898–99 (2006) (explaining how hegemonic masculinity rejects qualities associated with women).

²⁶² See *id.* (outlining the pressures that hegemonic masculinity places on men).

²⁶³ See DOWD, *supra* note 32, at 63 (discussing men’s performances of masculinity).

²⁶⁴ See Cooper, *supra* note 257, at 18 (examining men’s intragroup competitions).

²⁶⁵ Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in FEMINISM AND MASCULINITIES 182, 187 (Peter F. Murphy ed., 2004); see also Cooper, *supra* note 257, at 18 (analyzing the role anxiety and competitiveness play in men’s gender identities).

leave as long as such behavior remains coded feminine.²⁶⁶ But in addition to explaining why men fail to utilize parental leave, the study of masculinities also provides a roadmap for designing a policy that can loosen the association between parental leave and femininity. This begins by understanding the variable nature of masculinity itself.

Gender theorists prefer the term “masculinities” over “masculinity” to emphasize men’s multiple, competing gender performances.²⁶⁷ Indeed, many men perform subordinated masculinities to counterbalance the more idealized form of manhood that hegemonic masculinity exemplifies.²⁶⁸ For example, whereas some men may act “hypermasculine” through exaggerated acts of sexual activity or exhibitions of physical strength, other men may subvert the dominant norm by emphasizing their grace, style, or artistry.²⁶⁹ As such, those exhibiting subordinated masculinities attempt to reclaim power by redefining their behavior as normatively superior.

At-home fathers exemplify this process of redefining the characteristics of acceptable manhood. Although still small in absolute terms, the number of men in the United States who stay home and serve as their children’s primary caregiver has doubled in the past decade.²⁷⁰ Numerous studies have shown how idealized masculinity forces these men to recast their behavior in nonfeminine terms.²⁷¹ For example, many at-home fathers tend to emphasize activities such as playing sports with their children over more sedentary endeavors.²⁷² Others may stress the importance of outdoor pursuits, risk-taking, and independence, thereby giving their work a masculine hue.²⁷³ In the process, these men demonstrate the contingent nature of masculinity; that is, by disassociating their work

²⁶⁶ See DOWD, *supra* note 32, at 112–13 (discussing how some men attempt to masculinize care).

²⁶⁷ See *id.* at 61 (examining masculinity’s malleable nature).

²⁶⁸ See Andrea Doucet, “It’s Almost Like I Have a Job, but I Don’t Get Paid”: Fathers at Home Reconfiguring Work, Care, and Masculinity, 2 FATHERING 277, 281 (2004) (arguing that fatherhood involves the convergence of multiple masculinities).

²⁶⁹ See Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 784, 793 (2000); Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 722–24 (2010) (examining subordinated masculinities).

²⁷⁰ JEREMY ADAM SMITH, THE DADDY SHIFT: HOW STAY-AT-HOME DADS, BREADWINNING MOMS, AND SHARED PARENTING ARE TRANSFORMING THE AMERICAN FAMILY, at x (2009); Alex Williams, *Just Wait Until Your Mother Gets Home*, N.Y. TIMES, Aug. 12, 2012, at ST1 (discussing at-home fathers).

²⁷¹ See, e.g., DOWD, *supra* note 32, at 112–14; Doucet, *supra* note 268, at 292–96 (outlining at-home fathers’ reconstructed masculinities).

²⁷² See Beth A. Burkstrand-Reid, *Dirty Harry Meets Dirty Diapers: Masculinities, At-Home Fathers, and Making the Law Work for Families*, 22 TEX. J. WOMEN & L. 1, 29 (2012) (examining how at-home fathers simultaneously subvert hegemonic masculinity and comply with it); Doucet, *supra* note 268, at 295 (suggesting that coaching sports allows men to pursue traditionally male endeavors).

²⁷³ See Doucet, *supra* note 268, at 293 (summarizing narratives among at-home fathers).

from traditionally feminine behavior, at-home fathers present a new vision of fatherhood that allows them to assume a primary caregiving role.²⁷⁴

Other countries have shown how properly designed work–family laws can expand the bounds of acceptable masculine behavior. Consider again the case of Sweden, which in 1974 became the first country in the world to pass legislation offering men paid parental leave.²⁷⁵ Even with generous financial incentives, few men actually took leave because Sweden allowed men to transfer all of their leave to women.²⁷⁶ Consistent with the penalties men experience for violating dominant masculinity, society reserved the label “velvet dads” for the few men who dared to take leave.²⁷⁷ Not until the advent of father-targeted leave—along with an aggressive publicity campaign that depicted a macho weightlifter holding a newborn—did the rate of Swedish men using parental leave jump from six percent to eighty-five percent.²⁷⁸ Similarly, the government in Finland recently acted upon the need to publicly promote men’s care work by offering a “father’s month” of leave and posting billboards that asked, “How many men, upon dying, wish they had spent more time with their bosses?”²⁷⁹ Recognizing the insecure nature of masculinity, these countries have attempted to put a masculine spin on care work, thereby encouraging men to engage in that work.

Social norms reinforce patterns of behavior. As such, the more that men engage in public acts of care like pushing strollers, changing diapers, and supervising children at playgrounds, the more that society begins to view their behavior as “normal” and, eventually, “normative.”²⁸⁰ In fact, the tipping point at which masculine norms begin to change may occur long before the majority of men actually display alternative behaviors.²⁸¹ For example, one optimistic estimate predicts that most of the population will view men’s public acts of care as normatively appropriate when at least twenty percent of men become actively engaged in this work.²⁸² Although the precise percentages may differ depending on the cultural and social

²⁷⁴ See DOWD, *supra* note 32, at 10 (discussing emerging ideas of fatherhood).

²⁷⁵ Franklin, *supra* note 76, at 104.

