

Pregnancy as a source of discrimination: A
comparative study of antidiscrimination
legislation in the European Union and the United
States of America.

Denise Broughton MacLeod

Doctor of Philosophy

University of York

Law

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Abstract

While the antidiscrimination laws of the European Union (EU) and the United States of America (US) seek to prohibit pregnancy discrimination in the workplace, their approach to the problem has historically differed. US law has been defined by an 'equal treatment' approach. The contrasting EU laws reflect a holistic approach that seeks substantive equality by combining equal treatment with 'special treatment' measures, complemented by the strategy of gender mainstreaming.

This thesis sets out to examine the extent to which US antidiscrimination law is shifting towards a more holistic approach that seeks greater substantive equality for pregnant workers. This examination is carried out on two levels: firstly, this thesis will comparatively study the two distinct models of equality that exist to address sex discrimination in the EU and the US, with a view to highlighting differences and similarities, and the availability of alternative measures, or serious limitations in their approach to pregnancy discrimination.

Secondly, this thesis examines the antidiscrimination legislation that has been adopted and proposed on the national and state levels in the US, in order to draw attention to the increasing number of measures providing paid leave and workplace accommodations for pregnant workers, and imposing a duty to promote or achieve substantive equality. This examination is undertaken against a background of the distinct historical, legal, and conceptual context against which EU and US sex discrimination law has been adopted, and the discursive debate of feminist legal theorists regarding the role of law in both subordinating women, and in helping to end their inequality. EU and US law is studied in this wider context, because they have all been influential upon its development and provide a framework for assessing how far the trajectory of US antidiscrimination law is converging with that of the EU.

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Author's declaration

I certify that this Thesis, and the research to which it refers, are the product of my own work, and that any ideas or quotations from the work of other people, published or otherwise, are fully acknowledged in accordance with OSCOLA referencing practices.

No portion of the work referred to in this Thesis has been submitted in support of an application for another degree or qualification at this or any other university or other institute of learning.

Chapter 1: Introduction

Justice isn't about some abstract legal theory, or footnote in a casebook – it's about how our laws affect the daily realities of people's lives: their ability to make a living and care for their families and achieve their goals¹

Pregnancy remains a source of workplace discrimination in the European Union (EU) and the United States of America (US), despite the passage of several decades since the enactment of legislation specifically designed to forbid it. In the United Kingdom (UK), it is estimated that 30,000 pregnant workers are illegally forced out of their jobs each year.²The concern is such that the UK government has tasked its Equality and Human Rights Commission (EHRC) with carrying out a £1 million investigation into discrimination against pregnant women, considering both its impact on their families and the national economy.³

The problem of pregnancy discrimination is not unique to one member state in the EU. A 2009 report by the EU Commission to the Council and Parliament on the application of Directive 2002/73/EC (Equal Treatment Directive), declared that 'less favourable treatment of a woman related to pregnancy or maternity leave... is still widespread in many states.'⁴The problem is also not unique to Europe. Statistics produced by the US Equal Employment Opportunity Commission (EEOC), indicate a similar prevalence of workplace discrimination. Between 1997 and 2011, 70,417 pregnant women filed complaints of being illegally discriminated against in the

¹ President Obama, *Remarks of President Barack Obama on the Lilly Ledbetter Fair Pay Restoration Act bill signing, January 29, 2009* (2009).

² EOC, *Greater Expectations: Final Report of the EOC's investigation into discrimination against new and expectant mothers in the workplace* (ISBN: 1 84206 160 6, June 2005).

³ E. Dugan, 'Government launches probe into maternity discrimination at work after surge in complaints' *The Independent* (London, Monday 04 November 2013) <<http://www.independent.co.uk/news/uk/home-news/government-launches-probe-into-maternity-discrimination-at-work-after-surge-in-complaints-8919959.html>> accessed 19/6/2014 EHRC, 'Commission tackles pregnancy discrimination' (*EHRC*, 4 Nov 2013) <<http://www.equalityhumanrights.com/news/2013/november/commission-tackles-pregnancy-discrimination/>> accessed 5/12/2013.

⁴ Commission, *Report from the Commission to the Council and the European Parliament: Report on the application of Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, COM (2009) 409 final* 5.

workplace. Concern with this growing problem and the issue of private employers forcing women ‘onto unpaid leave after being denied accommodations routinely provided to similarly situated employees,’ has led the EEOC to declare its intent to target illegal pregnancy discrimination.⁵

It is against this background that this thesis examines pregnancy discrimination in comparative perspective by looking closely at EU and US law. The objective is to provide a better understanding of the EU and US approaches to pregnancy discrimination and to contribute to an ongoing debate. To fulfil this objective, this thesis will comparatively study the two distinct models of equality that exist to address discrimination in the EU and the US, discussing their similarities and differences, and investigating the possibilities for future development. In doing so, this study will reveal an overarching US national model of equality consisting of a ‘rights-based’ equal treatment approach to pregnancy discrimination that is supplemented by state and local laws and Presidential Executive Orders that provide additional rights and strategies. The contrasting EU model of equality is a holistic ‘dual track’ approach to ending discrimination, seeking greater equality by combining equal treatment with special treatment measures for pregnant and breastfeeding workers, and women on maternity leave, complemented by the transformative strategy of ‘gender mainstreaming.’

