Chasing Freedom: The History of Government Oppression of the Most Vulnerable and How Expanded Leave Laws Can Promote Liberty for Workers in the Wake of *Dobbs*

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Abstract

In Dobbs v. Jackson Women's Health Organization*, the Supreme Court held that the Constitution does not protect a women's right to an abortion, rejecting both equal protection and substantive due process arguments under the Fourteenth Amendment. The Court held that the Constitution must be interpreted as it would have been by the ratifiers, thereby limiting rights to those that are deeply rooted in the nation's history. However, as this article demonstrates, the country's history of legislation and Court decisions have repeatedly failed to protect the liberty interests of the most marginalized members of society and have consistently failed to ensure equal protection of the laws. As a result, Black people, women, and particularly Black women, experience significant inequality–particularly economic inequality.*

This article explores the ways in which Black women will bear the brunt of the negative impact of the Dobbs *decision–especially from an economic standpoint. As just one step in*

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> *addressing this inequality, this article proposes the expansion of the Family Medical Leave Act (FMLA) to include both more workers and to allow for paid leave. While by no means a complete solution, we argue that ensuring sufficient paid leave for all workers during and after pregnancy, including leave to support families caring for children, will alleviate some of the more severe economic hardships resulting from the* Dobbs *decision.*
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> As a matter of constitutional substance, the majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command. Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty.
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> *– Dobbs v. Jackson Women's Health Organization, Justices Breyer, Sotomayor, and Kagan dissenting.*[1]

I. INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization,* the Supreme Court held that the constitutional guarantee of liberty enshrined in the Fourteenth Amendment to the Constitution did not safeguard a woman's right to bodily autonomy if it involved having an abortion.[2] The Court further summarily dismissed the argument that a right to an abortion is protected under the Fourteenth Amendment's Equal Protection Clause, although it is primarily a women's health issue.[3]

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[1] 597 U.S. 215, 359 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

[2] *Dobbs,* 597 U.S. at 231.

[3] *Id.* at 236–37. We acknowledge that individuals who do not identify as women may also become pregnant and, therefore, may also seek to have an abortion. However, as the majority of our sources for this paper are laws, court cases, and

The *Dobbs* decision evidences that a majority of the Justices embraced an originalist interpretation of the Constitution. Such an interpretation requires that the original Constitution and Fourteenth Amendment be read as they would have been by the ratifiers in 1788 and 1868, limiting rights to those that are "deeply rooted in this nation's history and tradition."[4] However, as the dissent notes, "'people' did not ratify the Fourteenth Amendment. Men did."[5] Even more, at the time of the initial ratification of the Constitution, the Fifteenth Amendment did not yet exist. Accordingly, white men ratified the Constitution.

The Court in *Dobbs* ultimately determined that a woman's right to bodily autonomy, in deciding to obtain an abortion, is not an essential component of ordered liberty or equality. Sadly, the Court is, in many ways, correct in its determination that certain rights have not been guaranteed in this country's history of liberty and equality. Indeed, the history of this country is a brutal one that has not only ignored, but often obliterated, the guarantee of liberty for some of its most marginalized and vulnerable members. This is particularly so for women and people of color. More specifically, Black people generally and Black women in particular have been burdened by the withholding of basic liberties—especially when these liberties deal with physical autonomy.

The Court's insistence on interpreting the Constitution as those in power would have done at the time of its ratification means that the Court ignores the ways that race and sex have impacted this country's history, politics, and laws. The interpretation of the Constitution is itself skewed when the Justices ignore the exclusion of race and sex at the time of ratification. Neil Gotanda, in *A Critique of "Our Constitution is Color Blind,"* addresses how the skewed interpretations maintain an exclusionary status quo. Gotanda notes that, "a color-blind interpretation of the Constitution legitimates and thereby maintains the social, economic, and political advantages that whites hold over other Americans."[6]

First Lady Jill Biden, on the one-year anniversary of the *Dobbs* decision, noted that the "consequences of these [abortion] bans go far

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social science that address gender in binary terms, for clarity we have chosen to use the same binary terms, while recognizing that this language is limiting.

[4] *Id.* at 231 (citing Washington v. Glucksberg, 521 U. S. 702, 721 (1997)).

[5] *Id.* at 372 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[6] Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2 (1991).

beyond the right to choose."[7] Indeed, the *Dobbs* decision will further exacerbate the existing social, economic, and political advantages that whites, men, and white men in particular already have. At the same time, additional burdens will be imposed on women. These burdens will be further exacerbated for women of color, particularly Black women.

It is anticipated that more women will be forced to carry pregnancies to term that are contrary to their health, both physically and psychologically. This could cause the already high mortality rate to increase by 24 percent.[8] A 2020 study found that maternal death rates were 62 percent higher in states that restricted abortion than in the rest of the country.[9] Further, Black women are 3.3 times more likely to die from pregnancy-related complications than white women.[10] Even more, wealthy Black women and their children have worse health outcomes than the lowest income white women.[11] Harvard social scientist David R. Williams explains, "There is a Black tax that we pay that hurts our health, and the gap is larger among the college-educated than it is among high school dropouts."[12]

Women will take on additional responsibilities for raising children from unplanned or forced pregnancies; these responsibilities come with significant physical, psychological, and financial tolls.[13]

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[7] Associated Press, *Watch: Jill Biden Says Consequences of Overturning Roe v. Wade "Go far Beyond the Right to Choose,"* PBS NEWS HOUR, https://www.pbs.org/newshour/politics/watch-live-first-lady-jill-biden-hosts-discussion-on-anniversary-of-overturning-roe-v-wade (June 20, 2023, 6:34 PM EDT).

[8] Amanda Jean Stevenson, Leslie Root & Jane Menken, *The Maternal Mortality Consequences of Losing Abortion Access* 3, 6 (unpublished manuscript June 29, 2022), https://osf.io/preprints/socarxiv/7g29k.

[9] Eugene DeClercq, Ruby Barnard-Mayers, Laurie C. Zephyrin & Kay Johnson, *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, COMMONWEALTH FUND (Dec. 14, 2022), https://doi.org/10.26099/z7dz-8211 (scroll down to "Differences in Maternal Health Outcomes").

[10] Kate Kennedy-Moulton, Sarah Miller, Petra Persson, Maya Ross-Slater, Laura Wherry & Gloria Aldana, *Maternal and Infant Health Inequality: New Evidence Linked from Administrative Data* 1 (Nat'l Bureau of Econ. Rsch. Working Paper 30693, 2022), https://www.nber.org/system/files/working_papers/w30693/w30693.pdf.

[11] *Id.* at 5.

[12] ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 308 (2020).

[13] Melissa Jeltsen, *We Are Not Prepared for the Coming Surge of Babies*, THE ATLANTIC (Dec. 16, 2022), https://www.theatlantic.com/family/archive/2022/12/abortion-post-roe-rise-in-

The *Dobbs* decision, with its severe limitations in allowing women to make their own decisions about their reproductive health, places further limits on the ability of women, particularly marginalized women, to achieve economic security and independence if they are pregnant, have pregnancy related health complications, or need to care for the children. In a country with no universal/widespread guaranteed paid leave, unplanned or forced pregnancies could mean economic insecurity for some of the country's most marginalized members. Freedom cannot be fully achieved without economic security. In a post-*Dobbs* landscape, with the implications of unplanned or forced pregnancies, those who can already least afford to will face economic instability. This will make America's ostensible promises of freedom even more out of reach for those for whom freedom has already been too often denied. Indeed, the impact of *Dobbs* goes beyond the liberty right to bodily autonomy and impacts the economic security and independence needed for true freedom.

President Franklin D. Roosevelt recognized the inextricable link between freedom and economic security. In his State of the Union address on January 11, 1944, Roosevelt argued that the rights in the Declaration of Independence and the Bill of Rights failed to go far enough in securing freedom and liberty.[14] He, therefore, proposed a Second Bill of Rights. Roosevelt reasoned, "We have come to a clear realization of the fact, however, that true individual freedom cannot exist without economic security and independence. Necessitous men are not free men. People who are hungry, people who are out of a job are the stuff of which dictatorships are made."[15]

Although the framers of the Constitution purported to design a limited government that would allow freedom from oppression by social majorities, the reality is that the Supreme Court, in its decisions, and Congress, in its passing of legislation, have regularly favored the more powerful. "Liberty" has been narrowly defined in this country in favor of white men. The history of this country demonstrates that women have been precluded by law from the best paying jobs, from voting, and have been considered the property of their husbands.

It is an accurate observation that, "[w]hite identity and whiteness [have been] sources of privilege and protection; their absence meant

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births-baby-care/672479.

[14] Franklin D. Roosevelt, President of the U.S., State of the Union Message to Congress (Jan. 11, 1944), https://www.fdrlibrary.org/address-text.

[15] *Id*.

being the object of property."[16] This results in the most vulnerable, women and other marginalized demographics—particularly those marginalized by race, being repeatedly excluded from guarantees of liberty and equality. As Professor Erwin Cherminsky notes in *The Case Against the Supreme Court,* the Court "has done much more harm than good with regard to race."[17]

The *Dobbs* decision may not immediately be seen as a decision that should be analyzed within the realms of employment law or workers' rights. However, the *Dobbs* decision cannot be seen in a vacuum. *Dobbs* will undoubtedly have wide-spread impacts on the workplace. The economic hardships will be particularly burdensome on already marginalized workers. This nation's history of inequality and limitations on the liberties of marginalized people has already resulted in workplace environments that devalue many of the jobs held by marginalized people. This translates into lower wages, less negotiating power, and overall insecurity for certain workers. After *Dobbs,* the denial of freedoms and liberties in making decisions about pregnancy will manifest in exacerbations of economic instability for the most marginalized workers. Workers who have the fewest protections in the workplace will be especially adversely impacted by unpaid time off or job loss due to the need to address pregnancy and related conditions.

This paper advocates for ensuring more economic freedom for those whose economic security will be threatened, and thus their freedoms curtailed, by the aftermath of *Dobbs.* This paper recognizes that because the reality of a legal decision is likely to cause economic instability for many, there need to be legislative decisions that combat that sobering reality. Accordingly, this paper advocates for the expansion of family and medical leave to include all workers and to include paid leave as one part of what should be a larger effort to ensure economic freedom for all.

The aftermath of *Dobbs,* an environment in which those who can least afford it will be adversely impacted by what may essentially be forced pregnancies, points to the need to address the paltry amount of leave available to workers. Indeed, the lack of leave is one of the more glaring limitations within the system of workplace protections. The limited amount of leave available—leave that is generally unpaid—is usually only available to a limited number of workers. The expansion of leave, both for longer time periods and to larger numbers of

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[16] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1721 (1993).

[17] ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 53 (2014).

workers, in addition to leave that is paid, are all critical to address some of the harsher economic consequences of the *Dobbs* decision.

Kendall Thomas, in his article, Rouge Et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case, convincingly argues that,

> American constitutional history remains one of the few disciplines in which the call for the rigorous reconstruction of our national past from the bottom up has for the most part been ignored. The historical treatment of constitutional law and politics in America is, in short, still largely an institutional history.[18]

It is important to conduct a rigorous examination of our national past from the bottom up to understand not only constitutional interpretation but also Congressional actions. Through this rigorous examination, we can begin to understand our current system of economic inequality from the perspective of marginalized communities who are the most impacted by inequalities. It is then through understanding that we can begin to craft effective solutions.

