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Pregnancy and Social Citizenship

Joanna L. Grossman*

Pregnant workers and workers who are new mothers are, fundamentally, workers. They should not be relegated to second class citizenship in employee rights or benefits.¹

The Pregnancy Discrimination Act does not . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work.²

Introduction

Can pregnant working women capture the benefits of equal citizenship? Or do the physical effects of pregnancy, combined with the law's general failure to insist that they be accommodated, make that an elusive goal? This chapter takes up those questions by reconsidering pregnancy discrimination law through the lens of social citizenship.³

Despite vital legislative and judicial victories that together had established a broad-based federal right of sex equality by the early 1970s,⁴ pregnant women continued to face myriad forms of discrimination in the workplace. During the campaign for and debate over the Pregnancy Discrimination Act (PDA) of 1978, advocates and legislators bandied about the familiar fear of second-class citizenship to argue for greater protection for pregnant women in the workplace. Like other important legislative enactments and of the same era,⁵ the central goal of the PDA was to

* My sincere thanks to Linda McClain, Grant Hayden, and Deborah Brake for editing suggestions and to John DiNapoli for his assistance with research and citations.

¹ "Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor," 95th Cong., Sess. 1 (1977) (testimony of Odessa Komer, Vice President, United Auto Workers).

² *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (Posner, J.).

³ See 42 U.S.C. § 2000e(k) (2000).

⁴ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000) (making it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment because of . . . sex."); *Craig v. Boren*, 429 U.S. 190 (1976) (establishing intermediate scrutiny for sex-based classifications).

⁵ The Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972, all passed within a decade, provide the core federal statutory protections against sex discrimination.

promote women's equality by breaking down formal barriers to participation. At its core, this movement was a quest for equal social citizenship – access to paid work and economic security – for women. But while second-wave feminists logged tremendous successes in opening workplace doors for women, the aspiration of the PDA – that pregnant workers would cease being second-class citizens – has not come to pass.

This chapter develops a citizenship-based model for evaluating pregnancy discrimination law, offering it as a substitute to the conventional gender equality framework. Because modern law takes a capacity-based approach to defining discrimination, it ultimately fails to promote sufficient integration of women into workplaces and occupations in which the physical effects of pregnancy are most likely to clash with job performance. The chapter concludes by urging greater accommodations for pregnant workers as a means of promoting their equal social citizenship.

Women's Equal Citizenship

Pregnancy, with its real, if temporary, physical effects, presents a challenge to women's claims to full citizenship because it can impair a woman's ability to draw on her natural talents and capacities in the workplace, causing repeated setbacks for women individually and as a class that systematically dampen women's workforce participation. In this section, I resituate the conventional debate about workplace accommodations for pregnancy within the citizenship framework, arguing, ultimately, that the social citizenship tradition demands some protection for a pregnant woman's right to work despite the potential physical limitations of pregnancy.

Defining Equal Citizenship

This chapter, like many others in this volume, uses "citizenship" as a proxy for inclusion or participation and as a benchmark for assessing progress toward gender equality. *Equal citizenship* is often used more broadly than simply to connote technical legal status;⁶ it is, in sociologist T. H. Marshall's words, "a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed."⁷ This broader notion of citizenship is not merely descriptive, but also normative – used

⁶ See Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, MA: Harvard University Press, 1991), at 4 ("Citizenship as nationality is the legal recognition, both domestic and international, that a person is a member, native-born or naturalized, of a state").

⁷ See T. H. Marshall, *Class, Citizenship, and Social Development: Essays* by T. H. Marshall (Garden City, NY: Doubleday, 1964), at 84; see also Linda Bosniak, "Citizenship and Work," 27 *N.C. J. Int'l L. and Com. Reg.* 497, 500 (2001) ("Equal citizenship is understood to entail enjoyment of various kinds of rights – civil rights, political rights, social rights, and cultural rights – but all of these rights are described in the language of citizenship"); Jennifer Gordon and Robin Lenhardt, "Rethinking Work and Citizenship," 55 *UCLA L. Rev.* 1161, 1185 (2008).

as an expression of our shared desire to achieve “the highest fulfillment of democratic and egalitarian aspiration.”⁸ The rhetorical “second-class citizen” – someone “who is denied full rights and recognition of membership in society,” despite having citizenship status – illustrates this substantive notion of citizenship.⁹

Though the citizenship framework has become a staple of anti-discrimination theory and legal rhetoric, it has also been criticized as unnecessarily, perhaps even inherently, exclusionary.¹⁰ If rights are tethered to citizenship, then, so the claim goes, we abandon those without formal citizenship status.¹¹ The usefulness of the citizenship framework in the gender context outweighs its detriments, however. As Linda McClain and I argue in the introduction to this volume, women’s rights advocates have long pitched their arguments in citizenship terms. The birth of the women’s movement in Seneca Falls in 1848 revolved around the demand for “immediate admission to all the rights and privileges which belong to them as citizens of the United States.”¹² Later feminist struggles – for the right to serve on juries and the right to pursue a livelihood, to take just two examples – would also root themselves deeply in the concept of citizenship-based rights.¹³ Though these claims were often rejected,¹⁴ the aspiration of equal citizenship remained central to women’s march toward equality. And even in modern struggles, where citizen/non-citizen is not obviously a useful distinction, the concept of second-class citizenship retains rhetorical power and is often invoked. We should thus not be too quick to abandon the citizenship framework.

Moreover, the exclusionary bias of the citizenship framework can be overcome, at least in large part, by un-tethering the concept of citizenship from formal legal status altogether. Perhaps new terminology would help,¹⁵ but many scholars continue to talk about “citizenship” while using a definition that has little if anything to do with one’s legal status. And regardless of terminology, we can apply the aspiration

⁸ See Linda Bosniak, *The Citizen and the Alien* (Princeton, NJ: Princeton University Press, 2006), at 1.

⁹ Bosniak, “Citizenship and Work,” at 500.