On the basis of this study, this thesis proposes that while there are significant differences of detail, profound similarities between EU law and US law are emerging with respect to the legal approach taken to tackling the problem of pregnancy discrimination. Close examination of the substantive law of the US reveals an increasing number of measures providing for job protected paid leave, workplace accommodations, and gender mainstreaming, which taken together suggest that the trajectories of EU and US pregnancy discrimination law may not be as different as traditionally believed.⁶ Indeed, from these similarities may be deduced a common belief that a mandate of equal treatment is inadequate to address the inequality, disadvantage, and exclusion suffered by pregnant and breastfeeding women and women on maternity leave, and that

⁵ EEOC, ‘Strategic Enforcement ‘Plan’ (2012) <http://www.eeoc.gov/eeoc/plan/sep_public_draft.cfm> accessed 3/12/2013.

⁶ See the academic arguments discussed in, Gráinne de Búrca, ‘The Trajectories of European and American Antidiscrimination Law’ (2012) 60 *Am J Comp L* 2, 3.

additional ‘hard’ and ‘soft’ law measures are integral to achieving greater substantive equality between women and men. This comparative study presents legal evidence for the similarities and differences between EU and US law, and proposes that there is evidence of an emerging legal convergence with the EU approach to ending pregnancy discrimination, albeit in a rather ad hoc and limited fashion.

I Originality and significance of the research.

The originality and significance of this research lies in the fact that although there is a vast body of feminist legal theory devoted to considering this issue of gender discrimination there is an important gap in the literature, with regard to a discussion of the role that the US state legislatures play in moving the national gender equality agenda forward.⁷The literature discussing the specific issue of pregnancy discrimination in the US, while significant, is remarkable for its extremely divisive debate regarding the need for what are variously described as ‘equal treatment’ or ‘special treatment’ measures, as addressed in the works of Siegel, Ginsburg, Williams, MacKinnon, Kay, Pedriana, Kenney, and others.⁸Chapter 6 highlights how this divisive debate has affected the equality measures that Congress has been willing to propose and adopt nationally. In contrast, some individual state and local legislatures have enacted broader equality measures prohibiting discrimination and mandating, or supporting the provision of pregnancy leave, maternity leave, family leave, and workplace accommodations. Although there is a significant amount of social science research discussing the outcome of equality measures enacted in specific US states, such as California, there is a lack of academic comparison and discussion of all the measures enacted by the state legislatures

⁷ See: Chapter 2.

⁸ See: NS Siegel and RB Siegel, ‘Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination’ (2010) 59 Duke LJ 771; W.W. Williams, ‘Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate’ (1984-1985) 13 Rev L & Social Change 325; JC Williams, ‘Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA’ (2009) 21 Yale JL & Feminism 79; JC Williams and ES Westfall, ‘Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of Carers in the Workplace’ (2006) 13 Duke J Gender L & Pol’y 31; Catharine A MacKinnon, *Sex Equality* (2 edn, New York: Foundation Press 2007); Catharine A MacKinnon, ‘Substantive Equality: A Perspective’ (2011-2012) Minn L Rev 1; N Pedriana, ‘Discrimination By Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978’ (2009) 21 Yale JL & Feminism 1; SJ Kenney, ‘Pregnancy Discrimination: Toward Substantive Equality’ (1995) 10 Wis Women’s LJ 351.

relating to pregnancy, breastfeeding, and maternity leave.⁹This thesis seeks to place itself within this space, seeking to consider, contrast, and compare not only EU and US national equality measures, but also US state measures applicable to this category of workers. An in depth and systematic comparison of the equality measures on these different levels is important to answering the central question posed as to whether the trajectory of US antidiscrimination law is shifting towards an approach that seeks greater substantive equality between women and men.

Furthermore, academic discussion of gender mainstreaming in the US has been relatively non-existent, because of an erroneous belief that this equality tool has yet to be adopted, as illustrated by Sylvia Walby's assertion that 'The US is noteworthy for the absence of gender mainstreaming among its gender equality policies.'¹⁰Instead, the existing research and literature discussing the strategy of 'gender mainstreaming,' is notable for its focus on implementation efforts within the individual member states of the EU and in international development aid, as seen in the works of Stratigaki, Mazey, Verloo, Beveridge, Rubery, Rees, Squires and Walby.¹¹In this regard, this thesis makes an original contribution through its discussion of the lessons that EU implementation efforts hold for the US, and with the assertion that with Executive Order No. 13506, establishing the Whitehouse Council on Women and Girls, President Obama has adopted the gender mainstreaming strategy domestically.¹²

⁹ See, for example Eileen Applebaum and Ruth Milkman, *Leaves That Pay: Employer and Worker Experiences with Paid Family Leave in California* (CEPR, 2011); Mayer Rossin-Slater, CJ Ruhm and J Waldfogel, *The Effects of California's Paid Family Leave Programme on Mothers' Leave-Taking and Subsequent Labor Market Outcomes* (NBER Working Paper 17715, 2011); R Milkman and E Appelbaum, 'Paid family leave in California: New research findings' (2004) *The State of California labor* 45.