This paper does not purport to capture the entire history of the ways that Congressional action (and inaction) and Supreme Court decisions have resulted in current economic inequality. Such a task would require numerous volumes. This paper only highlights key decisions and legislation in efforts to demonstrate the current need to adopt expanded and paid family/medical leave for all workers.

The history covered in this paper starts with the founding of the United States, while recognizing that the views incorporated into the Constitution had been formed in the more than 150 years prior when the first enslaved persons were brought to this land. The paper will then provide a historical overview of the nation's general reliance on inequality and subjugation. The limited advances of the post-civil rights era will also be addressed, recognizing that neither the Court nor Congress went far enough to address the inequality that had been manifested by the nation's system of laws. The paper concludes with a discussion of the ways in which expanded and paid family and medical leave would provide some economic security for those most impacted by the *Dobbs* decision.

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[18] Kendall Thomas, Rouge Et Noir *Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599, 2606 (1992).

II. THE HISTORY OF THE COUNTRY'S BIRTH: FOUNDATIONS OF INEQUALITY AND SUBJUGATION

The *Dobbs* decision commands that we interpret the Constitution as it would have been interpreted at the time it was written. Yet, the decision fails to even contemplate the extreme racist ideologies and misogynistic beliefs that informed those interpretations. This ensures the ongoing incorporation of those ideas in the decision's interpretation of liberty, equality, and freedom. These skewed interpretations will also extend to the ways in which *Dobbs* impacts the workplace.

Of the fifty-six signers to the Declaration of Independence, forty-one enslaved other humans.[19] Therefore, it is no surprise that the characterization of slavery as a "cruel war against human nature" was struck from the final draft.[20] However, slavery, while not explicitly stated, was prominent among the list of injuries and usurpations that were included:

- "cutting off our trade with all parts of the world," which included the slave trade;
- "incit[ing] domestic insurrections among us," referring to Virginia Governor Lord Dunmore's promise of freedom to any enslaved person who assisted the British as well as a general fear of slave revolts[21]; and
- "Endeavor[ing] to bring on the inhabitants of our frontiers, the merciless Indian Savages," referencing the violent opposition the Indigenous Nations made, with support of the British, to the colonists' invasion of their land west of the Appalachians.[22]

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[19] Colman Andrews, *These Are the 56 People Who Signed the Declaration of Independence*, USA TODAY (July 3, 2019, 7:00 AM), https://www.usatoday.com/story/money/2019/07/03/july-4th-the-56-people-who-signed-the-declaration-of-independence/39636971.

[20] IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 108 (2016).

[21] Jeffrey Ostler, *The Shameful Final Grievance of the Declaration of Independence*, THE ATLANTIC (Feb. 8, 2020), https://www.theatlantic.com/ideas/archive/2020/02/americas-twofold-original-sin/606163; KENDI *supra* note 20, at 105 (an estimated two-thirds of enslaved Africans ran away from Georgia and 30,000 left Virginia in a single year).

[22] Ostler, *supra* note 21.

The signers of the Declaration of Independence famously proclaimed, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." However, the discussions of "liberty" and "equality" envisioned by the framers did not actually apply to all people, but only to white men. The intended racism and sexism embedded in the Declaration of Independence are best emphasized by the words of Thomas Jefferson, who authored this ostensible manifesto of freedom.

In a letter about enslaved women Jefferson noted, "I consider the labor of a breeding woman as no object, and that a child raised every 2 years is of more profit than the crop of the best laboring man."[23] This view was not new or exclusive to Jefferson. Instead, it had been codified more than 100 years earlier when the Virginia colonial assembly in 1662, provided that "[c]hildren got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother."[24] This codification changed the long standing law of a child's status being passed down by the father.[25] This ensured that enslaved children were created through Black women's bodies.[26]

When the *Dobbs* Court declared that we must interpret liberty as it was understood at the time of ratification, it is this lack of liberty that they were intending. *Dobbs* dictates that our current laws be interpreted the same way there were by white men who saw Black women's value primarily as bodies to create more enslaved people who could be human property used to increase their own wealth.

The Constitution offers further evidence that the founder's interpretation of liberty only extended to white men. When the Constitution was ratified in 1788, the Framers did not include the word slavery, but enshrined the practice into the fabric of this founding document. Populations of states, upon which representation in the government was based, counted the enslaved population as only three-fifths of a person.[27] Gouveneur Morris, in commenting on the three-fifths provision stated, "Upon what principle is it that slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property? Why then is no

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[23] Harris, *supra* note 16, at 1720.

[24] *Id.* at 1719.

[25] *Id.*

[26] *Id.*

[27] U.S. CONST. art. I, § 2, cl. 3.

other property included?"[28] The impact of the three-fifths clause was that it increased the influence of states with large enslaved populations in the House of Representatives and, through the electoral college, provided greater support for Presidents who enslaved people.[29]

The Antifederalists, who were concerned about the increase in federal power that came with the new Constitution, insisted on immediate amendments, which became the Bill of Rights.[30] Judicial decisions made clear that the right to liberty as articulated by the founders of the nation and solidified in the Bill of Rights, did not extend to enslaved persons or even the free Black population. Decisions such as *Dred Scott v. Sandford* (1857) were clear that liberty and freedom could be legally denied based on race.[31]

In *Dred Scott,* the Supreme Court was tasked with interpreting to whom the special "rights, privileges, and immunities" of citizenship applied. The Court, applying originalism, opined that Black people, both enslaved and free,

> had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit.[32]

Going beyond what was necessary to decide the case, the Justices, a majority of whom came from families who enslaved people,[33] further declared the Missouri Compromise unconstitutional as well as any other law that prohibited slavery. The Court made its decision by relying on the Fifth Amendment's guarantee, protecting the

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[28] Harris, *supra* note 16, at 1719.

[29] Aaron O'Neill, *Reported Number of Slaves Owned by U.S. Presidents Who Served from 1789 to 1877*, STATISTA (June 21, 2022), https://www.statista.com/statistics/1121963/slaves-owned-by-us-presidents (noting that ten of the first fifteen presidents enslaved people).

[30] CTR. FOR LEGIS. ARCHIVES, NAT'L ARCHIVES, CONGRESS CREATES THE BILL OF RIGHTS: GET THE BACKGROUND PART I 5, https://www.archives.gov/files/legislative/resources/bill-of-rights/CCBR_I.pdf

[31] *See generally* Dred Scott v. Sandford, 60 U.S. 393 (1856).

[32] *Id.* at 407.

[33] *The Human Factor of History: Dred Scott and Roger B. Taney*, NAT'L MUSEUM OF AFR.-AM. HISTORY & CULTURE: OUR AM. STORY, https://nmaahc.si.edu/explore/stories/human-factor-history-dred-scott-and-roger-b-taney (last visited Mar. 30, 2024).

"property" of the slave holder, finding that the Missouri Compromise resulted in a "taking" of the enslaved people from the slaveholders.[34] In so doing, the Court ignored any right to liberty under the Fifth Amendment that Dred Scott or any Black person—enslaved or free—had. The *Dred Scott* decision was not ultimately overturned by a landmark Supreme Court decision. Instead, this decision was only overturned by a bloody civil war and the passage of the Thirteenth and Fourteenth Amendments to the Constitution. Nevertheless, it only takes a cursory review of the nation's history after the passage of the Thirteenth and Fourteenth Amendments to demonstrate that legal prohibitions on slavery and ostensible guarantees of equal protection did not ensure liberty or freedom to those existing in the margins.

The founders surely did not consider the extension of equality to women in laying the blueprint for the foundation of this "free" country. Prior to the ratification of the Fourteenth Amendment, in fact prior to the ratification of the Nineteenth Amendment, white women were also relegated to the margins of a country supposedly founded on freedom and equality. As asserted by the *Dobbs'* dissent,

> Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed in the time of ratification (except that we also check it against the Dark Ages), it consigns women to second-class citizenship.[35]

A women's rights convention held in Seneca Falls, New York in 1848 produced a declaration that explained the limitations on equality for women. The declaration noted that women were:

- [Compelled] to submit to laws, in the formation of which she had no voice; . . .
- [I]f married, in the eye of the law, civilly dead. . . . [A]ll right in property [has been taken from her], even to the wages she earns. . . .
- [C]ompelled to promise obedience to her husband, he becoming, to all intents and purposes, her master, the law

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[34] *Dred Scott,* 60 U.S. at 450.

[35] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 373 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

> giving him power to deprive her of her liberty and to administer chastisement.[36]

Notably, the history of abortion legislation in this country started with laws created by men. Abortion laws started with a campaign against what was perceived as obscene literature (directed at men for their pleasure). As these laws were expanded, they included prohibitions on contraception and abortion as a way of combating what advocates believed were "offenses against chastity, morality, and decency" by controlling women's bodies, but not men's.[37] The reasoning of the *Dobbs* decision, interpreting the Constitution as it was understood at the time of the founding and the time of ratification for subsequent amendments, allows these forms of inequality to remain constitutional.

Black women, and particularly Black enslaved women, were caught at the intersection of these two devastating forms of legally enforced and constitutionally supported inequality. The "reproductive labor" of Black women was especially valuable to the institution of slavery.

> The investment in protecting the worth of black babies is well documented in the slave narratives of former bondmen and bondwomen who recalled how expectant mothers protected the children in their wombs while receiving the lash. There are numerous judicial cases across slaveholding states that reveal how vested owners were in the reproductive health of black mothers and their unborn children. Last, in murder trials that involved pregnant enslaved women as defendants, execution dates were halted until their children were born.[38]

The case of *State of Missouri v. Celia* exemplifies a judicial system that prized a woman's pregnancy and unborn child over that of the

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[36] ELIZABETH CADY STANTON, THE SENECA FALLS DECLARATION (1848), http://www.let.rug.nl/usa/documents/1826-1850/the-seneca-falls-declaration-1848.php.

[37] *See* Carol Flora Brooks, *The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 AM. Q. 3, 9–10, 16 (1966). As a precursor to arguments we still hear today, one woman protesting these laws wrote, "This so-called 'government' now holds woman's person for man's use or abuse as he pleases; and that her claim to own even her own womb is criminally obscene." *Id*. at 16.

[38] Deirdre Cooper Owens, *Black Women's Experiences in Slavery and Medicine*, *in* MEDICAL BONDAGE: RACE, GENDER, AND THE ORIGINS OF AMERICAN GYNECOLOGY 42, 43 (2017).

life of the Black teen mother who had been continuously raped by her "owner."[39] Celia was an enslaved teenager who lived and died in Callaway County, Missouri.[40] In June 1855, Celia, who was owned by slaveholder Robert Newsom and was repeatedly raped by him, had already borne two children who were likely Newsom's offspring.[41] In June 1855, Celia was pregnant with a third child. Desiring to engage in a romantic relationship with a fellow enslaved male, Celia sought to stop Robert Newsom from his ongoing sexual assaults of her.[42] As expected, Newsom refused. When Newsom entered Celia's cabin on the night of June 23, 1855, to again demand sex from her, a confrontation ensued. It ended with Celia ultimately killing Newsom.[43] At a later trial in October 1855, denied the availability of asserting a self-defense argument, Celia was found guilty of murder and sentenced to death.[44] Celia's execution was delayed until she could give birth—a fact that Deidre Owens says points to the effects of the "maternal-fetal conflict."[45] Of note, when Celia did deliver, the baby was stillborn.[46] As such, the institution of slavery did not profit from the birth of Celia's third child.