¹⁰ See Gordon and Lenhardt, “Rethinking Work and Citizenship,” at 1188–89 (discussing, and rejecting, critiques of “citizenship” as a framework for assessing societal inclusion).

¹¹ *Ibid.*

¹² “Declaration of Sentiments, Adopted by the First Women’s Rights Convention Seneca Falls, N.Y., July 19, 1848,” in *History of Woman Suffrage* (Salem, NH: Ayer, 1985), at 71–72.

¹³ See, e.g., Joanna Grossman, “Women’s Jury Service: Right of Citizenship of Privilege of Difference?,” 46 *Stan. L. Rev.* 115 (1994) (noting the centrality of “citizenship” arguments in women’s long suffering fight for equal service on juries); *Bradwell v. State*, 83 U.S. 130 (1872) (plaintiff unsuccessfully challenging exclusion of women from state bar relied on a citizenship-based claim to the right to earn a livelihood).

¹⁴ As Judith Resnik notes, the Supreme Court’s rationale for upholding a Missouri law denying women suffrage was that they “were citizens but citizens of a special sort, possessing not all of the attributes of citizenship that men had.” Judith Resnik, “*Naturally* Without Gender: Women, Jurisdiction, and the Federal Courts,” 66 N.Y.U. L. Rev. 1682 (1991).

¹⁵ Many scholars have settled on other terms to capture the substantive aspects of citizenship. See, e.g., Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (New Haven, CT: Yale University Press, 1989) (“belonging”); Gretchen Ritter, *The Constitution as Social Design: Gender and Civic Membership in the American Constitutional Order* (Palo Alto, CA: Stanford University Press, 2006), at 6 (“civic membership”); Shklar, *American Citizenship*, at 2–3 (“standing”).

of “equal citizenship” to all members of a community, regardless of their technical status. This approach is consistent with the most important components of federal anti-discrimination and workers’ rights laws, which do not limit their protections to “citizens.”¹⁶ Whether we adhere to the citizenship language, or substitute an alternative designed to capture the same value of inclusion, the citizenship framework has great potential as both yardstick and ideal when assessing women’s progress.

Social Citizenship

Within T. H. Marshall’s classic formulation of citizenship – divided into civil, political, and social dimensions – issues related to pregnancy and work fall squarely into the last category. He defined “social citizenship” to include “the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society.”¹⁷

Marshall posited that these dimensions naturally occur sequentially – civil, then political, then social rights. Whether or not this order is inevitable, the experience of American women bears out both the non-unitary nature of citizenship-based rights and their sequential development.¹⁸ While earlier struggles focused on civil and political rights, the quest for equal social citizenship has been a late-twentieth-century struggle.

The “social citizenship tradition” in the United States, as William Forbath has described it, “centers on decent work and livelihoods, social provision, and a measure of economic independence and democracy.”¹⁹ Social citizenship has animated the debate over constitutional welfare rights²⁰ as well as a number of movements and debates about work.²¹ Although access to paid work is not the only component of

¹⁶ See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that the Equal Protection Clause applies to legal and illegal aliens); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93 (1973) (“We agree that aliens are protected from discrimination under the Act.”); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (holding that “employees” includes documented and undocumented aliens for purposes of applying the National Labor Relations Act).

¹⁷ See Marshall, *Class, Citizenship, and Social Development*, at 71–72.

¹⁸ See Gordon and Lenhardt, “Rethinking Work and Citizenship,” at 1185 (“These aspects of citizenship can and do operate independently of each other”); cf. *Muller v. Oregon*, 208 U.S. 412 (1908) (observing that the “lack of political equality” demonstrated by the denial of suffrage to women “was not of itself decisive” on the question whether the state could impose restrictive hours legislation on the basis of sex).

¹⁹ William E. Forbath, “Caste, Class and Equal Citizenship,” 98 *Mich. L. Rev.* 1, 1 (1999); see also Kenneth Karst, “The Supreme Court 1976 Term – Foreword: Equal Citizenship Under the Fourteenth Amendment,” 91 *Harv. L. Rev.* 1, 9 (1977).

²⁰ See generally Forbath, “Caste, Class and Equal Citizenship”; Karst, “Supreme Court 1976 Term.”

²¹ See Vicki Schultz, “Life’s Work,” 100 *Colum. L. Rev.* 1881, 1888 (2000) (“At crucial times in our history, including the New Deal, the labor movement, the civil rights movement, and strands of the women’s movement have championed an affirmative conception of the right to work as the basis for a robust, equal social citizenship”).

social citizenship, it is central to it. The breadth of access to decent, paid work is one measure of a society's commitment to equality and its success in integrating all citizens as full participants in society.²²

The connection between work and citizenship is multifaceted.²³ Work relates directly to political participation by providing individuals with the independence necessary to exercise those rights and the forum to discuss political ideas.²⁴ Increasingly, workplaces are the sites "where we learn about each other, work together, and exchange social and political views."²⁵ Judith Shklar argued that voting and earning are the two most important aspects – indeed, "pillars" – of citizenship. As she sums it up, "We are citizens only if we 'earn.'"²⁶

Work in our society is also deeply connected to self-identity and dignity. Vicki Schultz has argued that "jobs create people" because they shape individuals' behavior and self-conception.²⁷ Sociologists have long made a similar claim about the relationship between work and self-identification.²⁸ But work clearly also shapes the conceptions of others, relationships, and standing in the community.²⁹ Finally, and perhaps most important, work provides the most direct means to economic security. This enables individuals to reduce public and private dependencies and to provide for their own families.³⁰ Along these multiple channels, paid work has thus served as a link to social citizenship. Women have utilized a variety of measures to capture these many and varied benefits of paid work.

As a normative goal, equal social citizenship confronts greater barriers. Both civil and political citizenship, to draw on Marshall's framework, fit comfortably within

²² See Pamela S. Karlan and George Rutherglen, "Disabilities, Discrimination, and Reasonable Accommodation," 46 *Duke L. J.* 1, 25 (1996) (noting that the ADA was premised on the goal of "equality of opportunity," which "encompasses the opportunity to lead as valuable and satisfying a life as the rest of the population").