²⁷⁶ See Bennhold, *supra* note 22 (discussing the historical basis for Sweden’s use of father-targeted leave).

²⁷⁷ *Id.* (stating that fatherhood bonuses immediately impacted leave-taking among Swedish men).

²⁷⁸ *Id.*

²⁷⁹ See REBECCA RAY ET AL., CTR. FOR ECON. & POLICY RESEARCH, PARENTAL LEAVE POLICIES IN 21 COUNTRIES 10 n.19 (2009) (discussing Finland’s campaign to incentivize paternity leave), available at http://www.cepr.net/documents/publications/parental_2008_09.pdf [<http://perma.cc/592V-5MBA>]; see also INT’L NETWORK ON LEAVE POLICIES & RESEARCH, *supra* note 19, at 17, 112–13 (same).

²⁸⁰ Brighouse & Wright, *supra* note 14, at 368.

²⁸¹ *Id.* at 368–69 (examining how public policy can change patterns of behavior over time).

²⁸² *Id.* at 368.

circumstances, the theoretical connection between normative change and public perception is entirely consistent with the study of masculinities. Given that masculine ideals vary in different contexts based on social contingencies, it is quite feasible for men to redefine parental leave in masculine terms once it becomes clear that such behavior will not automatically cause them identity-based losses.²⁸³

Because cultural change depends on structural support, parental leave policies must involve both male targeting and strong governmental signaling.²⁸⁴ Although a gender-neutral approach might avoid certain constitutional challenges,²⁸⁵ it would lack the father-specific governmental imprimatur that could prompt more men to act. There is a reason why Finland promoted fatherhood bonuses with a publicity campaign that challenged men to confront their bosses on work–family matters. After all, who engages in the more “manly” performance: the father who publicly embraces his responsibilities at home or the man who ignores his children while working late into the night?²⁸⁶ A government-backed system recognizing the unique nature of men’s gender performances can radically reorient the cultural understanding of domestic work.

By explaining why gender-specific incentives represent the most effective method for encouraging men to engage in care work (thereby supporting women’s public participation), masculinities theory helps provide the “substantial justification” the government would need to enact fatherhood bonuses.²⁸⁷ As long as parental leave remains *de facto* “maternity leave,” men will refuse to take leave to avoid receiving the “velvet dad” label from other men. But masculinities theory does more than demonstrate the connection between fatherhood bonuses and existing masculine norms. By explaining how men’s current refusal to take leave reinforces negative, gender-based stereotypes, the study of masculinities shows how father-targeted leave can advance the “important governmental objectives” of combatting those stereotypes and promoting greater gender equality.²⁸⁸

²⁸³ David S. Cohen, *Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 522 (2010) (explaining how men perform different masculinities in various contexts).

²⁸⁴ See Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047, 1049 (2012) (discussing the need to recast masculine norms).

²⁸⁵ See *infra* Part IV and the accompanying discussion of the legal and policy implications of gender-neutral incentives.

²⁸⁶ SMITH, *supra* note 270, at 181–82 (explaining how masculine norms conflict with men’s instincts).

²⁸⁷ See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

²⁸⁸ *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted).

B. Stereotypes: Why Men Do Not Care

The study of masculinities teaches that men define themselves less by what they are and more by what they are not.²⁸⁹ Through a lifetime of repetition, the rules of manhood tell men to avoid engaging in feminine behavior at all costs.²⁹⁰ Given the long-held associations between women and domestic work, men follow the call of antifemininity by disengaging from that work.²⁹¹

The connection between women and caring for children remains entrenched in our culture. Since the rise of the “separate spheres” ideology during the nineteenth century, American society has largely presumed that women are predisposed to care for children, while men are not.²⁹² Despite women’s success in the marketplace in the late twentieth and early twenty-first centuries, the presumption of female domesticity remains a lasting cultural fixture. It is unsurprising, then, that today both employed and jobless women perform a far greater share of childcare than men.²⁹³

Women’s adherence to this norm deemphasizes male-based caregiving in a number of ways. Take, for example, the practice of “intensive mothering,” which obligates mothers to ensure their children’s constant stimulation.²⁹⁴ From scheduling playdates, to coordinating lessons, to designing enrichment activities, mothers remain primarily responsible for guaranteeing the social and emotional well-being of their children. In contrast, men experience no similar cultural imperative.²⁹⁵ In fact, the call to nurture even causes some women to obstruct men’s efforts to participate in caregiving.²⁹⁶ Psychologists describe the phenomenon of “gatekeeping” among mothers who restrict the amount of childcare that men can perform.²⁹⁷ Whether they do this to preserve domestic power or to defend against male incompetence, gatekeepers control access to children by

²⁸⁹ See Kimmel, *supra* note 265, at 185–86 (examining the constructs of male identity).

²⁹⁰ See DOWD, *supra* note 32, at 22 (explaining the association between femininity and caregiving).

²⁹¹ See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1–2 (2000); Gerstel & Armenia, *supra* note 64, at 168 (commenting on the gendered nature of care).

²⁹² See WILLIAMS, *supra* note 31, at 23 (examining the cultural resiliency of separate spheres); see also Caldwell G. Collins, Note, *Home Alone: Is This the Best We Can Do? A Proposal to Amend Pending Parental Leave Legislation*, 29 WASH. U. J.L. & POL’Y 301, 302 (2009) (discussing the presumption of domesticity).

²⁹³ See Kessler, *supra* note 115, at 372 (examining why legal regimes have failed to effectively address women’s disproportionate caregiving burdens).

²⁹⁴ See WILLIAMS, *supra* note 31, at 23 (discussing the performances of intensive mothering).

²⁹⁵ See Dickerson, *supra* note 46, at 434–35 (explaining men’s exclusion from the “new momism”).