From before the founding until after the Civil War, women had few freedoms that were protected by law, and Black women had none. Women in general, and Black women in particular were valued for their reproductive capabilities. Morality has been enforced through the control of women's bodies, while excusing men from such control. When the Supreme Court proclaimed that we must interpret the interest women have in bodily autonomy as it was at the nation's founding, it ignored the history of racism and sexism that informed that interpretation. Advocacy to combat the devastating impacts of these interpretations must include changes to ensure economic freedom to the most marginalized demographics.

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[39] *Id.*

[40] *See generally* MELTON A. MCLAURIN, CELIA: A SLAVE (1991).

[41] Owens, *supra* note 38, at 43.

[42] MCLAURIN, *supra* note 40, at 29–30.

[43] *Id.* at 35.

[44] *See id.* at 120.

[45] Owens, *supra* note 38, at 43.

[46] MCLAURIN, *supra* note 40, at 121.

III. THE HISTORY OF SUPREME COURT DECISIONS AFTER EMANCIPATION: LIMITATIONS ON LIBERTY AND EQUALITY

The Thirteenth, Fourteenth, and Fifteenth Amendments were ratified between 1865–1870, after 250 years of legal servitude and the exclusion of an entire race of people from citizenship. These Amendments supposedly guaranteed the right to liberty and equality for all persons. However, subsequent decisions by the Supreme Court, as well as discriminatory legislation, limited the promises of these Amendments for the next 100 years. All too often, promises of equality and ostensible guarantees of freedom remained elusive for marginalized people living in the midst of the late nineteenth and early twentieth centuries. We continue to live with the repercussions of those decisions and laws.

The Fourteenth Amendment proclaimed that no State "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[47] This Amendment also asserted that no State may "deny to any person within its jurisdiction the equal protection of the laws."[48] Thaddeus Stevens, in his speech introducing the Fourteenth Amendment, stated its purpose was simply to allow "Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all."[49]

It took only five years for the Supreme Court to severely limit the Fourteenth Amendment's promise of ensuring equality. In the *Slaughter-House Cases*, the Court eliminated the privileges or immunities clause holding,

> Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can

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[47] U.S. CONST. amend. XIV, § 1.

[48] *Id.*

[49] Thaddeus Stevens, U.S. H. Rep., Speech Introducing the Fourteenth Amendment (1866), https://constitutioncenter.org/the-constitution/historic-document-library/detail/thaddeus-stevens-speech-introducing-the-fourteenth-amendment-1866.

> abridge until some case involving those privileges may make it necessary to do so.[50]

As noted by the dissent in the *Slaughter-House Cases*, the Privileges and Immunities Clause became a "vain and idle enactment, which accomplished nothing."[51]

The Court in the *Slaughter-House Cases* went even further in limiting the Fourteenth Amendment by unnecessarily holding that the amendment was limited only to the protection of Black people. The Court offered this prediction, "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[52] The Court made this prediction even though the wording of the Fourteenth Amendment is "persons," unlimited by race.[53]

Seven years after the ratification of the Fourteenth Amendment, the Reconstruction Congress passed the Civil Rights Act of 1875, ambitiously titled "An Act to Protect All Citizens in their Civil and Legal Rights."[54] The Act sought to ensure that people, regardless of race or previous condition of servitude "be entitled to the full and equal enjoyment of . . . places of public amusement."[55]

In hearing five related cases known as *The Civil Rights Cases,* the Court, in 1883, even further limited the Fourteenth Amendment by striking down the Act. The Court, again narrowly reading the new Amendments, held that they applied only to state action and not to the private actions of places of public accommodation. In reaching this conclusion, the Court opined,

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable

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[50] Slaughterhouse Cases, 83 U.S. 36, 78–79 (1872).

[51] *Id.* at 96.

[52] *Id.* at 81.

[53] This argument is also not limited to the Supreme Court of the late 1800's. In a 2011 interview, Justice Scalia stated that Constitution does not prohibit discrimination on the basis of sex. Max Fisher, *Scalia Says Constitution Doesn't Protect Women from Gender Discrimination*, THE ATLANTIC (Jan. 4, 2011), https://www.theatlantic.com/politics/archive/2011/01/scalia-says-constitution-doesn-t-protect-women-from-gender-discrimination/342789.

[54] An Act to Protect All Citizens in their Civil and Legal Rights, ch. 114, 18 Stat. 347 (1875), https://www.senate.gov/artandhistory/history/resources/pdf/Civil_Rights_Act_1875.pdf.

[55] *Id.* § 1.

> concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. . . .[56]

Notably, the referenced legislation was not "beneficent legislation"; instead, the legislation only sought to ensure that all individuals were treated equally. A broader interpretation, much more in keeping with the purpose of the Amendments, was made by the dissent:

> Citizenship in this country necessarily imports equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals, or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude. . . .[57]

Had the reasoning of the dissent carried the day, it is possible that the worst abuses of the Redemption and Jim Crow eras would have been avoided.

In 1896, the Supreme Court again had an opportunity to realize the potential of the Fourteenth Amendment to protect the rights of all people. However, the Court continued its tradition of restricting freedom and equality for marginalized populations. In *Plessy v. Ferguson*, the Court refused to strike down laws that required separate facilities for white and Black people. Choosing to ignore the racism inherent in the laws, the Court placed the blame on the Black people opposing segregation:

> A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races . . .[58]

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[56] Civil Rights Cases, 109 U.S. 3, 25 (1883).

[57] *Id.*at 49.

[58] Plessy v. Ferguson, 163 U.S. 537, 543 (1927).

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[59]

The dissent, written by Justice John Marshall Harlan, drew the obvious parallel between the majority's reasoning in *Plessy* and the Court's decision in *Dred Scott*:

> If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.[60]
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> . . .
>
> [T]he judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case. . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.[61]

It took sixty years for the Court to overturn the decision in *Plessy*.[62] During this time racial purity laws were perfected with such harshness, particularly in the South, that even the German Nazis, who modeled their own racial purification laws on Southern Jim Crow laws, found them to be too extreme.[63]

The Court did not limit its support for the apartheid laws that existed primarily in the South to the denial of freedoms for Black people. In 1927, the Court in *Gong Lum v. Rice*[64] ruled that Mississippi could also exclude a child of Chinese ancestry from attending a white school. While it may have been the local governments that were passing laws that limited freedom, those laws

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[59] *Id.* at 551.

[60] *Id.* at 557.

[61] *Id.* at 559.

[62] *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (reversing *Plessy*).

[63] WILKERSON, *supra* note 12, at 88.

[64] Gong Lum v. Rice, 275 U.S. 78, 86 (1927).

were upheld with the blessing, support, and justification of the U.S. Supreme Court.

The potential promise of the Fourteenth Amendment was also withheld for women. For the first time in the Constitution, the Fourteenth Amendment specifically excluded women from its protections. In Section 2, the Amendment addressed the three-fifths clause and consequences for denying the right to vote. However, whereas the other parts of the Amendment talk about "persons," in this section, the Amendment specifically references the denial of the vote to any "male inhabitants," implicitly supporting the denial of the vote to women.[65]

Women, who had been carrying the burden for the family through the years of the Civil war, by the nineteenth century were demanding equal input in the formation of the laws that controlled their lives. However, this would be impossible without the right to vote. The Supreme Court, relying on the history of laws that had been written by men, continued to deny women this right.

In *Minor v. Happersett* and two years after the decision in the *Slaughter-House Cases*, the Court denied women the right to vote by following a narrow interpretation of equality and freedom.[66] The Court held that Missouri's restriction of the vote to only men was not a violation of either the Equal Protection Clause or the Privileges and Immunities Clause. Holding that the denial of the vote to women did not violate the Fourteenth Amendment, the Court found "[t]he right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law, but in order to claim protection, he must first show that he has the right."[67] The Court then looked to the history of the voting laws—laws made almost exclusively by men—and determined that women had rarely been granted the right to vote. It would be another forty-five years after the decision in *Minor v. Happersett* before women's right to vote was codified with the ratification of the Nineteenth Amendment.[68]

It was not until after 1920 that women had any input into laws, including those governing reproductive choices and work conditions. Even then, Black women were not included in the voting right ultimately afforded to "women." Black women were not guaranteed this right until 1965, with passage of the Voting Rights Act.[69] The

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[65] U.S. CONST. amend. XIV, § 2.

[66] Minor v. Happersett, 88 U.S. 162, 163–64 (1874).

[67] *Id.* at 176.

[68] H.R.J. Res. 1, 66th Cong. (1919) (ratified 2020).

[69] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

failure to recognize this exclusionary history encourages current interpretations that are infused with the misogynistic history of this country.

IV. THE HISTORY OF WORK: OCCUPATIONAL SEGREGATION AND LIMITED WORKPLACE PROTECTIONS

In the workplace, like the larger society, the interests of the powerful have been protected at the cost of the interests of marginalized workers. As aforementioned, jobs held by marginalized people are often devalued. Liberty interests of business owners trumped the health and safety interests of workers. Peonage work and segregation resulted in Black people being severely limited in the occupations in which they could find employment. Sexist attitudes about women limited the types of jobs open to them. The intersection of racism and sexism placed Black women in the lowest paying positions with the fewest options.

A. Post Reconstruction Laws Perpetuated Black Enslavement

The end of the Civil War was supposed to offer an opportunity to enjoy freedom for the formerly enslaved. In *To Joy My Freedom,* Tera Hunter recounts the story of Julie Tillory, who, in the spring of 1866, traveled to Atlanta as a newly emancipated freedperson.[70] In visiting the Freedmen's Bureau, Tillory encountered missionaries and Union Army officials who were assisting the newly freed with finding shelter, food, clothing, and work. A perplexed female missionary posed what may have been seen as a complex inquiry to Tillory. She asked, "Why would you want to leave the certainties and comforts of your master's plantation, where subsistence was guaranteed, for the uncertainties before you?"[71] Tillory's response was simple, "to 'joy my freedom."[72]

As the hopes and joys of Reconstruction drew to a close by 1877, so too did the promises of the Civil War Amendments. As one Southern newspaper declared, the Fourteenth and Fifteenth Amendments "may stand forever; but we intend . . . to make them dead letters on the statute-book."[73] Ensuring that inequality

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[70] TERA W. HUNTER, TO 'JOY MY FREEDOM: SOUTHERN BLACK WOMEN'S LIVES AND LABORS AFTER THE CIVIL WAR 1 (1997).

[71] *Id.* at 2.

[72] *Id.*

[73] ERIC FONER, RECONSTRUCTION; AMERICA'S UNFINISHED REVOLUTION (1863–

remained the centerpiece of the economy, and therefore the labor force, was key to ensuring this intention was made fact.

With the promise of the Fourteenth Amendment all but obliterated by the Supreme Court, many Black workers, particularly in the South, were pulled and pushed back into new types of slavery. Indeed, the dependence on slavery was woven in the economy of the South. As one writer noted in 1936:

> Slavery was too integral a part of the social life of the South and too vital to the interests of certain classes to be suddenly eliminated by a mere constitutional amendment. [It was necessary to find] new ways of perpetuating the Negro's enslavement."[74]

Racial discrimination meant that Black people were segregated to the most devalued work. Black women were more likely to be working to support the family. But the work available to them was limited. "[R]acial caste and the demands of the Southern political economy dictated that black women work, and in Southern cities their options were confined to household labor."[75] In the late nineteenth century, 90 percent of Black women workers were employed as domestic workers.[76] The white employers demanded long hours, unreasonable amounts of work, and paid unreasonably low wages. Some Black women also experienced sexual harassment and assault.[77] For instance, when Rosa Parks was employed as a domestic worker, it is believed that her white employer tried to rape her.[78]

1877) 590 (2002).