²³ See Gordon and Lenhardt, "Rethinking work and Citizenship," at 1191–95 (considering various theories of "work and citizenship"). There is also a connection between citizenship as a legal status and work. See, e.g., Bosniak, "Citizenship and Work," at 499.

²⁴ See, e.g., Cynthia Estlund, "Working Together: The Workplace, Civil Society, and the Law," 89 *Geo. L. J.* 1, 53 (2000) (arguing that work provides "a significant deliberative forum" that facilitates individuals' participation as citizens).

²⁵ Eddie A. Jauregui, "The Citizenship Harms of Workplace Discrimination," 40 *Colum. J. L. and Soc. Probs.* 347, 348 (2006) (summarizing literature on the connection between citizenship and democratic or political citizenship); see also Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, MA: Harvard University Press, 2006), at 93 (an "appeal to 'social citizenship' would accept the premise of the important link between work and citizenship, and would argue for a right to decent, satisfying work as a component of responsible self-government").

²⁶ Shklar, *American Citizenship*, at 67; see also Marshall, *Class, Citizenship, and Social Development*, at 80 (arguing that those who needed the protection of the state were by definition not citizens; the poor were entitled to public subsidy as an *alternative* to citizenship, rather than an incident of it).

²⁷ See Schultz, "Life's Work," at 1890.

²⁸ See, e.g., Rosabeth Moss Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977).

²⁹ See Shklar, *American Citizenship*, 63 ("In the marketplace, in production and commerce, in the world of work in all its forms, and in voluntary associations that the American citizen finds his social place, his standing, the approbation of his fellows, and possibly some of his self-respect").

³⁰ See Karst, "Supreme Court 1976 Term"; Forbath, "Caste, Class and Equal Citizenship"; Schultz, "Life's Work."

the liberal theory tradition of “negative rights.”³¹ Though courts did not immediately give in to rights-based claims by women – even after, in many cases, they granted comparable rights to African Americans or other disadvantaged groups – the nature of the claims was consistent with the American constitutional and political structure. Women were prevented from voting or serving on juries by formal governmental barriers. Social citizenship, in contrast, entails not only the removal of state-sponsored barriers to participation, but also a change in private behavior and, more incongruent still, the state’s affirmative assistance to disadvantaged individuals or groups.³²

Feminist Conceptions of Social Citizenship

A central goal of the second-wave women’s movement was to achieve greater economic opportunity for women. Yet, feminists have not been of a single mind on matters of social citizenship. On the one hand, feminists critique the conventional account of social citizenship for its failure to account for the valuable and disproportionate contributions women make through care and domestic work. Linda McClain identifies an “important limitation in the social citizenship tradition: its inattention to the gendered economy of care, that is, women’s disproportionate responsibility for caregiving, and how this responsibility limited their full participation in the labor market and their access to forms of economic security tied to employment.”³³ Martha Fineman has similarly cautioned against defining citizenship by reference only to paid work given the importance of unpaid caregiving,³⁴ and a gendered pattern that persists regardless of whether women also engage in paid work.³⁵

These concerns have led feminists to challenge courts and policy makers to acknowledge “the importance of caregiving as a form of social contribution”³⁶ and to equate reproductive and unpaid domestic work with paid labor in a variety of legal and policy settings.³⁷ Joan Tronto, for example, calls for care work as a “ground for conferring citizenship.”³⁸ This critique also justifies calls for greater governmental

³¹ Eileen McDonagh groups these two types of citizenship into a single category, “liberal citizenship,” because they share this characteristic. See Chapter 9.

³² Nancy Hirschmann makes a parallel claim for the disabled. See Chapter 7.

³³ McClain, *Place of Families*, at 94.

³⁴ See Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2004), at 280.

³⁵ For the original coining of the term “second shift” to describe this pattern, see Arlie Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (New York: Viking Penguin, Inc., 1989). For more recent data, see http://mothersandmore.org/press_room/statistics.shtml (last visited April 6, 2009).

³⁶ McClain, *Place of Families*, at 94.

³⁷ See, e.g., Ann Crittenden, *The Price of Motherhood: Why the Most Important Job in the World Is Still the Least Valued* (New York: Metropolitan Books, 2002); Katharine Silbaugh, “Turning Labor into Love: Housework and the Law,” 91 *Nw. L. Rev.* 1 (1996). Supporters of this approach have advocated for, among other things, permitting family caregivers to accrue social security benefits. See, e.g., *State v. Bachmann*, 521 N.W.2d 886 (Minn. Ct. App. 1994) (rejecting homemaker’s claim for “work release” on grounds that “homemaking is not generally considered employment”).

³⁸ Joan Tronto, “Care as the Work of Citizens: A Modest Proposal,” in Marilyn Friedman, ed., *Women and Citizenship* (Oxford: Oxford University Press, 2005), at 131.

support for the work undertaken when families (mostly women) care for children and other dependents.³⁹

On the other hand, feminists have also sought to enhance women's access to paid work to capture the conventional benefits of social citizenship. The wide-ranging and effective efforts to open educational and workplace doors were taken in this vein, resulting in important enactments like the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and the Pregnancy Discrimination Act of 1978, as well as key litigation victories establishing a robust federal right of sex equality in the workplace.⁴⁰ These victories dovetailed with an emerging constitutional right of sex equality.⁴¹

These feminist conceptions of social citizenship are not necessarily inconsistent with one another, but there can be costs to seeking to access and reform the notion of social citizenship simultaneously. Efforts to equate unpaid work with paid work run the risk of embracing a modern version of separate spheres ideology, which essentializes care work as women's work, and reinforces gender role stereotypes and gender inequality at home and at work. The perception of women as *inauthentic workers*, to borrow a term coined by Vicki Schultz, is fed by arguments that contemplate men and women with different levels of caregiving responsibility and, concomitantly, different levels of labor force attachment and participation.⁴² Schultz and other scholars have urged feminists to reconsider the importance of paid work to women's full participation in society. Paid work, historically, has been associated with independence, and independence with citizenship.⁴³ Paid work also has proven tangible benefits for the individual, including greater psychological well-being and economic security, and to society. Recent popular press books, like Linda Hirshman's *Get to Work* or Leslie Bennett's *The Feminine Mistake*, have tried to remind women directly of the value of paid work – and the costs of giving it up, not the least of which is economic dependency.⁴⁴

The notion of social citizenship informs the feminist debate over work in two ways. First, it reminds us of the centrality of paid work, at least historically, to societal and democratic inclusion, and thus suggests that efforts to equate the value

³⁹ McClain, *Place of Families*, at 94 (refocusing the historical tradition of social citizenship would “posit governmental responsibility to facilitate women’s and men’s participation in paid employment and family work”) (emphasis added); see also Fineman, *Autonomy Myth*.