¹⁰ Mark Dawson, 'Three waves of new governance in the European Union' (2011) 36 *ELRev* 208, 80

¹¹ M. Stratigaki, 'Gender Mainstreaming vs Positive Action' (2005) 12 *EJWS* 165; S Mazey, 'The European Union and women's rights: from the Europeanization of national agendas to the nationalization of a European agenda?' (1998) 5 *JEPP* 131; M. Verloo, 'Another velvet revolution? Gender mainstreaming and the politics of implementation' [Institut für die Wissenschaften vom Menschen Vienna] IWM Working Paper No 5/2001 Vienna; J Rubery, 'Gender mainstreaming and gender equality in the EU: the impact of the EU employment strategy' (2002) 33 *ILJ* 500; F Beveridge, 'Building against the past: The impact of mainstreaming on EU gender law and policy' [2007] *ELRev* 193; Theresa Rees, 'Reflections on the uneven development of gender mainstreaming in Europe' (2005) 7 *Int Feminist Jnl of Politics* 555; Judith Squires, 'Is Mainstreaming Transformative? Theorizing mainstreaming in the context of Diversity and Deliberation' (2005) 12 *Social Politics: International Studies in Gender, State and Society* 366; Sylvia Walby, 'Gender mainstreaming: Productive tensions in theory and practice' (2005) 12 *Social Politics: International Studies in Gender, State & Society* 321.

¹² Executive Order 13506 of March 11, 2009 Establishing a White House Council on Women And Girls, 74 FR 11271.

Ultimately, what this thesis will provide is an up to date evaluation of measures intended to address the issue of pregnancy discrimination in the EU and the US. This evaluation will present evidence of an emerging shift in the trajectory of US antidiscrimination law, moving beyond an equal treatment rights based approach, towards one that provides some preference to pregnant workers, and imposes a duty to promote or achieve gender equality. It will also highlight the difference between law's promise and its performance, for as Dr. Martin Luther King, Jr., once said, 'The law tends to declare rights. It does not deliver them.'¹³Such a study could prove important in light of the limitations of legislating to resolve a seemingly intractable problem of discrimination, and underscore the role that gender mainstreaming plays in ending structural inequalities for women.

II Research questions

In order to provide a better understanding of the EU and US approaches to tackling pregnancy discrimination, this thesis poses several research questions. The central question posed is as follows: Is the trajectory of US antidiscrimination law shifting away from a purely formal equality approach to addressing pregnancy discrimination, towards a more holistic approach that seeks greater substantive equality, and imposes a duty to promote or achieve equality? In order to answer this overarching question, a number of ancillary research questions need to be addressed. In particular, what is the historical, legal, and contextual background against which EU and US antidiscrimination law has been enacted? How does this affect the equality measures they adopt to address pregnancy discrimination, and the possibilities for future development?

First, however, what is meant by 'discrimination' and 'equality' in the EU and the US needs to be clarified. These are complex and multifaceted concepts that have been the subject of intense academic debate. While the following account is largely

¹³ Martin Luther Dr. King, 'The Time for Freedom Has Come;' This belief, Dr. King asserts, illuminates the motivations of today's young Negroes--and their extraordinary willingness to fill jails as if they were honour classes. '*The New York Times, Magazine* (NY, September 10, 1961) SM25
<<http://query.nytimes.com/mem/archive/pdf?res=FB0D14FB395F147A93C2A81782D85F458685F9>>
accessed 3/12/2013

reconstructive, drawing on the works cited, where the discussion departs from those views, it is my own elaboration and refinement.

a The meaning of ‘discrimination.’

In the context of employment, ‘discrimination’ has a distinct and defined meaning. It is the action of treating someone differently or less favourably for some reason. As such, discrimination has a negative connotation, as being ‘the allocation of a generalized characteristic to an identifiable group.’¹⁴ Both the US and the EU, seek to prohibit discrimination in private employment through statutory measures. More specifically, in the US, a combination of the US Constitution and several national laws make it illegal to discriminate against someone on the basis of race, colour, religion, national origin, sex, pregnancy, disability, age, or genetic information. Under EU law, both Treaty provisions and Employment Equality Directives contain similar proscriptive provisions.