[74] PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901–1969, at 174 (1990) (quoting Editorial, *Slavery Seventy Years After*, CHRISTIAN CENTURY, Dec. 9, 1936, at 53).

[75] HUNTER, *supra* note 70, at 3.

[76] *Women & The American Story: Black Domestic Workers*, NY HISTORICAL SOC'Y, https://wams.nyhistory.org/industry-and-empire/labor-and-industry/black-domestic-workers (last visited Mar. 30, 2024) (citing W.E. BURGHARDT DUBOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY 109 (1899)).

[77] Kathryn Small, *African American Women in the Domestic Service Industry During Reconstruction: An Intersectional Analysis* 10–11 (MAD Rush Undergrad Rsch. Best Papers 2020), https://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=1130&context=madrush.

[78] Ula Iinitzky, *Rosa Parks Essay Reveals Rape Attempt*, HUFF. POST (July 29, 2011, 8:11 AM EDT), https://www.huffpost.com/entry/rosa-parks-essay-rape_n_912997.

The end of Reconstruction saw Southern whites going as "far as they dare in restricting" the liberty of Black people "without actually reestablishing personal servitude."[79] This was accomplished by rewriting the laws to allow planters to reassert control over their labor force.[80] Peonage, or debt slavery, allowed the conditions of slavery, including cheap or free labor and little to no protections for those performing labor, to continue to exist.[81] "Peonage infected the South like a cancer, eating away at the economic freedom of blacks, driving the poor whites to work harder in order to compete with virtual slave labor, and preserving the class structure inherited from slavery days."[82] Peonage allowed employers to compel workers to pay off a debt through work, forbidding them to change jobs or to even leave the place of work. Workers become indebted to employers through advances in pay, travel expenses advanced, or credit at company stores.[83] The most abusive systems often occurred in concert with the local law enforcement officials, who rounded up Black people on trumped up charges, such as vagrancy, and put them in jail. Employers then paid their fines, and in turn, forced the individuals into peonage.[84]

Although the Supreme Court found that laws allowing peonage violated the Thirteenth Amendment, there was little effort by other branches of government to enforce the decision.[85] As a result, state and local laws allowing peonage continued to be enforced through the early 1940's, ensuring cheap labor and continued racial subjugation.[86] Peonage continued despite Reconstruction era federal laws that forbade the practice.[87]

The Depression, despite the resultant increase in cheap labor, did not make a significant impact on the practices of debt slavery.[88] In addition, the New Deal programs and laws designed to provide economic security, failed to address the existence of debt slavery.[89] A

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[79] FONER, *supra* note 73, at 593.

[80] *Id.*

[81] DANIEL, *supra* note 74, at 11.

[82] *Id.*

[83] *Id.* at 15–16.

[84] *Id.* at 14–15.

[85] *See* Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1349 (1987).

[86] *Id.*

[87] FONER, *supra* note 73, at 277.

[88] DANIEL, *supra* note 74, at 171–72.

[89] Linder, *supra* note 85, at 1351.

Justice Department amicus brief in a peonage case before the Supreme Court warned, "there are more negros held by these debt slavers than were actually owned as slaves before the War between the States."[90]

B. The Courts Protected the Interests of Businesses over Workers

The protection of business interests over those of workers, particularly marginalized workers, continued to be the focus of the Court into the early twentieth century. It is unsurprising that the first decision to interpret the Fourteenth Amendment expansively sided with business interests.

In *Lochner v. New York,* the Court interpreted what was protected as "liberty" pursuant to the Fourteenth Amendment.[91] *Lochner* is often cited as an expansion of the definition of "liberty." However, the result of *Lochner* was that the Court protected the interests of business owners at the expense of workers[92]—just as the Court in *Dred Scott* protected the property of enslavers at the expense of Black people.

In *Lochner*, the issue before the Court was the constitutionality of New York's law limiting the hours of work for bakers.[93] The record reflected that such a limitation was necessary for the health of bakers, including evidence that bakers, on average, had shorter life expectancy due to the various dangers associated with their working conditions.[94] While the Court in *Dred Scott* severely limited the definition of liberty for Black people, in *Lochner*, the Court expanded the constitutional definition of liberty to include the freedom to contract for the business owners.[95] Nonetheless, the results in both cases were similar—the freedoms of individuals were restricted in favor of the interests of those who wielded social, economic, and political power. For approximately forty years, the Court continued using this same reasoning to strike down numerous laws designed to protect the marginalized, while placing the interest of the business owners over that of the safety and health of workers.

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[90] DANIEL, *supra* note 74, at 181.

[91] 198 U.S. 45 (1905).

[92] *See id.* at 58–59 (holding that bakers did not need protection from long working hours).

[93] *Id.* at 52.

[94] *Id.* at 71 (Harlan, J., dissenting).

[95] *Id.* at 56–57.

C. Protective Legislation for Women Relied on Their Role as Mothers First

Notably, the one area in which the Court was willing to consider workplace regulations for the health and safety of workers was in laws that singled out women. These workplace protections, which should have been in place for the health and safety of ***all*** workers, were found to be constitutional based on paternalistic views of women, with a focus on their role in society as mothers first. In short, the job of women was considered to be their ability to give birth–even if it kept them from the freedom of economic stability.

In *Muller v. Oregon*, a case that came only three years after the *Lochner* decision, the Court upheld a statute that limited the hours women could work.[96] The Court held that,

> [W]oman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. . . .healthy mothers are essential to vigorous offspring, the ***physical wellbeing of women becomes an object of public interest*** and care in order to preserve the strength and vigor of the race.[97]
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> . . .
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> The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all.[98]

The legislation at issue in *Muller*, as well as the decision in the case, were not necessarily for the "protection" of women. On the 100th anniversary of the *Muller* decision, Justice Ginsberg recounted that the result of the decision was that it protected "men's jobs from women's competition" and protected women "from better-paying jobs and opportunities for promotion."[99]

These Supreme Court interpretations of the Constitution underscore the history of protecting property and business interests

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[96] 208 U.S. 412, 420 (1908).

[97] *Id.* at 421 (emphasis added).

[98] *Id.* at 422.

[99] Ruth Bader Ginsburg, U.S. Sup. Ct. Just., Address at Rutgers-Newark Law School Symposium on the Role of Women and Rutgers-Newark Law School in Reshaping American Law, From *Muller v. Oregon* to the Family Medical Leave Act: Protective Legislation Then and Now (Feb. 13, 2009), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_02-13-09.

over the health and safety of workers. The interpretations also underscore the history of placing the control of women's bodies over all other interests. Moreover, the decisions also perpetuate the history of seeing women's primary role as giving birth, superseding all other roles that a woman may have, and impacting her ability to work and achieve economic freedom. The *Dobbs* decision continues this history of instability. It is, therefore, imperative that legislation address what the Court has ignored or misconstrued.

V. THE HISTORY OF THE NEW DEAL: RACISM WINS OVER WORKPLACE PROTECTIONS

The idea of economic security is not a novel one. New Deal legislation, promulgated by Franklin Roosevelt in the 1930s, was one of the first major efforts to legislatively advance freedom for all through the promise of economic security for workers. Nevertheless, Black workers were purposefully excluded from this promise of freedom. As discussed above, the practice of peonage specifically targeted predominantly Black workers to limit not only the freedom that comes from economic security, but also their very liberty by instituting a new kind of slavery. Black women were relegated to the lowest paid positions as domestic laborers. The New Deal legislation further excluded Black workers from the promise of economic security by specifically excluding from its benefits those occupations with the largest concentration of Black workers.

In 1930, over one-half of the Black population in the United States lived in the South with Black employment there concentrated in agricultural and domestic labor, a holdover from the time of legalized slavery. Specifically, 53 percent of Black women in the workforce were employed as domestic laborers, a number that grew to 60 percent by 1940.[100]

There were two threats to the apartheid system of the South in the 1930's: 1) Any initiatives that would improve the economic welfare of Black people relative to the white population; and 2) administration of any such programs by the federal government, rather than local governments who could continue the racist status quo.[101] Consequently, in order to pass any New Deal legislation, President

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[100] PHYLLIS M. PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920–1945, at 12 (1989).

[101] Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 102 (2011).

Rosevelt knew he would have to accommodate the large block of Southern Democrats. This block included Speaker of the House, William B. Bankhead (D–Alabama), and Majority Leader, Sam Rayburn (D–Texas).[102] Bankhead, Rayburn, and other Southern Democrats were committed to upholding the apartheid system of the South. President Roosevelt knew that for his New Deal legislation to pass, it could not promote the economic welfare of Black people or otherwise disrupt the racist social order of the South.[103]

The National Industrial Recovery Act was the first New Deal legislation to address issues of economic security for all workers that encountered resistance due to the potential of providing economic security for Black workers. As one employer testified at the hearings, "a negro makes a much better workman and a much better citizen, insofar as the South is concerned, when he is not paid the highest wage."[104] Conceding to the Southern Democrats, President Roosevelt stated, "It is not the purpose of this Administration to impair Southern industry by refusing to recognize traditional differentials."[105] In order to pass his New Deal legislation, President Roosevelt was willing to consistently ignore the rights to equality and liberty of Black Americans. For example, explaining his failure to pass anti-lynching legislation, he said:

> I did not choose the tools with which I must work . . . Had I been permitted to choose them I would have selected quite different ones. But I've got to get legislation passed by Congress to save America. The Southerners by reason of the seniority rule in Congress are chairman or occupy strategic places on most of the Senate and House committees. If I come out for the anti-lynching bill now, they will block every bill I ask Congress to pass to keep America from collapsing. I just can't take that risk.[106]

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[102] *See* Walter J. Heacock, *William B. Bankhead and the New Deal*, 21 J. S. HIST. 348, 356–57 (1955).

[103] Perea, *supra* note 101, at 102–03.

[104] *From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & Lab.*, Serial No. 117-10, at 13–14 (May 3, 2021) (statement of Rebecca Dixon, Nat'l Emp. L. Project), https://www.govinfo.gov/content/pkg/CHRG-117hhrg44532/pdf/CHRG-117hhrg44532.pdf.

[105] *Id.* at 14.

[106] Perea, *supra* note 101, at 103.

This appeasement of Southern politicians was apparent in the passage of the Fair Labor Standards Act (FLSA). Ostensibly the FLSA was passed to eliminate "labor standards detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[107] The FLSA excluded Domestic and Agricultural workers—the cornerstones of the Southern plantation system and primary occupations of the majority of Southern Black workers.[108] Prior to the passage of the FLSA, both the National Industrial Recovery Act and the Social Security Act had also excluded domestic and agricultural workers, and thus excluded most Black workers from the benefits of these programs.[109] The FLSA adopted these exclusions, preventing Black workers in these occupations from the benefit of a living wage or the protection of a forty-hour work week.