⁴⁰ See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (establishing that sexual harassment is an actionable form of intentional sex discrimination); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (invalidating an employer’s policy of excluding women with school-age children from employment); *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (interpreting Title VII to prohibit employment decisions shaped by sex role stereotyping).

⁴¹ See *Boren* (establishing intermediate scrutiny for sex-based classifications).

⁴² Schultz, “Life’s Work,” at 1900–18.

⁴³ See, e.g., Alice Kessler-Harris, *A Woman’s Wage: Historical Meanings and Social Consequences* (Lexington: University Press of Kentucky, 1990), at 31–32.

⁴⁴ See Leslie Bennetts, *The Feminine Mistake: Are We Giving Up Too Much?* (New York: Voice/Hyperion, 2007); Linda R. Hirshman, *Get to Work: A Manifesto for Women of the World* (New York: Viking, 2006), at 2 (“Bounding home is not good for women and it’s not good for the society. The women aren’t using their capacities fully; their so-called choice makes them unfree dependents on their husbands”).

of nonpaid work with paid work should not be undertaken to the exclusion of efforts to increase women's access to paid work. Second, when considering how best to enhance women's access to paid work, it militates in favor of a theory that defines equality as inclusion or integration into workplaces across the occupational spectrum.

Pregnancy Discrimination: A Problem of Social Citizenship

An assessment of, or claim to, equal social citizenship requires us to account for pregnant women in the workplace. Pregnancy challenges both feminist accounts of social citizenship because it often renders women temporarily incapable (or less capable) of performing their jobs – and thus unable to maintain paid work without employer accommodation – but not necessarily interested in opting for unpaid labor during or after pregnancy, even if such work was equally valued.

The earliest claims of equal citizenship did not address rights related to pregnancy, even though the Seneca Falls advocates demanded the immediate removal of obstacles to a broad spectrum of political, personal, and civil rights. Elizabeth Cady Stanton, one of the main architects of the platform and the mother of eight children, would certainly have understood the centrality of pregnancy to women's lives. As she once wrote, she “fully understood the practical difficulties most women had to contend with in the isolated household, and the impossibility of woman's best development if in contact, the chief part of her life, with servants and children.”⁴⁵ But for Stanton, as for most nineteenth-century women, pregnancy and childbirth were not perceived as inconsistent with women's aspirations to equal citizenship. Pregnancy was not a formal obstacle to the exercise of the basic personal, civil, and political rights they sought.

Pregnancy began to operate more systematically to undermine women's claim to equal citizenship when they entered the work force in large numbers during the second half of the twentieth century and as they began to enter traditionally male-dominated occupations later still. The pregnant worker was an anomaly who faced open hostility from employers, protectionist impulses, and job structures designed around an ideal, non-pregnant worker. These forces converged to undermine women's equal access to paid work. Pregnancy is thus properly conceived as a problem of social citizenship. Indeed, the unfair treatment of women in the workplace ultimately triggered an antidiscrimination movement that resulted in, among other things, an important piece of federal legislation: the Pregnancy Discrimination Act (PDA) of 1978. The PDA was part of a broader access-to-work movement that expressly drew on notions of equal *social* citizenship for women, rather than on the political and civil forms of citizenship that occupied earlier equality movements.

⁴⁵ Eleanor Flexner, *Century of Struggle: The Woman's Rights Movement in the United States* (New York: Atheneum, 1972), at 73.

Pregnant Women at Work: A Brief History

The 1970s marked an abrupt reversal of course in the treatment of pregnant women at work. Before the adoption of Title VII of the Civil Rights Act of 1964⁴⁶ and the establishment of heightened scrutiny under the equal protection clause for sex-based classifications,⁴⁷ states and private employers were essentially free to engage in intentional sex-based or pregnancy-based discrimination, regardless of motive. Pregnant and potentially pregnant women were primarily accounted for by laws designed to exclude or protect them from various forms of work. Sex-based protectionist labor legislation received the blessing of the U.S. Supreme Court in *Muller v. Oregon*,⁴⁸ in which the Court upheld a 1903 Oregon law prohibiting women from working more than ten hours per day in a factory or laundry. Despite having recently struck down a similar gender-neutral law,⁴⁹ the Court opined that woman's "physical structure, and the functions she performs . . . justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."⁵⁰ At its core, this ruling reflected the belief in an inherent conflict between work and a woman's reproductive function. The Court in *Muller* specifically disassociated women's claims to citizenship and suffrage from the right to work on equal terms, concluding that "political, personal and contractual" equality would not change the protection required by "her physical structure and a proper discharge of her maternal functions."⁵¹

This ruling left the door open for more than half a century to exclusionary or restrictive policies that were expressly based on physical differences, including maternal function. At the time *Muller* was decided, nearly half of the states imposed some restrictions on women's hours of labor,⁵² many of which still were in place when Title VII was enacted in 1964.⁵³ Employers also relied on sex-differentiated policies regarding hiring and working conditions, policies that were particularly common for jobs desirable to men.⁵⁴

Against this backdrop of gender-based employment policies and laws, second-wave feminists united in their aim to break down barriers to workplace participation.