Two variants of discrimination in employment are recognised by the US and the EU. They are ‘direct discrimination,’ or ‘disparate treatment,’ as it is termed in the US, and ‘indirect discrimination,’ or ‘disparate impact,’ as it is termed in the US. Direct/ disparate treatment discrimination is less favourable treatment ‘on grounds of,’ ‘on the basis of,’ or ‘because of’ sex,’ and it refers to an intentional act of discrimination in employment, such as the refusal to employ, or the dismissal of a woman because she is pregnant. While intentional discrimination is prohibited in the US by statute and the US Constitution, the latter *only* prohibits discrimination by governmental actors, and does not protect against indirect discrimination/disparate impact. In a nutshell, indirect discrimination/disparate impact theory is focused on policies that have the effect of perpetuating disadvantage, with no requirement of bias, or intent on the part of the employer. This includes, for example, height, weight, and literacy requirements that operate as an artificial barrier to employment. The concept was initially judicially created in the ground-breaking US case of *Griggs v. Duke Power Co.*, and subsequently

¹⁴ Malcolm Sargeant, *Discrimination law* (Pearson Longman 2004) 11.

transplanted to the EU, but its current form is statutory in both the EU and the US.¹⁵ It could be thought that because indirect discrimination/disparate impact theory does not require bias it begins where intentional discrimination ends.¹⁶ However, the reality is, as the discussion in Chapters 3 and 5 will reveal, there are exemptions, and defences to discriminatory practices that employers may rely upon, as well as proof burdens that must be met before any claim of discrimination can succeed. This is to say that the prohibition of discrimination is not absolute. Indeed, intentional discrimination is permissible in the EU if the occupational activity necessitates the employment of a person of a particular sex by reason of their nature or the context in which they are carried out, provided its ‘objective is legitimate and the requirement is proportionate.’¹⁷ Similarly, in the US, the Civil Rights Act of 1964 contains an affirmative defence to sex-based discrimination, where sex is considered to be a ‘bona fide occupational qualification’ (BFOQ) reasonably necessary to the operation of the business or enterprise.¹⁸ Additionally, indirect discrimination is defensible in the EU where the employer’s ‘provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.’¹⁹ Similarly, the Civil Rights Act of 1991 (CRA) provides employers with the defence that, ‘the practice is job-related for the position in question and consistent with business necessity.’²⁰

Notwithstanding these similarities, this close study found that the concept of indirect/disparate impact discrimination has been differently applied in the EU and the US. This difference arises from the special rights accorded to pregnant workers in the EU, and the lack thereof in the US. In particular, the express provision of paid leave and workplace accommodations to EU workers has created less need to rely on the concept

¹⁵ *Griggs v. Duke Power Co* 401 US 424 (1971). Also: Article 2 (1) (b) in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204, 26 July 2006, pp. 23–36. Civil Rights Act of 1991 § 109, 42 U.S.C. § 2000e et seq (1991). See further, the discussion in Chapters 5 and 6.

¹⁶ See: Michael Selmi, ‘Was the Disparate Impact Theory a Mistake?’ (2005) 53 *UCLA L Rev* 75, for a discussion of how difficult it is to succeed in a case alleging disparate impact.

¹⁷ Recast Directive (n 15) Article 14 (2).

¹⁸ Civil Rights Act of 1991 §109, 42 U.S.C. §2000e et seq. Section 703e, § 2000-2e.

¹⁹ Recast Directive (n 15) Articles 2(1) b.

²⁰ CRA 1991 (n 15) section 2000e-2 (k) (1) (A) (i), (ii) and (c).

to secure equality than exists in the US. Instead, as the discussion in Chapter 3 will reveal, the EU variant of the US paradigm of indirect discrimination is focused on invalidating *other* workplace policies based upon unexamined assumptions and stereotypes that disproportionately impact women, especially atypical workers.

b The meaning of ‘equality.’

Intense academic debate has made clear that there is no single legal, theoretical definition of equality in the EU or the US. Sandra Fredman explains the lack of definition best when she states that the concept of equality is ‘a contested notion with many different interpretations.’²¹ Niall Crowley concurs by saying that ‘Equality is a contested concept,’²² while Mark Bell calls it ‘an open textured concept, with alternative and competing visions of what it should entail.’²³ It should not be surprising, therefore, that the concept of equality has been criticized by Peter Westen as ‘an empty vessel with no substantive moral content of its own.’²⁴ Criticisms aside, legal concepts of equality in the EU and the US are informed by three distinct ‘visions.’ These visions are formal equality, substantive equality, and equality as diversity or dignity, and inclusion.²⁵ Understanding these different visions is important for our examination of the limitations of legislation designed to address pregnancy discrimination. An overview of each vision follows.

c Formal equality

It is generally accepted that the vision of formal equality originates with the first part of the Aristotelian paradigm of treating likes alike. ‘Things (and persons) that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood.’²⁶ The liberal conception of formal equality is one of

²¹ See: S Fredman, *Discrimination law* (OUP 2002) 1.

²² Niall Crowley, *An ambition for equality* (Irish Academic Press 2006) 14.

²³ See: Mark Bell, ‘The Right to Equality and Non-Discrimination’ in Tamara K. Hervey and Jeff Kenner (eds), *Economic and social rights under the EU Charter of Fundamental Rights: a legal perspective* (Hart Publishing 2003) 92.

²⁴ Peter Westen, ‘The Empty Idea of Equality’ (1981) 95 Harv L Rev 537.