²⁹⁶ See Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525, 537–38 (1999) (discussing the phenomenon of gatekeeping among some mothers).

²⁹⁷ *Id.* at 538; Malin, *supra* note 71, at 1067–68 (noting that some women may feel threatened by greater male involvement at home).

holding fathers to unrealistic expectations, monitoring fathers in their interactions with their children, redoing fathers' childcare work, or ridiculing fathers for their caregiving "errors."²⁹⁸

But gatekeeping alone is certainly not the central reason why men fail to engage in greater levels of caregiving. Instead, masculinities theory teaches that a constellation of masculine norms encourages men to distance themselves from anything deemed "womanly."²⁹⁹ This is reflected in the markedly different language employed when describing male caregiving and female caregiving. For example, fathers who watch their children are described as "babysitters," whereas mothers who stay at home are doing the "most important job in the world."³⁰⁰ Similarly, popular rhetoric categorizes men who "show their feminine side" as honorary women, thereby undermining their efforts to subvert masculine norms.³⁰¹

Reinforcing the primacy of motherly care, many men espouse the ideal of coequal parenting but rarely take the steps needed to ease their partners' domestic burdens.³⁰² Consider a recent study of fathers in Fortune 500 companies.³⁰³ In it, sixty-five percent of men said they believed in the concept of shared parenting, but only thirty percent actually performed the same amount of care as their partners.³⁰⁴ In addition, these fathers ranked "[doing] your part in the day-to-day childcare tasks" *last* among six qualities associated with being a "good father."³⁰⁵ Perhaps unsurprisingly, then, over seventy-five percent of these fathers took one week or less of parental leave, whereas women in the study took six to twelve weeks of leave when they became mothers.³⁰⁶ As these experiences show, masculine norms may permit men to speak generally about the value of shared parenting, but the rules of manhood keep them from translating such aspirations into practice.

Of course, the male reluctance to perform care work extends well beyond Fortune 500 men. Indeed, numerous studies demonstrate that

²⁹⁸ SMITH, *supra* note 270, 135–36 (discussing parenting and gender dynamics).

²⁹⁹ See Cooper, *supra* note 261, at 898–99 (outlining men's need to distinguish themselves from women).

³⁰⁰ Alexis Coe, *Dads Caring for Their Kids: It's Parenting, Not Babysitting*, ATLANTIC, Jan. 23, 2013, <http://www.theatlantic.com/sexes/archive/2013/01/dads-caring-for-their-kids-its-parenting-not-babysitting/267443/> [<http://perma.cc/89XK-CBAB>] (discussing rhetorical distinctions between descriptions of mothers and fathers).

³⁰¹ See Cunningham-Parmeter, *supra* note 51, at 277 (examining popular references to men's care work).

³⁰² See WILLIAMS, *supra* note 31, at 59 (noting the tendency of middle-class men to speak about the virtues of coequal parenting without actually engaging in such behavior).

³⁰³ HARRINGTON ET AL., *supra* note 35, at 6.

³⁰⁴ *Id.* at 23.

³⁰⁵ *Id.* at 13 (listing "[p]rovide love and emotional support" as the top-ranked fatherly quality).

³⁰⁶ *Id.* at 15.

American fathers spend far fewer hours performing childcare than mothers and take much less parental leave than women.³⁰⁷ Drawing from this data, masculinities theory offers a useful method for linking men's gendered acts to the Supreme Court's test for authorizing certain sex-based classifications. The Supreme Court has noted the importance of challenging "traditional, often inaccurate, assumptions about the proper roles of men and women."³⁰⁸ Just as the Supreme Court has identified the ways in which domesticity stifles women, the study of masculinities demonstrates the powerful influence that gender norms have on men's behavior as well. Feeling that their masculinity is constantly on the line, men fear the humiliation that comes from associating their acts with those traditionally performed by women.³⁰⁹ Given the feminized nature of caregiving, the rules of manhood require men to resist any effort to engage in more coequal forms of parenting.

But the government cannot act upon sex classifications merely by highlighting the gender stereotypes at issue. Rather, in order to affirm a law that combats deeply rooted gender norms, the Supreme Court looks for evidence that the stereotypes at issue limit men's or women's advancement.³¹⁰ The study of masculinities builds this case by highlighting the real-world consequences of men's complicity with hegemonic masculinity.

C. Subordination: How Masculine Norms Constrain Both Sexes

When men play by the rules of manhood, both sexes lose. On this point, masculinities theory makes the seemingly paradoxical assertion that masculine norms both subordinate and privilege men.³¹¹ Given that gender rules tend to buttress male power, it might seem counterintuitive that men would have any interest in dismantling a gender system that produces so many tangible benefits for them.³¹² Yet masculinities theory suggests that men pay a price for their privilege.³¹³ For example, the masculine norms of strength and aggression cause men to suffer from violent crimes at far

³⁰⁷ See *supra* Part I.B and accompanying discussion of leave-taking differentials between men and women.

³⁰⁸ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

³⁰⁹ See DOWD, *supra* note 32, at 20–21 (arguing that men's gendered acts arise out of insecurity).

³¹⁰ See, e.g., *United States v. Virginia*, 518 U.S. 515, 534 (1996) (critiquing laws that "perpetuate the legal, social, and economic inferiority of women").

³¹¹ See Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 421 (2010) (arguing that masculinities theory helps expose gender-based harms that men experience).

³¹² See Robert S. Chang, *Joan Williams, Coalitions, and Getting Beyond the Wages of Whiteness and the Wages of Maleness*, 34 SEATTLE U. L. REV. 825, 833 (2011) (questioning the likelihood that men will relinquish their power).