⁴⁶ See 42 U.S.C. §§ 2000e to 2000e-17 (2000).

⁴⁷ *Boren*.

⁴⁸ *Muller*, at 420.

⁴⁹ *Lochner v. New York*, 198 U.S. 45 (1905).

⁵⁰ *Muller*, at 420.

⁵¹ *Ibid.*, at 422.

⁵² See *ibid.*, at 419 n. 1.

⁵³ Ann O'Leary, "How Family Leave Laws Left Out Low-Income Workers," 28 *Berkeley J. Emp. and Lab. L.* 1, 22 (2007).

⁵⁴ Deborah Rhode, *Speaking of Sex: The Denial of Gender Inequality* (Cambridge, MA: Harvard University Press, 1997), at 34; see also Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* (New York: Oxford University Press, 1982), at 181 ("Protective legislation divided workers into those who could and could not perform certain roles. It therefore bears some of the responsibility for successfully institutionalizing women's secondary labor force position.").

Their efforts resulted in a significant array of legislative enactments and judicial interpretations that combined to ensure formal equality for working women. Despite these sex equality successes, however, pregnant workers continue to have difficulty navigating the workplace. Despite the tremendous influx of women into the work force,⁵⁵ it was still common into the 1970s for employers to refuse to hire pregnant women, to force them to stop work early in pregnancy, and to deny them important fringe benefits like leave, medical insurance, or disability coverage. And despite the establishment of federal guarantees of sex equality, the differential treatment of pregnant workers earned the Supreme Court's imprimatur twice during the 1970s, as the Supreme Court ruled that neither the equal protection clause (*Geduldig v. Aiello*)⁵⁶ nor Title VII (*General Electric Co. v. Gilbert*)⁵⁷ prohibited discrimination on the basis of pregnancy.

The Development of Pregnancy Discrimination Law

The modern era of pregnancy discrimination law began in the 1970s. Although the Supreme Court rejected an equality-based right against pregnancy discrimination in 1974, in *Geduldig*, earlier the same year, it had invoked the due process clause in *Cleveland Board of Education v. LaFleur* to invalidate school district policies requiring pregnant teachers to leave work early in their pregnancies and permitting them to return to work only three months after childbirth. The Court ruled such irrebuttable presumptions of incapacity, touching on long-established protected rights related to reproduction and work, were sufficiently arbitrary so as to be unconstitutional.⁵⁸ This ruling, in effect, created a constitutional right against stereotyping, though it was rooted in notions of due process rather than equal protection.

Because of *Geduldig*, however, constitutional rights figured only marginally in the development of pregnancy discrimination law. After *Gilbert* was decided, the Campaign to End Discrimination Against Pregnant Workers worked furiously to lobby for a federal law to protect pregnant workers from discrimination. The passage of the PDA in 1978 was a quick and direct result of their efforts.⁵⁹ The first clause of the PDA specifically overrules *Gilbert's* interpretation of Title VII by redefining sex to include "pregnancy, childbirth, or related medical conditions." This clause, which prohibits treating a pregnant employee adversely, put an end to employment policies and practices that had explicitly or implicitly barred women from working

⁵⁵ See Kessler-Harris, *Out to Work*; Nancy Cott, *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835* (New Haven, CT: Yale University Press, 1977); Barbara F. Reskin and Heidi I. Hartmann, eds., *Women's Work, Men's Work: Sex Segregation on the Job* (Washington, DC: National Academy Press, 1986).

⁵⁶ 417 U.S. 484, 497 (1974).

⁵⁷ 429 U.S. 125 (1976).

⁵⁸ *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); see also *Turner v. Dep't of Employment Sec.*, 423 U.S. 44 (1975) (invalidating Utah's unemployment compensation rules, which deemed pregnant women ineligible for benefits at certain fixed times).

⁵⁹ See 42 U.S.C. § 2000e(k) (2000).

through pregnancy, despite their individual capacity to do so. These types of policies were a direct target of Congress, which noted that they "have long-term effects upon the careers of women and account in large part for the fact that women remain today primarily in low-paying, dead-end jobs."⁶⁰ Congress revealed the same concern with capacity-based stereotyping as did the Supreme Court in *LaFleur*, but the PDA would ultimately protect a much larger group of women.⁶¹

The PDA's second clause guarantees pregnant workers the right to be treated the same "as other persons not so affected but similar in their ability or inability to work. . . ."⁶² In other words, pregnant women were to be compared to temporarily disabled employees when making employment-related decisions. The correct interpretation of this clause, however, was not immediately obvious. While feminists converged on the principle that women have the right to be assessed individually, rather than on the basis of group characteristics, thus embracing the formal equality notion around which modern sex discrimination law has been built, they diverged over how to conceptualize equality in areas where men and women had real physical differences.⁶³ So-called equal treatment feminists urged adherence to formal equality principles – likes should be treated alike, even where such treatment might lead to an unequal result because of underlying physical differences⁶⁴ – in order to avoid reinforcing gender-based stereotypes and to align women's rights with workers' rights. Pregnant women, in other words, could be treated no better, no worse than comparably disabled employees. So-called special treatment feminists, in contrast, urged a substantive equality model that might insist on or at least permit accommodation of pregnancy and childbirth, whether or not provided for other temporary disabilities, if necessary to produce more equal outcomes for men and women trying to balance reproductive behavior with the obligations of paid work.⁶⁵

This conflict among feminists came to a head in the 1980s, as litigation raised the question whether states or employers could accommodate pregnancy without doing so for other temporary disabilities. In *California Federal Savings v. Guerra*,⁶⁶ the U.S. Supreme Court considered whether a California law, which required employers to provide up to four months unpaid leave for pregnancy- or childbirth-related

⁶⁰ See S. Rep. 95-331, at 43 (1977).

⁶¹ See *ibid.*, at 40 ("As the testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace").

⁶² 42 U.S.C. § 2000e(k) (2000).

⁶³ See generally Ritter, *Constitution as Social Design*, at 242–60.