²⁵ See: Mark Bell ‘The Right to Equality and Non-Discrimination’ in Hervey and Kenner (n 23) 91.

²⁶ D. Schiek, ‘A New Framework on Equal Treatment of Persons in EC Law?’ (2002) 8 ELJ 290, 303, quoted from Aristotle, *Ethica Nichomacea* (1925) W. Ross’ translation at 1131a-6.

consistency, uniformity, and assimilation—a like must be treated alike, for ‘equality of treatment is predicated on the principle that justice inheres in consistency.’²⁷ The focus for formal equality therefore, is the procedure, or the rule to be followed and not the outcome. This is to say that formal equality is ‘preoccupied with procedural fairness rather than with the results of a given treatment.’²⁸ It is predicated on the idea that entry, participation, and advancement in the workplace should be available to everyone, and that merit, rather than irrelevant characteristics, should be the basis for such.

It is the formal equality vision that is the touchstone of antidiscrimination efforts in the EU and the US. Transcribed into law, formal equality is non-discrimination. Where ‘the first principle of legal equality has been same treatment based on relevant empirical sameness, equivalence, symmetry with a relevant comparator,’²⁹ it is based upon the argument that ‘unequal treatment is wrong in principle and inefficient in practice.’³⁰ Formal equality for men and women mandates that as they are similarly situated, they should have the same rights and opportunities. In an employment context, this vision of equality requires an employer to exclude irrelevant characteristics from a decision-making process. This means that an employer must be blind to specifically enumerated characteristics, including pregnancy. This is to say that sex-based differences are always irrelevant, unless as noted above, there is some permissible ‘justification’ for different treatment of comparable situations.

Having outlined the vision of formal equality, it is now important to address its limitations. Academics have highlighted two clear limitations. The first is that as the vision is a simplistic promise of consistency in treatment, employer practices are not required to change for the better. With specific regard to pregnancy, the requirement is only that employers treat pregnant employees the same as non-pregnant employees who are similarly situated with respect to their ability to work. Formal equality is disinterested in whether or not employers provide employees with fringe benefits, and as Catherine Barnard and Bob Hepple observe, there can be a ‘levelling up,’ or a ‘levelling

²⁷ Fredman (n 21) 2.

²⁸ R. Ben-Israel and P. Foubert, ‘Equality and the Prohibition on Discrimination in Employment’ in R. Blanpain and J. Baker, *Comparative labour law and industrial relations in industrialized market economies* (Kluwer Law Intl 2004) 324.

²⁹ MacKinnon, *Sex Equality* (n 8) 7.

³⁰ Hugh Collins, *Employment law* (2nd edn, OUP 2010) 55.

down,' by their provision to both men and women, or the deprivation thereof.³¹ Consequently, some important thinkers have concluded that laws seeking formal equality have had a marginal impact on the behaviour of employers towards pregnant workers.³² The study of EU and US law in this thesis supports this conclusion, revealing that in the absence of a clear mandate to level up; there is a tendency to level down the benefits available pregnant workers and women on maternity leave. For instance, the discussion in Chapter 4 reveals that in their laws providing for an allowance to women on pregnancy and maternity leave, the majority of EU member states have elected to provide only an amount that is the same as that received by workers on sick leave, rather than full pay, as permitted by EU law. Similarly, a discussion of US federal case law in Chapter 5 reveals that formal equality as embodied in US antidiscrimination law means that employers may deny pregnant workers a workplace accommodation, or leave, and that their employment may be terminated, so long as similarly situated non-pregnant workers are not given a benefit that the pregnant worker is denied. The reality, as Hugh Collins observes, is that formal equality permits employers to engage in a 'race to the bottom,' rather than a race to the top in their treatment of employees.³³

The second limitation of the formal equality vision is the subject of a great deal of feminist legal criticism, which is discussed in depth in Chapter 2 and throughout this thesis. Much of this criticism is directed at the comparative nature of formal equality, which derives its source and its limits from the treatment of others. In the case of sex discrimination, the comparator is the 'male norm' against which the treatment of a woman is to be judged. Consequently, critics observe that formal equality requires assimilation and that women conform to the male norm in order to obtain the benefit of legislative provisions. This is to say that for a woman to be able to claim the benefit of formal equality protections, she has to obscure any differences.³⁴ As Fredman observes, the comparator 'is at the core of the legal formula.'³⁵ This means that a woman is only

³¹ Catherine Barnard and B Hepple, 'Substantive Equality' (2000) 59 CLJ 562, 563.

³² Herma Hill Kay, 'Equality and Difference: The Case of Pregnancy' (1985) 1 Berkeley Women's LJ 1; W.W. Williams, 'Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment 'Debate' (n 8); RB Siegel, 'You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs' (2006) 58 Stan L Rev 1871.

³³ Collins (n 30) 45.

³⁴ See: Sharyn L. Roach Anleu, *Law and social change* (2nd edn, SAGE 2010).