³¹³ DOWD, *supra* note 32, at 3.

higher rates than women.³¹⁴ Masculinity takes an emotional toll on men as well. Taught from an early age to hide their emotions, boys who express grief are told to “take it like a man” and that “boys don’t cry.”³¹⁵ These modes of suppression lead to deeper anxieties and stunted interpersonal development as boys and men repeatedly adhere to unrelenting masculine expectations.³¹⁶

The same strictures affect men’s parental roles. For instance, the status of mothers as default parents means that many fathers share a secondary, less-meaningful relationship with their children.³¹⁷ Thus, the masculine requirement to disengage from care has profound consequences for fathers who are twice as likely as mothers to believe that they do not spend enough time with their children.³¹⁸ In fact, today, for the first time ever, working fathers report experiencing more work–family conflict than mothers.³¹⁹ Yet despite the fact that nearly all fathers say they would like to see their children more often, the masculine call to avoid domestic work hinders them from doing so.³²⁰

As a hegemonic form that seeks to quietly define cultural norms for both sexes, masculinity inflicts tangible economic hardships on women as well. Gender theorists talk about a “patriarchal dividend” that men earn from masculinity’s invisibility.³²¹ Men’s disengagement from domestic work frees them to pursue market work without drawing much attention to their domestic absence. The dividend yielded from men’s seemingly “normal” or “natural” detachment from childcare allows them to work longer hours and maintain a continuous presence in the labor market.³²² All men—even those who attempt to resist hegemonic masculinity—benefit

³¹⁴ See *id.* (examining the costs of abiding by masculine norms).

³¹⁵ See John M. Kang, *The Burdens of Manliness*, 33 HARV. J.L. & GENDER 477, 490 (2010) (discussing the policing of masculine norms in schools).

³¹⁶ Nancy E. Dowd et al., *Feminist Legal Theory Meets Masculinities Theory*, in MASCULINITIES AND THE LAW, *supra* note 30, at 25, 30; Kimmel, *supra* note 265, at 182–96 (discussing the anxieties of masculinity).

³¹⁷ See Kaminer, *supra* note 8, at 317–18 (examining the emotional costs of detached parenting).

³¹⁸ PARKER & WANG, *supra* note 13, at 30.

³¹⁹ ELLEN GALINSKY ET AL., TIMES ARE CHANGING: GENDER AND GENERATION AT WORK AND AT HOME 18–19 (2008, rev. 2011), available at http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf [<http://perma.cc/3YVB-PRE2>].

³²⁰ Gornick & Meyers, *supra* note 22, at 318 (reporting that ninety-five percent of American fathers say they would like more time with their families); see also Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 79–80 (1989) (arguing against the conventional understanding of work–family conflict as entailing “women’s talk”).

³²¹ Doucet, *supra* note 268, at 297.

³²² See *id.* (describing the “rewards of paid employment” as an example of the patriarchal dividend).

economically from the marketplace gains that the dominant masculine form yields.³²³

In contrast, women's diminished attachment to paid labor (as compared to men) causes a substantial loss of career opportunities. Half of American women do not return to work within six months of their child's birth,³²⁴ and over one-third of mothers with children under the age of six do not participate in the labor force at all.³²⁵ These departures from paid labor cause women to lose job-specific capital such as skills training and career development.³²⁶ As women remain away from work for extended periods of time, their ability to earn higher wages and receive promotions becomes increasingly diminished.³²⁷ Even when women reenter the workforce, most can never fully recover the losses that their marketplace exits created.³²⁸ Thus, the taken-for-granted acceptance of men's reduced caregiving roles results in a loss of social power and workplace privileges for women.³²⁹

The Supreme Court has criticized governmental classifications that limit women's economic and public activities.³³⁰ As the Court has observed, when the state utilizes age-old stereotypes about women's "proper place," it "perpetuate[s] the legal, social, and economic inferiority of women."³³¹ Consistent with the Court's antistereotyping, antisubordination principles, masculinities theory explains how certain gender norms indiscernibly limit the boundaries of appropriate male behavior, thereby hampering women's career progress.

But as explained above, in addition to striking down classifications that impede women's advancement, the Court has approved of sex-specific laws that enhance gender equality.³³² Indeed, a decision that sanctioned fatherhood bonuses would follow a long line of Court decisions that have approved of special treatment for women in response to job segregation,³³³

³²³ See Dowd et al., *supra* note 316, at 29 (explaining how hegemonic masculinity enjoys silent support from subordinated groups).

³²⁴ Lawrence M. Berger & Jane Waldfogel, *Maternity Leave and the Employment of New Mothers in the United States*, 17 J. POPULATION ECON. 331, 333 (2004).

³²⁵ U.S. BUREAU OF LABOR STATISTICS, *supra* note 35, at 1–2.

³²⁶ See Issacharoff & Rosenblum, *supra* note 18, at 2156 (discussing the long-term effects of workplace exits).

³²⁷ See *id.* (examining the consequences of pregnancy-related career interruptions).

³²⁸ See Cooper, *supra* note 73, at 452 (discussing mothers' career losses).

³²⁹ See Jeff Hearn, *From Hegemonic Masculinity to the Hegemony of Men*, 5 FEMINIST THEORY 49, 59 (2004) (noting the relationship between gender and power).

³³⁰ See Buchanan, *supra* note 171, at 1162–64 (outlining the Court's commitment to antisubordination principles).

³³¹ *United States v. Virginia*, 518 U.S. 515, 534 (1996).

³³² See *supra* Part II.C and accompanying discussion of norm-changing special treatment.

³³³ *Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

economic inequality,³³⁴ and discrimination.³³⁵ Advancing the principles expressed in these cases, masculinities theory explains how fatherhood bonuses also expand women's workplace opportunities by easing their domestic burdens while broadening the universe of acceptable behaviors for men. In so doing, father-targeted leave represents another instance of constitutionally appropriate special treatment that has the potential to loosen gender-based strictures while encouraging women's public participation.