⁶⁴ See, e.g., Wendy Williams, "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism," 7 *Women's Rts. L. Rep.* 175 (1982); Wendy Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate," 13 *N.Y.U. L. Rev. L. and Soc. Change* 325 (1985).

⁶⁵ See, e.g., Linda Krieger and Patricia Cooney, "The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality," 13 *Golden Gate U. L. Rev.* 513, 537–57 (1983); Ann Scales, "Towards a Feminist Jurisprudence," 56 *Ind. L. J.* 375, 426–30 (1981).

⁶⁶ 479 U.S. 272 (1987).

disability, had been preempted by the PDA. The Court ruled against preemption, paving the way for voluntary accommodation of pregnancy-related disability by employers. The Court concluded that "Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop, not a ceiling above which they may not rise."⁶⁷

The Failed Promise of Full Citizenship for Pregnant Workers

Without question, the PDA opened workplace doors for pregnant women. As just one data point, consider the stark drop in pregnant women dropping out of the work force – from a majority in the 1960s to only 27 percent in 1995.⁶⁸ Yet the PDA has ultimately fallen short of its promise of equal citizenship.

Today, pregnant workers benefit from an amalgam of statutory and constitutional protections, including, most centrally, the right not to be presumed *incapable* of work by the mere fact of pregnancy. This translates into a right of individualized assessment, protected both by notions of due process and by the PDA.⁶⁹ Unless impracticable, a pregnant employee is entitled to be individually assessed before her capacity can be used to limit her work opportunities.⁷⁰

A pregnant woman who is fully capable has the right to work on the same terms as other workers. The PDA adopts an official stance of pregnancy blindness, which prohibits an employer from applying special rules to pregnant women whether motivated by a desire to harm or protect. Congress specifically intended to eradicate the system of special rules that had developed, observing that "employers will no longer be permitted to force women who become pregnant to stop working regardless of their ability to continue."⁷¹

Fetal protection policies, which routinely barred women from jobs posing potential hazards to their fetuses, challenged the law's commitment to pregnancy-blindness. The Supreme Court, however, invalidated a policy barring fertile women from jobs in a battery manufacturing plant that involved lead exposure in *International Union v. Johnson Controls, Inc.*,⁷² ruling that fetal risk is not an aspect of a woman's *capacity* to work. The decision whether to endure potential risks to fetuses must be left to the individual woman.

⁶⁷ *Guerra*, at 285. In *Miller-Wohl Co. v. Commissioner of Labor and Industry*, 692 P.2d 1243 (Mont. 1984), the Montana Supreme Court upheld a state law mandating maternity (but not disability) leave on similar grounds.

⁶⁸ See Johnson and Downs, "Maternity Leave and Employment Patterns."

⁶⁹ *LaFleur*, at 645 ("the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter").

⁷⁰ Courts, for example, have upheld some rather extreme policies grounding flight attendants during all or part of pregnancy. See, e.g., *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) (upholding "stop" policy requiring a woman to disclose her pregnancy within twenty-four hours of becoming aware of it and immediately commence an unpaid sick leave).

⁷¹ "Prohibition of Sex Discrimination Based on Pregnancy," H.R. Rep. 95-948 (1978), at 3-6.

⁷² 499 U.S. 187 (1991).

A woman who is not capable of working due to pregnancy-related disability may have a right to leave. The PDA provides a comparative right to benefits like temporary disability leave, but provides no absolute guarantee.⁷³ After *Guerra*, a pregnant employee could end up with generous leave and benefits for pregnancy-related disability either because the employer generally accommodates temporary disability well or because the employer decides to offer leave for pregnancy-related disability even without offering similar benefits to other temporarily disabled employees. An employer can be meager with its provisions for all forms of temporary disability, pregnancy included. Disparate impact doctrine theoretically provides an additional measure of protection against, for example, a no-leave policy that would be devastating for pregnant women. But, while such policies have been successfully challenged in a small number of cases,⁷⁴ they have survived many other challenges.⁷⁵ It seems fair to note that disparate impact cases are notoriously hard to win, and some courts have gone so far as to suggest that disparate impact theory cannot be used to challenge unintentional pregnancy discrimination at all.⁷⁶

The Family and Medical Leave Act (FMLA) of 1993 provides some additional access to leave⁷⁷ by granting eligible employees the right to *unpaid* leave in a variety of situations, including as needed for prenatal care or if a woman's pregnancy renders her unable to work,⁷⁸ or to recover from childbirth.⁷⁹ The total leave, however, is limited to twelve weeks per year, regardless of the duration of the circumstance necessitating the leave. Nearly 40 percent of American workers are not eligible for FMLA leave,⁸⁰ and among those who are, many cannot afford to take leave that is unpaid.⁸¹

But what about the pregnant woman who wants or needs to continue working through her pregnancy, but has suffered a partial diminishment of capacity due to the physical effects of pregnancy? Federal law here is stingy, granting her no

⁷³ Compare this with Title IX, which requires some absolute accommodations for pregnant students, including student-athletes. Deborah Brake, "The Invisible Pregnant Athlete and the Promise of Title IX," 31 *Harv. J. L. and Gender* 323 (2008).

⁷⁴ Miller-Wohl had a no-leave policy for the first year of employment, which the Montana Supreme Court ruled had a disparate impact on women. See *Miller-Wohl Co.*

⁷⁵ See *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861–62 (5th Cir. 2002) (upholding, against a disparate impact challenge, a policy limiting leave within the first ninety days of employment to three days); *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 584 (7th Cir. 2000).

⁷⁶ See *Troupe*.

⁷⁷ Family and Medical Leave Act, Pub. L. 103-03, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2612–54 [2000]). For more on the FMLA and its contribution to women's equality, see Joanna L. Grossman, "Job Security Without Equality: The Family and Medical Leave Act of 1993," 15 *Wash. U. J. L. and Pol'y* 17 (2004).

⁷⁸ See 29 C.F.R. § 825.112(c) (2000).