For those benefiting from FLSA, the existence of minimum wage was extremely important in ensuring income above the poverty line. President John F. Kennedy, in a speech to the Senate in 1960, noted that 1 ⅓ million workers covered by FLSA were receiving the statutory minimum or no more than five cents more, an increase of 2.5 times the number from just five years previously. By increasing the minimum wage, Kennedy noted that higher earning workers would also likely receive an increase in pay.[110] However, these same benefits, which could undoubtedly lead to economic security, would not be seen by those not covered by the law.

The *de jure* means for advancing white income, while excluding Black workers, continue to be seen today in the racial wealth gap. While workers in industries predominated by white workers were guaranteed wages above the poverty threshold, the majority of Black workers were not. White workers were then able to take these benefits, together with other federal policies and programs, and invest in home ownership. By contrast, Black workers, segregated into the lowest paying jobs (and also prohibited from home ownership due to discriminatory housing practices), were not able to similarly invest.[111] In *The Color of Law,* Richard Rothstein notes:

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[107] 29 U.S.C. § 202(a).

[108] *From Excluded to Essential*, *supra* note 104, at 12.

[109] *Id.*

[110] John F. Kennedy, President of the U.S., Address to the Senate on the Fair Labor Standards Act (Aug. 10, 1960), https://www.presidency.ucsb.edu/documents/fair-labor-standards-speech-senator-john-f-kennedy-delivered-the-senate.

[111] RICHARD ROTHENSTEIN, THE COLOR OF LAW 153–54 (2017).

> [W]e cannot understand the income and wealth gap that persists between African Americans and whites without examining governmental policies that purposely kept Black incomes low throughout most of the twentieth century. Once government implemented these policies, economic differences became self-perpetuating.[112]

The nation's history of inequality informs our understanding of today's racial wealth gap. It is a gap that makes it significantly harder for Black families to be able to economically survive periods of low employment, unemployment, or no employment. These circumstances can be expected to arise when women need to take unpaid time off from work or even lose a job due to a pregnancy.

Pregnancy, childbirth, and raising children all require absences from the workforce. For those living paycheck to paycheck, missing any amount of time from work can mean economic disaster. The racial wealth gap and the stratification of lower paid jobs by sex means that women, and Black women in particular, who now must take time from work due to forced pregnancies and childbirth will suffer even more economic inequality. In the context of *Dobbs,* expanded paid leave would mean that those marginalized workers who may be involuntarily required to carry out pregnancies can have job protections as they undergo pregnancy and related conditions. For marginalized workers who face pregnancies and decide to travel to locations where access to abortions is still accessible, expanded paid leave can allow for privacy and protection as they make choices about reproduction.

VI. THE HISTORY OF CIVIL RIGHTS: THE FIGHT TO ADVANCE EQUALITY

The 1950's and 1960's saw court decisions and legislation aimed at advancing equality and expanding liberty for all people. Many of these advances were brought about by the activism of Black people. The only other time this country has seen similar advances was during Reconstruction, due in large part to the massive influx of those who were newly freed from bondage both as voters and as elected officials. It is, in part, this reality that inspired Nikole Hannah Jones to conclude, in her essay for the *1619 Project*, "We were told once, by

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[112] *Id*. at 153.

virtue of our bondage, that we could never be American. But it was by virtue of our bondage that we became the most American of all."[113]

Leaders in the Civil Rights movement called for expansion of the FLSA to include domestic and agricultural workers. At 1957 Congressional hearings on proposals to expand the FLSA, the National Counsel of Negro Women called for the "widest possible coverage" of the FLSA.[114] The NAACP testified that the existing exclusions were designed to keep a vast supply of cheap Black labor.[115]

In 1965, Black farm laborers, organized as the Mississippi Freedom Labor Union (MFLU), advocated for higher wages. In the spring of that year, some members went on strike, seeking the minimum wage of $1.25 per hour. Later that year, in testimony before Congress, they laid bare the dire conditions of sharecroppers, some of whom earned as little as $0.30 per hour.[116]

Often lost in commentary on the 1963 March on Washington was that it was entitled a "March on Washington for Jobs and Freedom." Among the demands by the organizers was a call for the expansion of the FLSA to "include all areas of employment which are presently excluded." It also called for new legislation barring discrimination in employment.[117]

Dr. Martin Luther King, Jr. continued to call for justice for workers. In a 1965 speech to the Illinois State AFL-CIO, he stated,

> It is a bitter and ironic truth that in today's prosperity, millions of Negroes live in conditions identical with or worse than the Depression thirties. For hundreds of thousands there is no unemployment insurance, no social security, no Medicare, no minimum wage. The laws do not cover their form of employment.[118]

Dr. King continued by emphasizing the great need and challenge in ensuring equality in the workplace. Echoing President Roosevelt's Second Bill of Rights, Dr. King stated,

> This is a more difficult challenge than the one we face in the South, for we will not be dealing with constitutional rights;

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[113] NIKOLE HANNAH-JONES, THE 1619 PROJECT 36 (2021).

[114] *From Excluded to Essential*, *supra* note 104, at 19.

[115] *Id.*

[116] *Id.* at 20.

[117] MARCH ON WASHINGTON FOR JOBS AND FREEDOM LINCOLN MEMORIAL PROGRAM (1963), https://www.crmvet.org/docs/mowprog.pdf.

[118] MARTIN LUTHER KING, JR., ALL LABOR HAS DIGNITY 117 (Michael K. Honey ed., 2011).

> we will be dealing with fundamental human rights. . . . It is not a constitutional right that men have jobs, but it is a human right.[119]

It was not until 1966 that Congress expanded the FLSA to cover previously excluded industries in which Black workers were overrepresented: agriculture, hotels, restaurants, schools, hospitals, nursing homes, entertainment, and other service related jobs; however it still excluded overtime protections for agricultural workers.[120] While these sectors covered approximately 20 percent of the U.S. workforce, they covered approximately one-third of all Black workers.[121] The positive impact of this legislation was more than twice that for Black workers and can explain approximately 20 percent of the reduction in the racial earning gap of the 1960's and early 1970's.[122] It is not surprising, therefore, that when President Johnson signed the amendments into law he stated that the law "will help minority groups who are helpless in the face of prejudice that exists. . . . This law, with its increased minimum, with its expanded coverage will prevent much of the exploitation of the defenseless—the workers who are in serious need."[123]

The Civil Rights Act of 1964 also advanced the economic security of women and Black workers. Title VII of the Act made it unlawful to discriminate against workers on the basis of race, national origin, color, sex, and religion.[124] Sex was almost not included in the law and was added during the February 8, 1964 debate in the House.[125] Opposition to the inclusion of women in the law came from such sources as the Department of Labor and the Senate Minority Leader Dirksen.[126] Among the arguments opposing the inclusion of women

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[119] *Id.* at 119.

[120] *From Excluded to Essential*, *supra* note 104, at 21–22.

[121] Ellora Derenoncourt & Claire Montialoux, *Minimum Wages and Racial Inequality*, 136 Q. J. ECON. 169, 171 (2021).

[122] *Id.* at 171, 217–18.

[123] Lyndon B. Johnson, President of the U.S., Remarks at the Signing of the Fair Labor Standards Amendments of 1966 (Sept. 23, 1966), https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-fair-labor-standards-amendments-1966.

[124] 42 U.S.C. § 2000e.

[125] Pauli Murray, Memorandum in Support of Retaining the Amendment to H.R. 7152, Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex 1 (Apr. 14, 1964), https://documents.alexanderstreet.com/d/1000680941.

[126] *See id.*

were that it would jeopardize the primary purpose of the law, which was to end discrimination against Black workers and that the biological differences between men and women pose potential problems in the workplace that should be studied by Congress.[127]

Pauli Murray, in an early nod to intersectionality, advocated for the inclusion of sex. She wrote,

> In matters of discrimination, it will be found that the problems of women are not so unique as we have been led to suppose. Those leaders who were most instrumental in bringing about a change in the status of women clearly recognized the interrelationship of their struggle with that of Negroes. That manifestations of racial prejudice have been more brutal than the more subtle manifestations of prejudice by reason of sex, in no way diminishes the force of the equally obvious fact that the rights of women and the rights of Negroes are only different phases of the fundamental and indivisible issue of human rights. It is against the background of their parallel development that the "sex" amendment to "Title VII" must be viewed.[128]

Responding directly to the argument that inclusion of sex would be to the detriment of white women, as employers would be more likely to hire Black women to avoid charges of race discrimination, she emphasized the interrelatedness of the two types of discrimination:

> What is more likely to happen, however is that if there is no "sex" amendment, in accordance with the prevailing patterns of employment *both* Negro and white women will share a common fate of discrimination, since it is exceedingly difficult for a Negro woman to determine whether or not she is being discriminated against because of race or sex. These two types of discrimination are so closely enterwined and so similar that Negro women are uniquely qualified to affirm their interrelatedness.[129]

Making her argument further in a speech to the National Conference of Negro Women, she stated

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[127] *Id.* at 2.

[128] *Id.* at 8–9.

[129] *Id.* at 20.

> The Negro woman . . . carries a heavier economic burden as a family head than her white sister. . . . The Negro woman . . . must prepare to be self-supporting and to support others . . . Negro women have no alternative but to insist upon equal opportunities without regard to sex in training, education and employment. . . . This may be a matter of sheer survival . . . and must be articulated by the civil rights movement so that they are not overlooked.[130]

Pauli Murray's advocacy to include sex as a category under Title VII was ultimately successful, in large part due to her ability to make the intersectional argument that to achieve equality for Black Americans it was necessary to ensure equality for Black women. Any call for an expansion of paid leave should pay attention to the importance of these intersectional arguments and be sure to include the voices of women of color in the advocacy.

VII. THE HISTORY OF THE LITIGATING SEX DISCRIMINATION: MOTHERHOOD, WORK, AND EQUALITY

In the nearly sixty years since the passage of Title VII, cases that have made it to the Supreme Court addressing sex discrimination in the workplace have repeatedly examined the role of women as mothers or potential mothers. An examination of these cases demonstrates the precarious positions that women as potentially pregnant people or potential mothers face in the workplace. These cases can also help form a foundation as we look toward the much-needed expansion of workplace rights that must come in the aftermath of *Dobbs*.

A. *Phillips v. Martin Marietta Corporation* (1971)

The first case to make it to the Supreme Court underscored the intersectionality arguments advanced by Pauli Murray as well as the economic burdens of women with young children. In the case of *Phillips v. Martin Marietta Corporation*, Ida Phillips applied for a position with Martin Marietta, but was denied because she had

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[130] Pauli Murray, *The Negro Woman in the Quest for Equality, Speech at the NCNW Leadership Conference* (Nov. 14, 1963), *reprinted in* BLACK WOMEN IN WHITE AMERICA: A DOCUMENTED HISTORY 596 (Gerda Lerner ed., 1972) (renaming the speech, "Jim Crow and Jane Crow").

preschool aged children.[131] In response, Ms. Phillips filed suit under the new Civil Rights Act.

The District Court held that "[t]he responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies."[132] At the time, 48 percent of mothers of preschool aged children worked due to financial necessity.[133] Further, Black women were nearly two times as likely to work as were white women.[134] The Fifth Circuit affirmed, and the case went to the U.S. Supreme Court.