IV. A MODEL FOR FATHER-TARGETED LEAVE IN THE UNITED STATES

To critics of paid parental leave and fatherhood bonuses, the government has no business funding individual choices related to the family. After all, why should parents expect society to bear the costs of their personal procreative decisions?³³⁶ If, for example, American mothers decide to leave their jobs to spend more time with their children, it hardly seems fair for others to subsidize their actions. Likewise, childless coworkers may understandably become resentful of the enhanced workloads heaped upon them by parents who demand entitlements such as parental leave and bonuses but are unwilling to suffer career losses as a result.³³⁷ The key to building popular support for fatherhood bonuses depends on addressing these concerns.

To this point, the Article has asked the constitutional question of whether fatherhood bonuses could withstand judicial scrutiny and has shown that they would. It is now time to ask *how* the government might structure such a policy in a way that accommodates a diverse set of interests and constituencies. Celebrating the values of autonomy and personal freedom, Americans have long distrusted governmental attempts to intervene in private matters such as family caregiving.³³⁸ Reflecting this distrust, neoclassical economic theory posits that freely made private decisions do not deserve special protection under the law.³³⁹ This is especially true in the area of parental leave where reproductive decisions generate real costs for employers in the form of workplace departures and replacement training costs. A law that places these costs on employers—as

³³⁴ *Califano v. Webster*, 430 U.S. 313 (1977).

³³⁵ *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

³³⁶ See Bartlett, *supra* note 5, at 401 (discussing debates within feminism over parenting).

³³⁷ See Nicole Buonocore Porter, *Embracing Caregiving and Respecting Choice: An Essay on the Debate over Changing Gender Norms*, 41 SW. L. REV. 1, 2 (2011) (describing the stigma attached to flexible work arrangements).

³³⁸ See Kaufman et al., *supra* note 59, at 324 (discussing the American experience with family leave policies).

³³⁹ See Kessler, *supra* note 115, at 375 (examining the limitations of classic liberal approaches to equality).

opposed to the workers who generate them—has the potential to cause workplace inefficiencies.³⁴⁰

But such economic critiques carry little practical value when conducted in a vacuum. Instead, a genuine cost-benefit analysis of any parental leave proposal ought to compare the costs of reform to the costs generated by the status quo. Under our nation's existing family leave system, the true cost-bearers of reproduction are not solely pregnant women or even caregiving mothers, but rather *all* female workers.³⁴¹ Because employers view all women (childless or not) as potential domestic caregivers—regardless of whether any individual woman actually intends to depart the labor force or not—all working women pay the price for maternal profiling.³⁴² In contrast to the existing dynamic, a properly designed parental leave system would not externalize the costs of procreation exclusively to one sex. If mothers and fathers posed the same risk of taking parental leave, for example, employers could no longer rationally assume that only women would depart the workplace, thereby undermining employers' basis for engaging in sex-specific statistical discrimination in hiring practices.³⁴³ Certainly, employers could still statistically discriminate against *parents*, but that would involve a much weaker basis for differentiation than the current sex-based proxy.³⁴⁴ Because roughly eighty-five percent of men and women have children at some point in their lives,³⁴⁵ the victims of parental-based discrimination could spread the risks of such differentiation across a much larger population. In fact, given the difficulty that workers have in signaling their intention to have children or not, nearly *every* employee of childbearing age would represent a risk of early career interruptions to employers, thereby significantly weakening the ability to discriminate against any individual.³⁴⁶

³⁴⁰ See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 329, 349 (1992); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1332–33 (1989) (outlining the costs generated by maternity leave policies).

³⁴¹ See Issacharoff & Rosenblum, *supra* note 18, at 2214 (discussing the benefits of an insurance-based pregnancy leave system).

³⁴² See *supra* Part I.A and accompanying discussion of maternal profiling.

³⁴³ Brighthouse & Wright, *supra* note 14, at 370 n.4 (explaining how father-targeted leave can reduce the harmful effects of maternal profiling).

³⁴⁴ *Id.*

³⁴⁵ CHILD TRENDS, *CHARTING PARENTHOOD: A STATISTICAL PORTRAIT OF FATHERS AND MOTHERS IN AMERICA* 3 (2002), available at <http://www.childtrends.org/wp-content/uploads/2013/03/ParenthoodRpt2002.pdf> [<http://perma.cc/TG5N-5GQN>].

³⁴⁶ See Issacharoff & Rosenblum, *supra* note 18, at 2169 (explaining the role pregnancy plays in statistical discrimination).

But a policy that shifts costs completely to parents is not normatively desirable either. Parents should not be the sole cost-bearers of paid parental leave because they are not the sole beneficiaries of such policies either. Raising society's dependents is a public good that benefits all Americans.³⁴⁷ Although parents pay the private costs of childrearing, all of society gains when parents raise children to become productive, responsible adults.³⁴⁸ As a means of supporting men and women in their parental roles, paid leave and fatherhood bonuses represent tangible investments in this public good.

Legislatures that recognize the value of this investment must also acknowledge its limitations. In fact, no one policy can completely shift the costs of statistical discrimination away from women. Even in the idealized world of Scandinavia, for example, fatherhood bonuses have not ended wage disparities between men and women or cured sex discrimination.³⁴⁹ Male targeting merely reduces, rather than eliminates, caregiving asymmetries. Indeed, the ultimate goal of these policies is not necessarily to achieve coequal parenting among all couples, but rather to "de-gender" specific activities in a way that weakens the association between caregiving and femininity.³⁵⁰

Given these realities, parental leave reform must represent a low-cost proposition to employers in order to diminish any remaining impulses to engage in maternal profiling.³⁵¹ Recognizing that reform will not completely close sex-based gaps among employees who take leave, the government should structure paid leave and fatherhood bonuses around an insurance-based, risk-pooling model that lowers employers' incentives to distinguish between leave-takers and other workers.³⁵² The lower a firm's costs associated with leave-taking, the more likely an employer will approach hiring decisions in a gender-neutral manner.³⁵³ The law can encourage this shift by: (1) minimizing employers' direct contributions to the system; (2) pooling risk among the greatest number of firms; and (3) maximizing usage among eligible employees.³⁵⁴

³⁴⁷ See Bartlett, *supra* note 5, at 400–01 (summarizing feminist debates over the concept of childrearing as a public good).