⁷⁹ See *ibid.*, § 825.112 (covered employers must grant leave to eligible employees "for birth of a son or daughter, and to care for the newborn child").

⁸⁰ See David Cantor et al., *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 2000 Update* (Washington, DC: U.S. Department of Labor, 2000), at 3–2 to 3–3.

⁸¹ *Ibid.*, at 2–16.

absolute right to work unless she is able fully to perform the duties of her job, and no absolute right to the accommodations that might allow her to perform them. A pregnant woman has a right to work despite partial or full incapacity only if her employer would permit other employees similar in their level – and, potentially, in the source – of incapacity the right to work. Neither the due process clause nor the PDA endows pregnant employees with the right to reasonable or necessary accommodations. Moreover, most courts have held the Americans With Disabilities Act to be inapplicable to disability arising from a normal pregnancy.⁸²

Kimberley Troupe learned the limits of the PDA's right of accommodation the hard way. A saleswoman at Lord & Taylor department store in Chicago who suffered chronic and debilitating morning sickness during pregnancy,⁸³ Troupe requested and received a shift change because of morning sickness. She continued to experience morning sickness at work and reported to work late or left early on a regular basis. She was fired one day before her scheduled maternity leave. The Seventh Circuit Court of Appeals rejected her claim of pregnancy discrimination, with Judge Richard Posner's explaining:

The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . to make it as easy, say, as it is for their spouses to continue working during pregnancy. Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees.⁸⁴

Troupe had no absolute right to accommodation and could prevail only if able to show that her employer would *not* have fired a "hypothetical Mr. Troupe" with a similar record of tardiness and plans to take a medically necessary leave.

As Gillian Thomas and I have argued elsewhere, a series of cases challenging employers' light-duty policies also illustrate the limits of pregnancy discrimination law and the consequences of not extending it further.⁸⁵ While *Johnson Controls* made clear that employers cannot deem a job too strenuous or dangerous for a pregnant woman to hold if she is physically capable of performing the job, they also have no obligation to provide alternative positions to accommodate a pregnant worker's genuine physical incapacity or her desire to avoid fetal risk. The consequences of this double-edged sword have been exposed in light-duty cases.

The question that has arisen in several cases is whether employers can, consistent with the PDA, offer light-duty assignments only to employees temporarily disabled by on-the-job injuries. Most courts to review such policies have upheld them. In

⁸² See, e.g., *Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970 (S.D. Iowa 2002).

⁸³ See *Troupe*, at 734.

⁸⁴ *Ibid.*, at 738.

⁸⁵ See Joanna L. Grossman and Gillian Thomas, "Making Pregnancy Work: Overcoming the Limits of the Pregnancy Discrimination Act's Capacity-Based Model," 22 *Yale J. L. & Feminism* (2009).

Reeves v. Swift Transportation Co.,⁸⁶ for example, the Sixth Circuit permitted a trucking company to deny the plaintiff's request for a light-duty assignment (one that would not require lifting more than twenty pounds) because her "injury" was not incurred on the job. The company's express policy permitted light duty for employees who could not perform heavy lifting, but only if they were eligible for workers' compensation because of an on-the-job injury. The policy, according to the court, was "indisputably *pregnancy-blind*" and thus could be challenged only upon a showing of pretext or statistically significant disparate impact.⁸⁷ Reeves's request for accommodation – even though based on the comparative provision of accommodation already available – was classified as a demand for *preferential* treatment and thus was not supported by the PDA's guarantee of "no worse" treatment. As *Reeves* and other similar cases illustrate, the comparative right of accommodation can be quite limited.

Cases like *Reeves* arise because there can be genuine conflicts between the physical effects of pregnancy and the performance of certain jobs. While most women work safely and effectively throughout pregnancy, pregnant workers may encounter a variety of risks to maternal or fetal health ranging from exposure to hazardous materials or contagions to physical movements difficult to perform while pregnant to job conditions like stress or night shifts.⁸⁸ Job performance may also suffer in the absence of risks due to sheer physical incapacity. While the potential for conflicts is not new, it was exacerbated by women's mass entry into the work force beginning in the 1960s,⁸⁹ as well as by the steady increase in workforce commitment of pregnant women.⁹⁰

These potential conflicts are not evenly distributed across the occupational spectrum. Research showing positive correlations between pregnancy, on the one hand,

⁸⁶ 446 F.3d 637 (6th Cir. 2006).

⁸⁷ Other courts have reached the same conclusion in similar cases. See, e.g., *Urbano v. Continental Airlines*, 138 F.3d 204, 208 (5th Cir. 1998); *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1312–13 (11th Cir. 1999).

⁸⁸ See, e.g., University of Michigan Health System, "Working During Pregnancy," available at <http://www.med.umich.edu/> (accessed Oct. 6, 2008); D. Hollander, "Improving Work Situations During Pregnancy May Help Improve Outcome," 32 *Int'l Fam. Plan. Persp.* 156 (2006) (concluding that "the odds that an infant was small for gestational age increased steadily with the number of risky conditions present at the beginning of pregnancy; they were 30% higher among women with 4–6 conditions than among those with none"); Maureen Hatch et al., "Do Standing, Lifting, Climbing or Long Hours of Work During Pregnancy Have an Effect on Fetal Growth?," 8 *Epidemiology* 530 (1997) (finding, as other studies have, that "a shorter work week during pregnancy appears to be advantageous for the fetus"); Claire Infante-Rivard et al., "Pregnancy Loss and Work Schedule During Pregnancy," 4 *Epidemiology* 73, 74 (1993) (finding, based on a study of 331 pregnant women, that "women who always worked evenings or nights were at a substantially higher risk of pregnancy loss compared with women who were fixed day workers").

⁸⁹ See Kessler-Harris, *A Woman's Wage*, at 301.