³⁵ Fredman (n 21).

treated equally if she can conform.³⁶Here lies the crux of the problem of using a formal equality vision in seeking to address pregnancy discrimination. Pregnancy cannot be gender neutralized. As there is no actual comparator, there is no discrimination.³⁷Thus, pregnancy creates a conundrum for the formal equality vision, which Barnard and Rapp aptly describe as a ‘unique, analytical wrinkle.’³⁸As the discussion in subsequent Chapters will show, originally, courts in the US and the UK sought to resolve this problem by using the hypothetical ‘sick man’ as a comparator. Only by assimilating pregnancy to *sickness* could pregnancy be compared to the male norm.³⁹Under this contorted analysis, pregnancy is considered a temporary illness, like any other. It follows therefore that under such comparison a pregnant worker’s employment can be terminated, for if the pregnant worker’s condition impacts her ability to work, she is deemed sick, and as a sick worker, she is subject to workplace rules, including dismissal for excessive absences.

It is the need for assimilation that has led Fineman to conclude that ‘formal equality is a flawed and poorly articulated objective.’⁴⁰She is not alone in her criticisms. While acknowledging that ‘entrenched discrimination would persist unless it was prohibited by law,’ some feminists consider formal equality an inadequate vision, on the basis that it does nothing to change existing societal structures that perpetuate discrimination.⁴¹Fredman writes that ‘experience has shown that equal treatment can in practice perpetuate inequalities.’⁴²Similarly, Collins observes that, ‘we know that equal treatment will in practice not ensure equality of opportunity,’⁴³and MacKinnon concludes that formal equality merely ‘reinforces and reproduces social inequality.’⁴⁴For these critics, the central failing of formal equality is that as, ‘It rests on the assumption

³⁶ Kenney (n 8).

³⁷ See: *Turley v. Allders Department Stores Ltd* [1980] IRLR 4 (EAT); *General Electric Co. v. Gilbert* 429 US 125 (1976).

³⁸ TH Barnard and AL Rapp, ‘The Impact of the Pregnancy Discrimination Act on the Workplace—From a Legal and Social Perspective.’ (2005) 36 U Mem L Rev 93, 95.

³⁹ See: *Hayes v. Malleable Working Men’s Club and Institute* [1985] ICR 703. Also: *Dormeyer v. Comerica Bank-Illinois* 223 F 3d 579 (7th Cir 2000).

⁴⁰ M.A. Fineman, ‘Evolving Images of Gender and Equality: A Feminist Journey’ (2009) 43 New Eng L Rev 437, 447.

⁴¹ Fredman (n 21) 31.

⁴² *ibid.*

⁴³ H Collins, ‘Discrimination, equality and social inclusion’ (2003) 66 MLR 16, 20.

⁴⁴ MacKinnon, *Sex Equality* (n 8) 12.

that we can separate stereotypes from true differences—it fails to recognize that sex differences are socially constructed.⁴⁵ As a result, MacKinnon concludes formal equality is a tool that is, ‘impotent, even regressive.’⁴⁶

These criticisms of the formal vision of equality are valuable. They draw our attention to the real limitations of legislation seeking to address pregnancy discrimination using an equal treatment mandate. As the results of this study will show, it is this mandate that underpinned initial efforts in the EU and the US, and continues in some fashion today, despite the fact that its application to pregnancy and maternity has significant limitations. It is these limitations that have ignited support for a substantive vision of equality, which will now be discussed.

d Substantive equality

There is a clear distinction between the formal equality vision and the substantive equality vision. Where formal equality is concerned with procedure, substantive equality is concerned with results and effect. Where formal equality seeks symmetry and ignores difference, substantive equality seeks to recognize difference. Substantive equality depends not simply on having the formal right to participate, but on having the actual ability and resources to exercise that right. Substantive equality is predicated on the understanding that participation in the workplace does *not* necessarily lead to a more egalitarian workplace. As Sandra Fredman explains:

*Substantive equality transcends equal treatment, recognizing that treating people alike despite pre-existing disadvantages or discrimination can simply perpetuate inequality.*⁴⁷

Ultimately, the goal that substantive equality seeks is to ensure that laws, policies, and practices are not discriminatory in effect. It does not provide any guarantee that members of a particular group will achieve equality of results, only that they will have the opportunity. In other words, the vision of substantive equality does not displace the role of individual merit and initiative. As Peter Westen explains, ‘opportunity is

⁴⁵ Kenney (n 8) 356.

⁴⁶ MacKinnon, *Sex Equality* (n 8) 12.