³⁴⁸ See Gornick & Meyers, *supra* note 22, at 323; Kaminer, *supra* note 8, at 319 (explaining how the work of parents benefits society).

³⁴⁹ See Haas & Hwang, *supra* note 76, at 90 (analyzing Sweden's pay gap); see also Doucet, *supra* note 21 (discussing the symbolic and practical importance of including fathers in parental leave policies).

³⁵⁰ See Brighouse & Wright, *supra* note 14, at 363 (advocating for social relations "unaffected by gender").

³⁵¹ See Issacharoff & Rosenblum, *supra* note 18, at 2216 (proposing methods for diminishing the risks of maternal profiling).

³⁵² *Id.* at 2216–17 (outlining an insurance approach to maternity leave).

³⁵³ *Id.* at 2217 (arguing in favor of an employer-funded system based on payroll taxes).

³⁵⁴ See *id.* at 2221; Fondas, *supra* note 112 (describing an insurance model for family leave).

A few paid leave systems emerging in the United States have begun to embrace these concepts.³⁵⁵ For example, both California and New Jersey offer men and women partially paid parental leave for newborn care.³⁵⁶ Modeled after each state's disability laws, neither system imparts any direct costs on employers. Rather, employees fund these insurance schemes through modest payroll taxes.³⁵⁷ Although companies still bear certain indirect costs that result from temporary employee losses, evidence suggests that paid leave has had either no effect or a positive effect on productivity, profitability, and employee morale in these firms.³⁵⁸ Recognizing the need to pool risk among many businesses to reduce the harm experienced by any one firm when an employee takes leave, these states require nearly all companies to participate in the system.³⁵⁹ In theory, this system might expose small businesses to greater risk given that firms with larger workforces can better absorb workload shifts that result from an individual employee's departure. But given the short-term nature of the leave involved and the fact that businesses can fund gap-filling measures with wages that would have gone to leave-takers, these disruptions should be minimal in most cases. In fact, a comprehensive study of California's family leave policy found that small employers actually experienced fewer negative effects from the law.³⁶⁰

Although the foregoing factors all help weaken the power of maternal profiling by making leave-taking a low-cost proposition for businesses, the most crucial variable for success depends on getting men more involved. The government could do this in a number of ways. A quota system might give families additional weeks of leave if men took off a designated amount of time from work following a child's birth or adoption.³⁶¹ Under this scheme, the father's leave would be structured on a "use-it-or-lose-it" basis, meaning that the government would not require men to take leave, but if they failed to take it, their families would earn less than the full insurance benefit.³⁶² Similarly, the state could offer a bonus system in

³⁵⁵ See Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 3–4 (2005) (discussing methods for funding paid parental leave).

³⁵⁶ APPELBAUM & MILKMAN, *supra* note 79, at 2–3 (summarizing paid family leave schemes in other states).

³⁵⁷ *Id.*; Ali, *supra* note 65, at 204–05.

³⁵⁸ See APPELBAUM & MILKMAN, *supra* note 79, at 4 (examining California's paid leave policy).

³⁵⁹ See Dickerson, *supra* note 46, at 446; see also 3 HR SERIES: POLICIES AND PRACTICES § 189:2 (2014) (describing family leave coverage in various states).

³⁶⁰ See APPELBAUM & MILKMAN, *supra* note 79, at 4 (addressing the "unfounded" fear that the state's paid leave system would impose extra burdens on small businesses).

³⁶¹ Cf. Gornick & Meyers, *supra* note 22, at 331 (discussing the use of father-targeted incentives in Nordic countries).

³⁶² See *id.* (arguing that a system of "daddy quotas" communicates to men that the government values and encourages their caregiving work).

which men could earn additional days of leave for themselves if they took a certain threshold amount.³⁶³ For example, if a father took two weeks of leave, the insurance system might pay for two additional weeks of leave as a reward.

In theory, of course, a parental leave law could offer these incentives in gender-neutral terms. A policy might grant three months of leave to a “first caregiver” and offer a bonus month if a “second caregiver” took some designated amount of time as well. Indeed, some countries have taken this gender-neutral approach to incentives,³⁶⁴ while others have directly called out men.³⁶⁵ However, a gender-neutral system would probably yield less gender equity than a father-specific policy, and would raise legal questions of its own.³⁶⁶ Certainly a gender-neutral policy might change *some* parents’ behaviors. But, as explained below, father-specific incentives hold much more practical and theoretical potential to disrupt gender norms and alter caregiving patterns.

The nation’s history with family leave policies points to the inadequacies of gender neutrality in the work–family arena. For example, more than twenty years since its implementation, the FMLA’s gender-neutral approach to leave has not significantly altered leave-taking differences between men and women.³⁶⁷ Although the common excuse for male inaction focuses on the unpaid nature of the FMLA, even paid leave might not significantly affect existing trends.³⁶⁸ In California, for example,

³⁶³ See INT’L NETWORK ON LEAVE POLICIES & RESEARCH, *supra* note 19, at 18–20 (examining measures in other countries that encourage fathers to use parental leave).

³⁶⁴ See *id.* at 151–56, 267–76 (summarizing gender-neutral incentives in Iceland and Sweden).