In her brief to the Supreme Court, Ms. Phillips' echoed the intersectional arguments made by Pauli Murray. She argued,

> The extent to which exclusion of mothers of pre-school children is contrary to Title VII becomes even more apparent upon examination of the racial impact of this exclusion. Its primary adverse impact is on Blacks.
>
> [There is] no tendency for Blacks in child bearing ages to retire even temporarily from the labor force. This situation is explained not only by the high incidence of poverty in the Negro community and the economic weakness of Negro males, but also by the large proportion of fatherless families.
>
> In 1967, nearly half of the non-white women in the working force had children under six years of age. In contrast, only one-fourth of the white mothers had children under six. These women tend to be family heads, responsible for the economic survival of their children. More than twice as many non-white mothers as white mothers are heads of families.[135]

The brief continued by emphasizing the particularly harsh economic oppression that impacted Black women, in part due to the discriminatory classification of the FLSA:

> Black women suffering under the double discrimination of race and sex are the most oppressed group of workers in the

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[131] 400 U.S. 542, 543 (1971) (per curiam).

[132] GILLIAN THOMAS, BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK 11 (2016).

[133] Brief for Petitioner, *Phillips*, 400 U.S. 542 (No.73), 1970 WL 136377, at *12 (citing Carl Rosenfeld & Vera C. Perrella, *Why Women Start and Stop Working: A Study in Mobility*, 88 MONTHLY LAB. REV. 1077, 1077–79 & tbl. 1).

[134] Due to the impact of this case on Black women, it was argued before the Supreme Court by the NAACP Legal Defense Fund. For an excellent history of this case, see THOMAS, *supra* note 132, at 7.

[135] Brief for Petitioner, *Phillips*, 400 U.S. 542 (No. 73), 1970 WL 136377, at *13.

> society. As women they earn much less than men. In 1966, the average yearly income of fully employed women was only 58% of the average yearly income of fully employed men. And for Black women the situation was even worse: for 1964 their average yearly income was only 70% of that of white women. An important factor in this low income situation is the large number of black women working as domestics or in other service work outside the coverage of minimum wage laws. Families dependent on such a breadwinner need every possible aid in breaking out of the bottom rung employment category and gaining decent factory and office work, such as that at the Martin Marietta Company.[136]

As her brief made clear, Black women are the lowest paid workers and the most impacted by workplace laws related to their roles as mothers and potential mothers.

Although the Supreme Court sided with Ida Phillips in determining that Martin Marietta's policy violated Title VII, the "victory" is not above reproach. Oral arguments in the case showed the clear biases of the Justices. Chief Justice Warren E. Burger asked if Title VII applied to the government as an employer (the statute did not apply to state and federal governments until 1972).[137] Justice Burger's question was framed in the context of inquiring whether a federal judge would violate Title VII if that Judge refused to hire a law clerk who had an infant child and implied that he would not want to hire such a woman.[138] Other Justices inquired if the statute would allow for the exclusion of pregnant women from jobs, if women could be excluded from the job of digging ditches, and if men could be excluded from the job of a hospital nurse.[139]

The Court's decision also appeared to give Martin Marietta an out by sending the case back to the district court for trial. The Court suggested that Martin Marietta could use the bona fide occupational qualifications (BFOQ) exception to justify its discriminatory policy. The Court concluded,

> The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under

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[136] *Id.* at *13–14.

[137] Transcript of Oral Argument at 6, *Phillips*, 400 U.S. 542 (No. 73), https://supremecourt.gov/pdfs/transcripts/1970/70-73_12-09-1970.pdf.

[138] *Id.* at 7.

[139] *Id.* at 16–17, 19–20.

> §703 (e) of the Act. But that is a matter of evidence tending to show that the condition in question "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The record before us, however, is not adequate for resolution of these important issues.[140]

Essentially the Court was leaving open the possibility that Martin Marietta could still present evidence that women with preschool-aged children were still not qualified for the position.

In his concurrence, Justice Thurgood Marshall criticized the Court for even suggesting that Martin Marietta's policy could make sex a BFOQ. He noted, "I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination."[141]

B. *General Electric Co. v. Gilbert* (1976)

Five years after the *Phillips* decision, the Court was again presented with a case under Title VII that focused on pregnant workers and workers who could become pregnant. In *General Elec. Co. v. Gilbert*, the question was whether General Electric's disability policy that provided temporary disability payments for workers with non-workplace injuries, but excluded pregnancy, was sex discrimination in violation of Title VII.[142] The district court and the Court of Appeals for the Fourth Circuit found that the policy violated Title VII. The Supreme Court infamously overturned that decision. The Court held that the plan "divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."[143] In reaching this conclusion, the Court relied on a prior decision, *Geduldig v. Aiello*,[144] that held the Equal Protection Clause did not prohibit a California insurance program from excluding pregnancy related benefits. As baffling as this argument is, it continues to appeal to the Court, as this same reasoning was used by

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[140] *Phillips*, 400 U.S. at 544.

[141] *Id.* at 545.

[142] 429 U.S. 125, 127 (1976).

[143] *Id.* at 135.

[144] Geduldig v. Aiello, 417 U.S. 484, 497 (1974).

the majority in *Dobbs* to summarily dismiss the Equal Protection argument.[145]

In response to the *Gilbert* decision, more than 200 feminist, civil rights, and labor organizations came together to advocate for an amendment to Title VII that would prohibit discrimination on the basis of pregnancy.[146] In 1978, Congress stepped in to offer protections that the Supreme Court had denied and passed the Pregnancy Discrimination Act (PDA).[147] The PDA, which amended Title VII made clear that discrimination "because of sex" includes discrimination "because of pregnancy, childbirth, or related medical conditions" and that women so impacted "shall be treated the same for all employment-related purposes."[148] More recently, on June 27, 2023, the Pregnant Workers Fairness Act went into effect, which requires employers to provide reasonable accommodations to known limitations related to pregnancy, childbirth, and related medical conditions.[149]

Of note, the Supreme Court in *General Electric Co. v. Gilbert* also seemed to support a position that pregnancy was a "voluntary" condition. The Court repeated the finding of the District Court that pregnancy is not a "disease" at all, and is often a "voluntarily undertaken and desired condition."[150] In a dissent, Justices William J. Brennan and Thurgood Marshall pointed out that the court of appeals correctly noted that General Electric never construed its plan to eliminate other supposedly "voluntary" disabilities including including "sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery."[151]

This view of pregnancy being a "voluntary" condition is instructive in examining the need for expanded leave in the aftermath of *Dobbs*. Undoubtedly, pregnancy is not necessarily a voluntary condition. In addition, even when a pregnancy is voluntary, this does not mean that maintaining a pregnancy is always voluntary. Numerous circumstances can arise after pregnancy occurs, including threats to the life of the mother and changes in relationships that can

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[145] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236–37 (2022).

[146] THOMAS, *supra* note 132, at 118.

[147] Pub. L. No. 95-555, 92 Stat. 2076 (1978).

[148] 42 USC § 2000e(k).

[149] Pub L. No. 117-328 div. II, 136 Stat. 4459, 6084 (2022) (codified at 42 U.S.C § 2000gg).

[150] *Gilbert*, 429 U.S. at 136.

[151] *Id.* at 141.

cause a pregnant person to not want to maintain an otherwise voluntary pregnancy. After *Dobbs,* many aspects of the voluntary nature of pregnancy, especially in terms of terminating a pregnancy, are even further stripped away. In the face of restricted rights regarding the decision to terminate a pregnancy, it is time for legislators, like those in the aftermath of *Gilbert,* to step in and mitigate the damages caused by a court decision. Simply put, because the rights to access abortions have been obliterated by the Supreme Court, Congress should step in with expanded leave.

C. *California Federal Savings & Loan Association v. Guerra* (1987)

California's Fair Employment and Housing Act required employers subject to Title VII to reinstate employees returning from pregnancy related disability leave to the same or similar position unless no job was available based on business necessity.[152] In January 1982, Lillian Garland, a receptionist at California Federal Savings and Loan went on pregnancy disability leave.[153] When she attempted to return to work in April 1982, she was informed that no positions were available. Ultimately California Federal Savings and Loan filed a lawsuit claiming that California's Fair Employment and Housing Act violated the PDA by not treating pregnant people and non-pregnant people the same. The employer argued that California's law was preempted by the PDA.[154]

While the PDA was an important step to ensure equal treatment in the workplace for women, it was not without limitations. The PDA did not require employers to provide maternity leave, unless they were already providing similar leave to other workers.[155] As Justice Ginsberg noted, "[a]lthough the PDA proscribed blatant discrimination on the basis of pregnancy, the Act is fairly described as a necessary, but not sufficient measure."[156] Judge Richard A. Posner, in a Seventh Circuit opinion, perhaps put the case more bluntly, "Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees."[157]

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[152] Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 275–76 (1987).

[153] *Id.* at 278.

[154] *Id.* at 278–79.

[155] *See* Young v. United Parcel Serv., 575 U.S. 206, 219–20 (2015).

[156] THOMAS, *supra* note 132, at 118.

[157] Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994).

Among women's rights advocates, there was a dispute about supporting California's law. Some argued that such laws ensuring benefits of pregnancy related leave were critically important for lower wage working women, as they were more often excluded from jobs with union representation, job security, or fringe benefits.[158] A counterargument was that laws guaranteeing pregnancy continued to stigmatize women as weak and fragile and some advocates believed they would be used to justify excluding women from certain opportunities.[159] Esther Peterson, Director of the Women's Bureau under President Kennedy, commented, "Are women better off being singled out for protection, or are they better served by erasing all legal distinctions between women and men? As the lettuce pickers and cafeteria workers know, it depends on your status."[160]

In concluding that the California's Fair Employment and Housing Act did not violate the PDA, the Court, in a decision written by Justice Marshall, held that the PDA is "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[161] In rebuke to the decision in *Gilbert* the Court quoted Justice Brennan's dissent from that case,

> [D]iscrimination is a social phenomenon encased in a social context and, therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment, end products that may demand due consideration of the uniqueness of the "disadvantaged" individuals. A realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies.[162]

The Court also addressed the arguments concerned about the potential stigmas which would be associated with the California law:

> The statute is narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions. Accordingly, unlike the protective labor legislation prevalent earlier in this century, §12945(b)(2) does not reflect archaic or stereotypical notions

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158 RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 20–21 (1995).

159 *Id.*

160 THOMAS, *supra* note 132, at 115.

161 Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 286 (1987).

162 *Id.* at 289.

> about pregnancy and the abilities of pregnant workers. A statute based on such stereotypical assumptions would, of course, be inconsistent with Title VII's goal of equal employment opportunity.[163]

While the *Guerra* decision was important for ensuring that state pregnancy leave laws would be upheld and for criticizing any legislation that would stigmatize working women, it was perhaps more important for the movement it sparked to pass a federal leave law for all workers. *Guerra,* with its attention on leave laws that may exceed the parameters of the PDA, can be instructive in imagining ways to expand leave laws in the aftermath of *Dobbs.*

D. *International Union, United Auto Workers of America v. Johnson Controls, Inc.* (1991)

With the advent of Title VII, industries that had previously been able to exclude women from certain workplaces, often those in manufacturing that paid higher wages, were now being pressured to hire women. At the same time that Title VII was gaining traction, discrimination was not the only focus of legislators. Workplace safety was also a rising concern. By 1978, the Occupational Safety and Health Administration (OSHA) was holding hearings and issuing regulations on various dangerous substances, including lead.[164] Johnson Controls manufactured batteries, for which lead is a primary ingredient.[165] In 1982, Johnson Controls adopted a policy excluding the majority of women from these jobs:

> [W]omen who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights.[166]

Notably, OSHA had found that "[e]xposure to lead has profoundly adverse effects on the course of reproduction in *both* males and females"[167] Still, there was no effort by Johnson Controls to exclude fertile men. Johnson Controls' policy characterized all women as

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[163] *Id.* at 290.