⁴⁷ S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 178.

something less than a guarantee, [but] it is something more than a mere possibility.’⁴⁸ Often, the goal of substantive equality has been explained by academics using metaphor. Sandra Fredman, in her book, *Discrimination Law*, which must be regarded as one of the most significant contributions to the literature on this subject, uses the metaphor of a race to explain that by providing equal opportunities, the aim is to ‘equalize the starting point, so that all participants can compete on the same terms.’⁴⁹ By equalizing the starting point, all have the opportunity to achieve the same outcomes.⁵⁰ This ‘implies the adoption of strategies designed to deal with the underlying barriers to equal participation.’⁵¹ This vision recognizes that specific obstacles hinder the attainment of full workplace participation, and that the obstacles may differ from one opportunity to another.⁵² In terms of pregnancy and maternity, the obstacles have been well documented and include the inequality of household labour, the lack of workplace accommodation of temporary limitations imposed by pregnancy and lactation, the lack of fully paid job protected leave, the availability of flexible hours, and affordable, high quality childcare.⁵³ In this regard, substantive equality requires that rules take account of differences, in order to eliminate the disadvantages caused to women. This gives rise to the questions as to *what* differences should be recognized and *how* they should be taken into account.⁵⁴ It is uncontroversial to say that while the EU and the US recognize the difference that pregnancy makes in their antidiscrimination legislation, their legislative support for special rights for pregnant workers has traditionally differed. What is

⁴⁸ Peter Westen, ‘The Concept of Equal ‘Opportunity’ (1985) 95 *Ethics* 837, 839.

⁴⁹ Fredman, *Discrimination law* (n 21) 18.

⁵⁰ Westen, ‘The Concept of Equal ‘Opportunity’ (n 48) 839.

⁵¹ Mark Bell, “The Right to Equality and Non-Discrimination” in Hervey and Kenner (n 23) 67.

⁵² See the discussion in Westen, ‘The Concept of Equal ‘Opportunity’ (n 48) 839.

⁵³ See, for example: ERA, *Expecting a Baby, Not a Lay-off: Why Federal Law Should Require Reasonable Accommodation of Pregnant Workers* (2012) <<http://www.equalrights.org/wp-content/uploads/2013/02/Expecting-A-Baby-Not-A-Lay-Off-Why-Federal-Law-Should-Require-the-Reasonable-Accommodation-of-Pregnant-Workers.pdf>> accessed 8/7/13; Patricia A. Shu and Stephanie M. Wildman, ‘Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker’s Right to Job-Protected, Paid Leave’ (2009) 21 *Yale JL & Feminism* 119; Commission, *Report on Pregnancy, Maternity, Parental and Paternity Rights: Commission’s Network of legal experts in the fields of employment, social affairs and equality between men and women* (2007); Commission, *Issues Paper: Barriers to women’s employment (work-life balance)* (2012); HRW, *US Failing its Families: Lack of Paid Leave and Work-Family Supports in the US* (NY:2011: ISBN: 1-56432-741-8, 2011); J. Platenga and C. Remery, *Childcare services for school age children: A comparative review of 33 countries*. (Luxembourg, 2013).

⁵⁴ See the discussion of feminist legal theory in Chapter 2.

controversial, and what the results of this research seek to suggest is that this difference is eroding, to some degree.

The foregoing suggestion is not to be construed as a blanket conclusion that the ‘equality of opportunity’ vision is a silver bullet to workplace discrimination. Indeed, it would be naive to think all discrimination could be ended, whatever vision is adopted. This suggestion also does not ignore the fact that the ‘equality of opportunity’ vision has been subject to broad criticism in the academic literature, mainly on the basis of not doing enough to transform the workplace. Critics argue that to be effective, substantive equality requires equality of results or outcome, rather than equality of opportunity. This strand of opinion holds that there is a need for equalizing where people end up.⁵⁵ Among these critics is Fredman, who argues that ‘the aim of equality is not consistency of treatment, but fairness in the resulting distribution of benefits,’⁵⁶ and that ‘inequality of treatment might be necessary to achieve a fairer allocation in the final result.’⁵⁷ This criticism of ‘equality of opportunity’ rests on the argument that removing obstacles for a class of subjects will lead to equal opportunity among the members of the class *only* if they have identical circumstances, and the same means to confront the obstacles, and the same obstacles to confront.⁵⁸ As Bob Hepple, another heavyweight academic observes, ‘one is not supplying genuine equality of opportunity if one applies an unchallenged criterion of merit, to people who have been deprived of the opportunity to acquire merit.’⁵⁹ Consequently, ‘equality of outcome... measured across the broad spectrum of resources, occupations, and roles—has to be taken as a key measure of equality of opportunity.’⁶⁰ Under this vision of equality:

⁵⁵ See, for example: Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (n 47); J. Edward Kellough, *Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice* (Georgetown University Press 2006); JP Sterba, *Affirmative action for the future* (Cornell Univ Press 2009); Tom L. Beauchamp, ‘In Defence of Affirmative Action’ (1998) [1998] 2 J Ethics 143; C O’Cinneide, ‘Positive Action and the Limits of Existing Law’ (2006) 13 MJ 351.

⁵⁶ S Fredman, ‘From Deference to Democracy: The Role of Equality under the Human Rights Act, 1998’ (2006) 122 LQR 53, 72.

⁵⁷ *ibid* 72.

⁵⁸ Michel Rosenfeld, ‘Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal’ (1986) 74 Cal L Rev 1687, 1695.

⁵⁹ Bob Hepple, ‘Chapter 5. Equality at Work’ in Hepple B, Veneziani, B. (ed), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945-2004*, vol 1 (1 edn, Hart 2010) 161.