³⁶⁵ See *id.* at 71–80, 128–34, 205–12 (discussing gender-specific incentives in Québec, Germany, and Norway). Although Germany technically grants families a two-month bonus if each “parent” takes two months of leave, given that the country requires women to take two months of maternity leave, this “gender-neutral” policy relies entirely on a father’s behavior in opposite-sex couples. *Id.* at 128–34.

³⁶⁶ A full discussion of the constitutionality of a parental leave policy with gender-neutral targets is beyond the scope of this Article. However, one challenge might scrutinize the legislative intent of such a policy. A facially neutral law violates equal protection when a legislature acts with a discriminatory purpose to impact a protected group. See *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977); *Washington v. Davis*, 426 U.S. 229, 246–47 (1976). Given that women already take family leave at far higher rates than men, even an incentive system stated in gender-neutral terms would still primarily target male behavior. See Duvander & Johansson, *supra* note 79, at 325 (noting that Sweden’s use of gender-neutral incentives had a “negligible impact on the proportion of mothers who use parental leave”). Challengers to such a law could conceivably argue that any adverse, sex-based effects of the policy were a foreseeable and intended result of the gender-neutral target. *Id.* at 323; see also *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1338 (2012) (plurality opinion) (noting that evidence of a leave policy’s disparate impact constitutes relevant but not sufficient proof of discrimination).

³⁶⁷ See *supra* Part I.B and accompanying discussion of the FMLA’s gender-neutral approach to family leave.

³⁶⁸ See Ayanna, *supra* note 73, at 294; Duvander & Johansson, *supra* note 79, at 323 (discussing the role that economic considerations play in leave-taking decisions).

both mothers and fathers have had the opportunity to take paid family leave for a decade.³⁶⁹ Yet despite the fact that the state has always offered this benefit in gender-neutral terms, women still constitute nearly three-quarters of workers who take so-called “bonding leave” to care for newborns, and the average mother’s leave is four times longer than the average father’s.³⁷⁰ In short, gender neutrality has failed to close large, sex-based gaps in California even though men have had paid leave available to them.

The study of masculinities explains why incentives that specifically call out “fathers” represent the most effective method for encouraging men to take leave. Patterns of behavior, social norms, and public policy mutually reinforce one another.³⁷¹ If a father quickly returns to work after a child’s birth, his behavior serves as a sign to other men that taking leave constitutes an inherently feminine act. Rooted in deeply held gendered identities, these actions and norms will continue to reinforce each other until public policies or social pressures radically disrupt them.³⁷² Unfortunately, a gender-neutral policy would send only a weak signal to men—a law that offered bonuses to “second caregivers” rather than to “fathers” would encourage only those men with enough savvy and confidence to claim the new entitlement. In contrast, reframing the bonus as one reserved for “fathers” sends a clear governmental message to men that society deems their involvement in childcare to be morally desirable and socially beneficial.³⁷³ Governmental rules help publicize the community’s approval of certain behavior, thereby creating a normative expectation for men to engage in that behavior.³⁷⁴ Responding to legislation designed specifically for them, men who claim bonuses for “fathers” do so with the backing of their family, community, and peer groups. Given the influence that social pressure and intragroup competitions have on men, a law unambiguously directed at them carries the greatest potential to change their behavior.³⁷⁵

³⁶⁹ See APPELBAUM & MILKMAN, *supra* note 79, at 1–2 (summarizing the history of leave legislation in California).

³⁷⁰ *Id.* at 18; RONA LEVINE SHERRIFF, *BALANCING WORK AND FAMILY* 7–8 (2007), available at <http://paidfamilyleave.org/pdf/paidfamily07.pdf> [<http://perma.cc/7CX6-E4S2>].

³⁷¹ See Brighouse & Wright, *supra* note 14, at 368 (explaining how social norms condemn and endorse certain behaviors).

³⁷² See *id.* at 369–70 (arguing in favor of public policies that explicitly encourage men to perform care work).

³⁷³ See de Silva de Alwis, *supra* note 16, at 310; Gheaus & Robeyns, *supra* note 93, at 183–87 (discussing the effect that default rules have on state signaling).

³⁷⁴ See Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 1002–03 (2005); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 371 (1997) (discussing the relationship between legislation and social norms).

³⁷⁵ See Dowd, *supra* note 11, at 210 (emphasizing the importance of rivalry to men).

A bonus offered to “second caregivers” contains rhetorical shortcomings as well. By extending bonuses to male “second caregivers”—as opposed to “fathers”—a gender-neutral approach reinforces the existing presumption that men play only a *secondary* role in their children’s lives. The “second” caregiver may perform *some* childcare while he earns his bonus, but “primary” responsibility for running the household remains with his partner. Buttressing the concept of maternal primacy, the gender-neutral system reinforces age-old frames about each parent’s proper role.

Designing a law that maximizes men’s use of parental leave has tremendous implications for women. Indeed, if gender-neutral targets failed to significantly increase the rate at which men utilized a new program, maternal profiling might become *more* problematic. Assuming that the government initiated an insurance-based leave system that offered some level of income replacement, women might appear even more expensive relative to men if existing differentials in usage remained constant.³⁷⁶ In fact, the larger the gap in leave-taking, the more expensive female employees would become under a paid scheme, thereby creating greater incentives for employers to engage in maternal profiling.³⁷⁷ Therefore, even if the use of father-specific incentives (as opposed to a sex-neutral approach) increased men’s marginal use by only a few percentage points, such a difference could dramatically reduce the overall risk of maternal profiling that women currently face in the labor market.³⁷⁸

Fatherhood bonuses must also account for same-sex and single parents. In fact, any policy development on this front should broaden the base of potential beneficiaries beyond two-parent, opposite-sex households to reduce the risk of discrimination faced by all leave-takers. The number of households led by single parents and same-sex couples has increased markedly over the last generation.³⁷⁹ Reflecting the importance of this issue, European countries with fatherhood bonuses have also extended family leave benefits to a wide variety of family arrangements.³⁸⁰ For

³⁷⁶ See Naomi Cahn & Michael Selmi, *The Class Ceiling*, 65 MD. L. REV. 435, 455 (2006) (explaining how the addition of income replacement to family leave policies affects women).