⁹⁰ See Julia Overturf Johnson and Barbara Downs, U.S. Census Bureau, "Maternity Leave and Employment Patterns: 1961–2000," *Current Population Rep.* 70 (2005); see also Kristin Smith et al., U.S. Census Bureau, "Maternity Leave and Employment Patterns: 1961–95," *Current Population Rep.* 70 (2001).

and age or educational level, on the other, suggests that they may be felt more acutely by women who work in male-dominated, blue-collar occupations or in female-dominated jobs with similar requirements or conditions.⁹¹

Reconsidering Pregnancy Discrimination Law

This quick examination of the promises and pitfalls of current pregnancy discrimination law shows the limits of a legal framework that ties rights to capacity and offers only a minimal, comparative right of accommodation. The problems pregnant workers face today call us back to the feminist debate in the 1980s about the proper way to conceptualize pregnancy within an equality frame.

The equal treatment feminists were adamant that women could not receive special treatment because of pregnancy, for fear of emphasizing and essentializing gender differences and sacrificing the real needs of other workers. They sought a formal equality approach to the problem of pregnancy discrimination. But scholars like Herma Hill Kay argued then that formal equality could not be applied to situations involving real physical difference because it "contains no independent justification for making unequals equal."⁹² She argued, instead, that "equality of opportunity" provided a "theoretical basis for making unequals equal in the limited sense of removing barriers which prevent individuals from performing according to their abilities." Pregnant women's experience over the last three decades has proven that a formal equality approach is perhaps a necessary first step, but insufficient to bring about women's full integration across the occupational spectrum.

The ideal of full citizenship is premised on the notion that all members of society have the same opportunity to make use of their abilities. As Justice Ginsburg wrote in her majority opinion in *United States v. Virginia*, in which the Court struck down the Virginia Military Institute's long-standing male-only admissions policy, "neither federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."⁹³ Pregnancy might temporarily prevent a worker from making use of her ability, though her innate ability remains unchanged. The law's failure to insist that her temporary needs be accommodated can mean that those short-term impairments become long-term consequences.

⁹¹ Johnson and Downs, "Maternity Leave and Employment Patterns," at 4, 6; see also Sonalde Desai and Linda J. Waite, "Women's Employment During Pregnancy and After the First Birth: Occupational Characteristics and Work Commitment," 56 *Am. Soc. Rev.* 551, 560 (1991) ("strength requirements of the job had a significant effect on exits from work"); David A. Savitz et al., "Maternal Occupation and Pregnancy Outcome," 7 *Epidemiology* 269, 270 (1996) (finding evidence of increased risk of preterm delivery among electrical equipment operators, janitors, textile workers, and food service workers, compared with "markedly reduced" risk for teachers and librarians).

⁹² See Herma Hill Kay, "Equality and Difference: The Case of Pregnancy," 1 *Berkeley Women's L. J.* 1, 26 (1985).

⁹³ *United States v. Virginia*, 518 U.S. 515, 532 (1996).

Kay's argument could be recast as a plea for equal citizenship. Pregnancy blindness does not ensure equal social citizenship because it may cause women to lose ground in the workplace regardless of their innate capacities. Women's equal citizenship requires at least some accommodation of the temporary impairments of pregnancy to preserve equal opportunity to make use of their innate abilities. The antidiscrimination model of pregnancy, as currently constructed, leaves women inadequately integrated into the workplace. It would do a disservice to women to demand work relief for all pregnant women, regardless of their jobs and regardless of their individual ability to work. Indeed, fetal protection policies were challenged as undermining women's workplace equality. But the law currently tends too far toward the other extreme – letting pregnant women workers fend for themselves financially and medically, despite genuine changes in capacity due to pregnancy and childbirth. Accommodation is even more important today, as women seek to infiltrate physically demanding jobs traditionally reserved for men.

A modest step toward equal social citizenship would be to amend federal law to require employers to provide reasonable accommodations for pregnant workers. An accommodation law could be modeled on the Americans With Disabilities Act, which promises otherwise qualified employees the right to reasonable accommodations that do not impose undue hardship on their employers.⁹⁴ Or it could be modeled on the handful of state laws that target pregnancy accommodations directly.⁹⁵ Regardless of the legal vehicle used to deliver it, the thrust of any accommodation model is to ask "how the job might be modified to enable more individuals to perform it," rather than "taking job descriptions as a given."⁹⁶ Many pregnant workers could be accommodated by slight modifications of tasks or short-term assignments to alternative positions. Making such adjustments would enable more pregnant women to stay at work, especially those who labor in physically demanding jobs.

Conclusion

The touchstone of pregnancy discrimination law has been capacity to work. But the focus has been too much on short-term capacity and too little on innate capacity. While the current approach promotes equality to the extent of sameness, it offers little, if any, protection in the case of difference. Thus, while pregnancy discrimination law has opened doors to the workplace by reducing or eliminating employment disadvantages rooted in stereotypes about the pregnant woman's ability to work, it has done little to deal with the *real* physical effects of reproduction for women.

⁹⁴ See Karlan and Rutherglen, "Disabilities, Discrimination" (describing the right of reasonable accommodation under the ADA).

⁹⁵ See, e.g., Cal. Gov't Code § 12945(b)(1) (West 2005) (requiring employers to provide reasonable accommodation for disabling effects of pregnancy and requiring that existing light-duty policies cover pregnancy).

⁹⁶ Karlan and Rutherglen, "Disabilities, Discrimination," at 38–39.

Depending on a particular woman's pregnancy and on the nature of the job she holds, it may or may not be possible for her to continue working without accommodation. The likelihood that she will be able to continue is lower in certain occupations, including many that include physical components and have been traditionally reserved for men. The integration of women into the workplace on equal terms with men has been stymied by the law's insistence that all rights flow from an uninterrupted ability to work on exactly the same terms as when hired. Without access to necessary accommodations, pregnant women risk losing paychecks, economic security, and their growing authenticity as workers. The cost of this model is a denial of women's equal social citizenship, a relegation of women as a class to a lesser status. Without refocusing pregnancy law around a goal of equal workplace outcomes and the accommodations necessary to deliver them, we simply guarantee that women will remain second-class citizens.