[164] THOMAS, *supra* note 132, at 150.

[165] Int'l Union, United Auto Workers of Am. v. Johnson Controls, Inc. 499 U.S. 187, 190 (1991).

[166] *Id.* at 192.

[167] THOMAS, *supra* note 132, at 150.

capable of becoming pregnant–unless they could provide documentation that they could not reproduce. The broad policy required proof of infertility for any woman under the age of seventy.[168] As a result, women were excluded from consideration for certain positions at Johnson Controls, or they were demoted. Drastic measures were sought in attempts to circumvent the policy. At least one woman chose to undergo sterilization so that she might keep her job. One woman asked if she could keep her job if her husband, also an employee of Johnson Controls, were to get a vasectomy. The employer's response was no, as that would not stop her from getting pregnant.[169]

Upon a challenge to Johnson Controls' policy being in violation of Title VII, the district court and Court of Appeals for the Seventh Circuit upheld the policy.[170] However, the Supreme Court overturned the decisions of the lower courts and unanimously held that Johnson Controls had discriminated against the workers based on sex.[171] Writing for the majority, Justice Harry Blackmun, the author of *Roe v. Wade*, asserted,

> Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them, rather than to the employers who hire those parents.[172]
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> . . .
>
> It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.[173]

It took eighty-three years, but employers could no longer justify excluding women from the workplace based on their role as potential mothers, a position that had been supported in *Muller v. Oregon.*

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[168] *Id.* at 148.

[169] *Id.* at 149.

[170] *Id.* at 160–61.

[171] *Johnson Controls*, 499 U.S. at 167, 206.

[172] *Id.* at 206.

[173] *Id.* at 211.

E. *Young v. United Parcel Service, Inc.* (2015)

The elimination of the paternalistic policy evident in *Muller v. Oregon* and subsequent laws and workplace policies were important to allow women to advance in all areas of the workforce. Increasingly, women were entering the workforce in greater numbers resulting in more women working while pregnant. Approximately three-fourths of working women will be pregnant while working and 87 percent of those who had their first baby between 2006 and 2008 worked full time into their ninth month of pregnancy.[174] At the same time that women should not be excluded from a job because of their potential for becoming pregnant, when women do become pregnant—an admittedly a major medical event—they may need some temporary accommodations in the workplace to allow them to do their job. Failure to provide the necessary accommodations could result in women being forced to take unpaid leave or losing their jobs, just when financial stability is most important.

Peggy Young, a delivery driver for UPS, was forced to take an extended unpaid leave from her job when she became pregnant and her medical provider advised that she not lift more than twenty pounds.[175] UPS drivers were required to be able to lift up to seventy pounds without assistance. UPS argued that it could not accommodate Ms. Young's restriction.[176] However, the company did accommodate workers with disabilities, workers with on-the-job injuries, and workers who were ineligible to drive due to DOT regulations (such as from medical conditions or as a result of a conviction for driving under the influence).[177] Because Ms. Young fit into none of these categories, she was required to take an extended leave of absence, resulting in significant financial instability for her family, including the loss of medical coverage.[178]

After the lower courts dismissed the case, the Supreme Court, in a six to three decision, held that Ms. Young should be able to proceed with her claims.[179] The Court did not conclude that an employer must always provide accommodations to pregnant workers, but it did provide a path for pregnant employees to allege sufficient facts to make a claim of a violation of the PDA if the worker can establish that

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[174] THOMAS, *supra* note 132, at 212.

[175] Young v. United Parcel Serv., Inc., 575 U.S. 206, 211 (2015).

[176] *Id.*

[177] *Id.* at 211–12.

[178] *Id.* at 212.

[179] *Id.* at 229.

the employer otherwise accommodated non-pregnant workers with a similar ability or inability to work.[180] Summing up the issue, Justice Breyer posed the question, "why, when the employer accommodated so many, could it not accommodate pregnant women, as well?"[181]

In June 2023, the Pregnant Worker Fairness Act went into effect.[182] The Act both codified and expanded on the decision in *Young*. Covered employers are now required to provide reasonable accommodations to pregnant workers, similar to accommodations provided under the Americans with Disabilities Act.[183] While the Act provides some important protections for pregnant workers, it does not ensure any particular amount of leave or any paid leave.

VIII. THE HISTORY OF THE FMLA: PROGRESS AND LIMITATIONS

As the *California Savings and Loan* case wound its way through the courts, legislators who had been responsible for the law in California and were concerned that it would be struck down, began considering legislative approaches to ensuring leave for pregnant women.[184] There was also momentum, not only to preserve the California law, but to ensure that all pregnant women were guaranteed the right to pregnancy related leave. These legislators reached out to activists, including Donna Lenhoff of the Women's Legal Defense Fund.[185]

Ms. Lenhoff did not support the concept of "special treatment" laws for pregnant women, but strongly believed that a leave bill was necessary to provide all workers with leave and job protection if needed for a medical condition, including pregnancy, or to care for a family member with a medical condition.[186] In response to those who argued that a leave law for pregnant women would be easier to pass, Ms. Lenhoff responded that while it may be easier in the short run, in the long run, a bill that provided leave only for pregnant women would make it much more difficult to later provide leave for all workers.[187]

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[180] *Id.*

[181] *Id.* at 231.

[182] Pub L. No. 117-328 div. II, § 109, 136 Stat. 4459, 6089 (2022).

[183] 42 U.S.C. §§ 2000gg–2000gg-1.

[184] RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 19–21 (1996).

[185] *Id.* at 19.

[186] *Id.* at 22–23.

[187] *Id.* at 23.

Ultimately Ms. Lenhoff and her colleagues' position persuaded lawmakers, and the Parental and Disability Leave Act of 1985 was introduced. It would have required:

- Eighteen weeks of unpaid leave for mothers or fathers of newborn or newly adopted children;
- Twenty-six weeks of unpaid leave for those with temporary disabilities that were not work-related and for employees with sick children;
- Continuation of health insurance and other benefits while on leave;
- Guarantee of the same or similar job upon completion of leave; and
- Creation of a commission to study means of providing income replacement and make recommendations within two years.[188]

While such a law was revolutionary for the United States, it was not so for the remainder of industrialized nations. At the time, the United States was the ***only*** industrialized nation that did not guarantee a woman her job after the birth of a child.[189]

Ultimately, it took nine years and numerous compromises to pass what Ms. Lenhoff has since described as "a modest policy—a mere unpaid leave" that is now the Family and Medical Leave Act (FMLA).[190] Compared to the original bill, the FMLA:

- Provides twelve weeks, rather than eighteen or twenty-six weeks, of unpaid leave
  - For the birth and care of the newborn child of an employee;
  - For placement with the employee of a child for adoption or foster care;
  - To care for an immediate family member (i.e., spouse, child, or parent) with a serious health condition (including more family members than the original bill); or

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[188] *Id.* at 42.

[189] DONNA R. LENHOFF & LISSA BELL, NAT'L P'SHIP FOR WOMEN & FAM., GOVERNMENT SUPPORT FOR WORKING FAMILIES AND FOR COMMUNITIES: FAMILY AND MEDICAL LEAVE AS A CASE STUDY 3 (2023), https://www.nationalpartnership.org/our-work/resources/economic-justice/fmla/fmla-case-study-lenhoff-bell.pdf.

[190] *Id.* at 1.

  - To take medical leave when the employee is unable to work because of a serious health condition.[191]
- Continuation of health insurance and other benefits while on leave, as with the original bill;[192]
- Guarantee of the same or similar job upon completion of the leave, as with the original bill;[193]
- A 2008 amendment provides twenty-six weeks of leave to care for a service member or to address family member related needs as a result of the deployment of a family member.[194]

No commission was created to study a means for income replacement. Covered "employers" under FMLA are limited to only those with fifty or more employees.[195] Covered "employees" are limited to those who have, in the prior twelve months, worked 1250 hours at the job from which leave is being taken.[196]

The remedies available for enforcement add a further limitation to FMLA. If an employee prevails in a legal claim for a violation of FMLA, the sole monetary remedies are lost compensation and an equal amount in liquidated damages.[197] Because the potential remedy would be limited, low wage workers may have a more difficult time securing legal representation.

The FMLA, in spite of certain limitations, has had an important impact on the workforce in the United States. Each year an estimated fifteen million workers take leave pursuant to FMLA, and FMLA has been utilized by more than 315 million workers needing temporary leave to care for their own or a family member's serious health condition.[198] Without the protections of the FMLA, it is likely that many of these workers would have lost their jobs, after taking a necessary leave from work. This would result in serious financial crises and related further challenges. The situation of Lillian Garland, who was the subject of the litigation in *California Federal Savings and Loan Association v. Guerra*, reveals why such protections

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[191] 29 U.S.C. § 2612.

[192] *Id.* § 2614(a)(2).

[193] *Id.* § 2614(a)(1).

[194] *Id.* § 2612(a)(3).

[195] *Id.* § 2611(4).

[196] *Id.* § 2611(2)(A).

[197] 29 CFR § 825.400(c) (2023).

[198] NAT'L P'SHIP FOR WOMEN & FAM. FACT SHEET 1 (2023), www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/key-facts-the-family-and-medical-leave-act.pdf.

are necessary. Indeed, Ms. Garland, as a result of her termination from California Federal Savings and Loan, became financially unstable and lost custody of her child—it was when she was pregnant with this child that Ms. Garland required leave, and this leave resulted in her job loss.[199]

When compared with protections offered to workers in other countries, the limitations of the FMLA are even more apparent. In a study conducted by the Organization for Economic Cooperation and Development (OECD), out of forty-one countries reviewed, only the United States lacks paid parental leave for workers.[200] In addition, the average paid maternity leave for all countries is 18.5 weeks (21.1 weeks for EU countries) with additional paid leave options of 50.8 weeks (64.6 weeks for EU countries) available to mothers.[201]

The number of workers who do not have access to leave pursuant to the FMLA also points to limitations in the law. Only 56 percent of workers are covered by the FMLA.[202] However, only 38 percent of low wage workers—those earning less than $15.00 per hour—are covered by the FMLA.[203] Sixty-one percent of these workers, who are least able to afford it, did not receive pay while on leave.[204] Even when eligible for FMLA leave, 64 percent of low-wage workers eligible for leave chose not to take needed leave due to concerns about job loss.[205]

A study by the Center for Economic Policy and Research noted that the limitations on access to leave are most heavily borne by single parents.[206] The study found that 15.7 percent of solo parent workers earning less than $50,000 reported needing leave in the prior twelve-month period, but were unable to take leave.[207] Further, among leave

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[199] THOMAS, *supra* note 132, at 109.

[200] ORG. FOR ECON. COOPERATION & DEV., OECD FAMILY DATABASE PF2.1. PARENTAL LEAVE SYSTEMS 2 (2022), https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf.

[201] *Id.* at 3.

[202] YIXIA CAI & EILEEN APPELBAUM, CTR. FOR ECON. & POL'Y RSCH., IT IS TIME FOR THE FMLA TO FULFILL THE PROMISE OF INCLUSIVE AND PAID LEAVE 2 (2021), https://cepr.net/wp-content/uploads/2021/02/2021-02-FMLA-Cai-and-Appelbaum.pdf.