³⁷⁷ See Gheaus & Robeyns, *supra* note 93, at 173 (discussing how women’s disproportionate use of paid parental leave can lead to statistical discrimination).

³⁷⁸ See Cahn & Selmi, *supra* note 376, at 455 (noting the importance of analyzing the gender implications of expanding leave provisions that women will primarily utilize).

³⁷⁹ GRETCHEN LIVINGSTON, PEW RESEARCH CTR., THE RISE OF SINGLE FATHERS 1–4 (2013), available at <http://www.pewsocialtrends.org/files/2013/07/single-fathers-07-2013.pdf> [<http://perma.cc/M8DE-U4N8>] (outlining changing family demographics).

³⁸⁰ See, e.g., INT’L NETWORK ON LEAVE POLICIES & RESEARCH, *supra* note 19, at 271 (discussing the leave-taking rates of same-sex couples in Sweden); *Family Leave—U.S., Canada, and Global*, *supra* note 40 (outlining family leave benefits offered to single parents in Germany); see also Dowd, *supra* note 75, at 245–46 (highlighting the importance of including a variety of family arrangements in discussions over work–family policies).

example, Germany offers fourteen months of family leave to two-parent households, and allows single parents to claim the same amount of leave as well.³⁸¹ Likewise, in Québec, lesbian co-mothers can receive five bonus weeks of leave in the same manner as fathers in opposite-sex relationships.³⁸² These inclusive models work in tandem with fatherhood bonuses. By recognizing the diverse landscape of child-rearing environments, such policies maximize the number of sexes and sexual orientations associated with family leave, thereby diluting the gendered nature of leave itself—a central goal of fatherhood bonuses.³⁸³

In sum, a properly designed fatherhood bonus would extend leave benefits to all forms of parental arrangements, pool risks among employers, minimize women’s exposure to discrimination, and, most critically, target men specifically. By focusing on men, fatherhood bonuses would provide cover to leave-taking fathers who could point to the governmental policy as the explicit justification for their decision to take leave. This outcome would differ significantly from our nation’s current approach to paternal leave, which tends to categorize such employees as less-committed workers.³⁸⁴ A fatherhood bonus would help reverse this presumption, while simultaneously forcing “traditional” fathers to confront the opportunity losses that they would experience—both financially and interpersonally—if they were to reject the new benefits available to them.³⁸⁵ By placing these choices directly in front of men, fatherhood bonuses represent the most effective method for incentivizing paternal caregiving and minimizing the harm of maternal profiling.

CONCLUSION

Despite their disagreements, sameness feminists and differences feminists have always shared the same goal of ending sexual oppression.³⁸⁶ United in purpose, they have differed in tactics. In the course of these discussions, however, both sides have focused on the narrow question of whether female-specific protections help or hurt women. Building on these

³⁸¹ See Kluge & Tamm, *supra* note 96, at 984 (summarizing provisions of Germany’s *Elterngeld* system).

³⁸² See RACHEL COX, THE RECENT QUÉBEC APPEAL COURT DECISION ON THE CONSTITUTIONALITY OF MATERNITY AND PARENTAL BENEFITS AS EMPLOYMENT INSURANCE BENEFITS: SOME FEMINIST REFLECTIONS 8–9 (2004), available at http://www.nawl.ca/ns/en/documents/Pub_Brief_MPBenefits04_en.pdf [<http://perma.cc/8BHR-KBHJ>] (outlining the advantages of the Québec system over Canada’s federal program).

³⁸³ See Dowd, *supra* note 75, at 244–46 (arguing against an exclusive, two-parent frame for work–family discussions).

³⁸⁴ See Gheaus & Robeyns, *supra* note 93, at 187 (examining workplace perceptions of leave-taking men).

³⁸⁵ See *id.* at 186–87 (proposing a default system that requires men to “opt out” of taking leave).

³⁸⁶ See Eichner, *supra* note 1, at 5 (examining legal feminism’s central normative commitment).

debates, a new understanding of gender equality must look beyond female-centered measures and create room for men as well.

The masculine norm that directs men to avoid domestic work causes a large number of women to assume a disproportionate share of that work. This disparity, in turn, reinforces age-old stereotypes holding that women enjoy a natural predisposition to care for children, while men lack any corresponding biological code. Women's subordination flows directly from these gendered presumptions. The perception of mothers as "expert" caregivers exposes them to social pressures to sacrifice their careers, while men, as seemingly less-talented parents, continue to compete in the marketplace unimpeded. As the Supreme Court has observed, laws ought not "perpetuate the legal, social, and economic inferiority of women."³⁸⁷ Fatherhood bonuses would not only combat gender norms that limit women's opportunities, they would expand the realm of "acceptable" behavior for men as well.

Despite the Supreme Court's admonition to the contrary, employers will continue to profile women as "mothers-to-be" as long as men remain comfortably detached from the day-to-day responsibilities of care work.³⁸⁸ By inducing men to step out of their entrenched parental roles, fatherhood bonuses can send a strong, state-sponsored message that the decision to take parental leave represents a safe way to be a man. Released from the masculine expectation of detached parenting, men can enter the domestic sphere more freely and both sexes can operate in a world less bound by gender.

³⁸⁷ *United States v. Virginia*, 518 U.S. 515, 534 (1996).

³⁸⁸ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).