[203] SCOTT BROWN, RADHA ROY & JACOB ALEX KLERMAN, ABT ASSOC., LEAVE EXPERIENCES OF LOW-WAGE WORKERS 1 https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA_LowWageWorkers_January2021.pdf.

[204] *Id.*

[205] *Id.*

[206] CAI & APPELBAUM, *supra* note 202.

[207] *Id.* at 4.

takers, 43 percent of solo parents did not receive pay while on leave.[208] The research suggests that this reflects that a majority of solo parents work in low-wage jobs. The study also found that 68 percent of solo parents also chose not to take leave for fear of job loss. In addition, 81 percent of single parents cited affordability as a major reason for not taking leave.[209]

These figures are further exacerbated by this country's history of discriminatory policies that have resulted in lower pay to women and people of color. According to data from the U.S. Census Bureau, in nine states, 50 percent or more of all women workers earn less than $15.00 per hour.[210] However, even more striking, in forty states, 50 percent of all women of color earn below a living wage.[211] The devastating impact of poverty level wages is exacerbated by the large percentages of mothers who are the primary, sole, or co-breadwinners for their families. As of 2017, 64.2 percent of mothers fit the description, and an incredible 84.4 percent of Black mothers were in this category.[212]

Adding to these disparities is the racial wealth gap, created in part due to the discriminatory occupational exclusions of the FLSA and discrimination in the workforce especially prior to the passage of Title VII. This gap leaves families, already marginalized by race, with less access to financial resources when an unpaid leave is necessary. In 2019, the median white household held $188,200 in wealth compared to only $24,100 for Black households.[213]

The wealth gap is even more stark when race and sex are considered. Comparing the median wealth of these groups under the age of thirty-five, the impact of racism and sexism on Black women is apparent: single white men are at $22,640; single white women are at

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[208] *Id.* at 5.

[209] *Id.* at 6.

[210] Chabeli Carrazana, *In Almost Every State, Over Half of All Women of Color Earn Less than a Living Wage*, THE 19TH (Mar. 21, 2022, 11:00 PM CT), https://19thnews.org/2022/03/women-color-earn-less-living-wage.

[211] *Id.*

[212] Press Release, Ctr. for Am. Progress, Nearly Two-Thirds of Mothers Continue to Be Family Breadwinners, Black Women Are far More Likely to Be Breadwinners (May 10, 2019), https://www.americanprogress.org/press/release-nearly-two-thirds-mothers-continue-family-breadwinners-black-mothers-far-likely-breadwinners.

[213] Emily Moss, Kriston McIntosh, Wendy Edelberg & Kristen Broady, *The Black-White Wealth Gap Left Black Household More Vulnerable*, BROOKINGS INST. (Dec. 8, 2020), https://www.brookings.edu/blog/up-front/2020/12/08/the-black-white-wealth-gap-left-black-households-more-vulnerable.

$6,470; single Black men are at $1,550; and single Black women are at a mere $101.[214] As a result, when a crisis occurs, such as a need to cover income from an unpaid leave or job loss, Black families have far less access to necessary emergency resources.[215]

These income and wage disparities will all be further exacerbated by the blatant restrictions on the right of women to make their own decisions about their reproductive health. It is estimated that as a result of the *Dobbs* decision, there will be 50,000 additional babies born each year.[216] While nation-wide this is not a significant increase, these additional births will be concentrated in the poorest of the poor and will likely increase poverty for those women.[217] Furthermore, states with greater restrictions on abortion also tend to have less access to financial assistance as well as less access to health care and worse health outcomes.[218]

IX. CONCLUSION—THE HISTORY OF THE FUTURE: THE GAPS EXACERBATED BY THE COURT AND PRIOR LEGISLATION, MUST BE MITIGATED BY CONGRESS

With a history of discrimination against people of color and women going back to before the founding of this country, and much of this country's "advancement" dependent on this discrimination, the solutions for the income and wealth disparities are not going to be found in a single piece of legislation. Nonetheless, providing more working people with paid family and medical leave would help to alleviate some of the more severe harms by providing a safety net that almost every other country in the world already provides. While this has been a goal of activists going back to shortly after *Roe* was decided, it may just be that the *Dobbs* decision provides the momentum to pass this legislation.

In drafting legislation, it is critical to prioritize the needs of workers who are disproportionately unable to access existing state,

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[214] *Id.*

[215] *Id.*

[216] Jeltsen, *supra* note 13.

[217] *See generally* ADVANCING NEW STANDARDS IN REPROD. HEALTH, UNIV. CAL. S.F., THE HARMS OF DENYING A WOMAN A WANTED ABORTION, https://www.ansirh.org/sites/default/files/publications/files/the_harms_of_denying_a_woman_a_wanted_abortion_4-16-2020.pdf.

[218] Rachel Treisman, *States with the Toughest Abortion Laws Have the Weakest Maternal Supports, Data Shows*, NPR (Aug. 18, 2022, 6:00 AM ET), https://www.npr.org/2022/08/18/1111344810/abortion-ban-states-social-safety-net-health-outcomes.

federal, and employer-based programs, either due to lack of coverage or lack of affordability of the coverage offered.

Existing research has shown significant positive effects of expanded and paid leave, particularly for pregnant women and families with children. Included among the many economic benefits are:

- Paid family leave policies are correlated with higher labor force participation rates, including increasing parity between men and women in workforce participation.[219]
- Paid leave has been shown to contribute to an increase in labor force participation for women in the year after the child's birth.[220]
- Paid and expanded family leave reduces the wage gap experienced by women who return to work after giving birth, increasing total lifetime earnings and retirement savings.[221]
- Paid leave policies reduce the disparities of who takes pregnancy related leave.[222]
- Research based on California's paid leave law has found that the law has resulted in a 10.2 percent reduction in new mothers dropping below the poverty line.[223]

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[219] HEATHER BOUSHEY, ANN O'LEARY & ALEXANDRA MITUKIEWICZ, CTR. FOR AM. PROGRESS, THE ECONOMIC BENEFIT OF FAMILY AND MEDICAL LEAVE INSURANCE 3 (2013), https://cdn.americanprogress.org/wp-content/uploads/2013/12/PaidFamLeave-brief.pdf.

[220] ELISABETH JACOBS, WASH CTR. FOR EQUITABLE GROWTH, PAID FAMILY AND MEDICAL LEAVE IN THE UNITED STATES: A RESEARCH AGENDA (2018), https://equitablegrowth.org/research-paper/paid-family-and-medical-leave-in-the-united-states/?longform=true#what_do_we_know_about_the_effects_of_paid_family_and_medical_leave_on_the_economy_as_a_whole%3F (scroll down to "fiscal savings" section).

[221] BOUSHEY ET AL., *supra* note 219, at 6.

[222] BARBARA GAULT, HEIDI HARTMAN, ARIANE HEGEWISCH, JESSICA MILLI & LINDSEY REICHLIN, INST. FOR WOMEN'S POL'Y RSCH., PAID PARENTAL LEAVE IN THE UNITED STATES: WHAT THE DATA TELL US ABOUT ACCESS, USAGE, AND ECONOMIC AND HEALTH BENEFITS 9 (2014), https://iwpr.org/wp-content/uploads/2020/09/B334-Paid-Parental-Leave-in-the-United-States.pdf.

[223] Katherine Policelli & Alix Gould-Werth, *New Research Shows California Paid Family Leave Reduces Poverty*, WASH. CTR. FOR EQUITABLE GROWTH (Aug. 20, 2019), https://equitablegrowth.org/new-research-shows-california-paid-family-leave-reduces-poverty.

- Paid family leave policies reduce food insecurity for pregnant women and families with newborn children.[224]

There is also significant research that supports expanded and paid leave positively impacts the health of the mother and child. Some of these positive impacts include:

- Ten weeks of full-time equivalent paid leave has been associated with a 9–10 percent reduction in neonatal mortality, infant mortality, and under-five mortality rates.[225]
- Paid protected family leave also increases the likelihood of well baby care visits and vaccination rates. In one study, children were 25.3 and 22.2 percent more likely to get their measles and polio vaccines when the mothers had access to full-time equivalent paid maternity leave.[226]
- Paid maternity leave has been associated with a 47 percent decrease in the odds of re-hospitalizing the infants and a 51 percent decrease in the odds of the mother being re-hospitalized at twenty-one months postpartum, compared to women taking unpaid or no leave.[227]
- Access to longer and paid maternity leave can have a positive impact on a woman's mental health and wellbeing, including fewer depressive symptoms and reduction in severe depression. Further, when leave is paid, there is an improvement in overall mental health.[228]
- Access to leave is further associated with increased rates of breastfeeding, which has been shown to have positive health benefits for both the infant and the mother.[229]
- In a study in Norway of the impact of their pregnancy leave law on the health of women, it found positive correlations for

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[224] Otto Lenhart, *The Effect of Paid Family Leave on Economic Insecurity—Evidence from California*, 19 REV. ECON. HOUSEHOLD 615, 634 (2021), https://link.springer.com/article/10.1007/s11150-020-09537-4.

[225] GAULT ET AL., *supra* note 222, at 14.

[226] *Id.* at 15.

[227] Judy Jou, Katy B. Kozhimannil, Jean M. Abraham, Lynn A. Blewett & Patricia M. McGovern, *Paid Maternity Leave in the United States: Associations with Maternal and Infant Health*, 22 MATERNAL & CHILD HEALTH J. 216, 216 (2018), https://link.springer.com/article/10.1007/s10995-017-2393-x.

[228] GAULT ET AL., *supra* note 222, at 15.

[229] *Id.* at 14, 16.

> women's health into their 40's, particularly for women in lower income brackets.[230]

Expanded paid leave is just a step in the direction of achieving economic security, equality, and freedom. Undoubtedly, expanded leave is not a complete cure. Much more will be required to undo, or to even lessen, the effects of a system that was never truly built on equality or the guarantees of liberty to all.

Recognizing that legislation takes time (it took nine years of compromises to effectuate FMLA), there are also serious questions as to whether there are more immediate ways to mitigate the impact on workers who will continue to be excluded from the workplace and suffer other forms of economic insecurity when they need to use leave from work to address pregnancy and related conditions. There is also the recognition that employers and the government will likely have to incur costs to expand paid leave, however the benefits noted above will likely offset many of these. Finally, even in the event that paid leave can be expanded, there will still be the problem of those workers who remain excluded from such benefits. Any leave laws that are modeled after the FMLA will not offer aid to the rising number of gig workers and workers who do not have regular or long-term employment. Therefore, in designing legislation, consideration should be given to providing leave payments similar to those made under the CARES Act for gig workers during the COVID-19 pandemic.

Admittedly, we conclude this paper with more questions than answers. Nevertheless, in light of the potential devastating impacts of *Dobbs,* there is an urgent need to move beyond the Supreme Court's morass of excuses attempting to justify the denial of rights. We must seriously consider active steps that can be accomplished by legislation that will mitigate a decision that has the potential to exacerbate the already damaging positions occupied by marginalized and vulnerable workers.

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[230] Aline Bütikofer, Julie Riise & Meghan Skira, *The Impact of Paid Maternity Leave on Maternal Health* 23, 26 (Norwegian Sch. of Econ. Discussion Paper SAM 4, 2018), https://openaccess.nhh.no/nhh-xmlui/bitstream/handle/11250/2490368/DP%2004.pdf.