⁶⁰ Anne Phillips, ‘Defending Equality of Outcome’ (2004) 12 J Political Phil 1, 6.

*The spread of women or minorities in a category should reflect their proportions in the workplace or the population as a whole. Thus, there is no need for proof of an intervening 'discriminatory' factor to trigger action.*⁶¹

The lack of proportional representation under this vision operates much like the presumption of negligence afforded by the doctrine of *res ipsa loquitur* in the law of tort.⁶² Proof of discrimination is not required. This vision views equality through numbers and would require reverse discrimination and allow preferential treatment for women, the use of targets or quotas, and employment decisions based upon irrelevant criteria of sex, where women are under-represented in the workplace.

While it will become apparent in this thesis that 'equality of results' is not the substantive vision of equality that informs the EU and US approaches to gender discrimination, evidence will be presented to suggest an increasing consideration by the EU of targets and mandates to address the underrepresentation of women, where other equality efforts have fallen flat. In particular, where data indicates that men are disproportionately represented on the boards of publically traded companies and in elected office; there is evidence of a move away from a formal equality vision, towards a more transformative approach, which this vision of equality encapsulates.⁶³

e Human dignity, diversity, and inclusion.

With this third vision of equality, 'non-discrimination is one aspect... of a wider principle of equality based on tolerance and respect for other human beings.'⁶⁴ This vision of equality underpins the Canadian, Greek, and Belgian Constitutions, as well as German Basic Law and the Northern Ireland Act.⁶⁵ And, as Fredman observes:

⁶¹ Fredman, *Discrimination law* (n 21) 15.

⁶² Latin term meaning 'the thing speaks for itself.'

⁶³ See: Europa, 'Cracking Europe's Glass Ceiling: European Parliament backs Commission's Women on Boards proposal' (*europa.eu*, 20 November 2013) <http://europa.eu/rapid/press-release_IP-13-1118_en.htm> accessed 10/1/2014; Catalyst.org, *Increasing Diversity on Boards: Current Index of Formal Approaches* (November, 2011) <<http://www.catalyst.org/knowledge/increasing-gender-diversity-boards-current-index-formal-approaches>> accessed 25/3/15; CBE Lord Davies of Abersoch, *Women on Boards* (2011) <<http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf>> accessed 12/12/14.

⁶⁴ David Pannick, *Sex discrimination law* (OUP 1985) 332.

⁶⁵ See: B Hepple, 'Equality, and Empowerment for Decent Work' (2001) 140 Int'l Lab Rev 5; B Hepple, M Coussey and T Choudhury, *Equality: A New Framework, Report of the Independent Review of the*

*The primacy of individual dignity and worth as a foundation for equality rights is expressed in a number of constitutions, notably constituting the first article of the EU Charter of Fundamental Human Rights proclaimed in Nice in December 2000.*⁶⁶

This vision focuses on the dignity, autonomy, and worth of individuals. As described by Niall Crowley, this vision is focused on equality of condition, requiring the removal of economic and political barriers that contribute to economic development. It requires elimination of disadvantage and protection of dignity.⁶⁷ Collins further clarifies the vision as one that is focused on social inclusion, where the goal of social inclusion does not depend upon a comparison with a man or some other privileged group. Rather, ‘social inclusion is an aim or principle of justice.’⁶⁸ As set out in the founding principle contained in Article 2, of the Treaty on European Union (TEU):

*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.*⁶⁹

In effect, this vision of equality seeks a move away from the notion of ‘corrective’ or individual justice, to ‘distributive’ or group-based justice.⁷⁰ This requires narrowly defined concepts to be abandoned in favour of strategies, including positive action measures, gender mainstreaming, and positive obligations. The lynchpin of this vision of equality involves the move away from merely legislating *negative* duties to avoid discrimination, towards imposing *positive* duties and obligations to promote equality and inclusion. For instance, in the EU, Consideration 2 in the preamble to the Recast Directive 2006/54/EC expressly references the ‘positive obligation to promote equality between women and men.’ As such, it exemplifies what Hepple calls ‘fourth’ generation’ equality laws, which form part of a comprehensive effort to tackle discrimination and achieve ‘transformative’ equality.⁷¹ This transformative equality

Enforcement of UK Anti-Discrimination Legislation (Hart 2000); Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (n 47).

⁶⁶ S Fredman, ‘Equality: A New Generation?’ (2001) 30 (2) *Ind Law J* 145, 155.

⁶⁷ Crowley (n 22).

⁶⁸ Collins, ‘Discrimination, equality and social ’inclusion’ (n 43) 22-32.

⁶⁹ Treaty on European Union, OJ C 224, 31.8.1992, p. 6-79.

⁷⁰ J. Gardner, ‘*Discrimination as Injustice*’ (1996) 16 *Oxford J Legal Stud* 353, 355.

⁷¹ See: B Hepple, ‘The New Single Equality Act in Britain’ (2010) 5 *The Equal Rights Review* 11.

involves a move away from the complaint led model of equality, based on individual rights, towards one in which governmental authorities have a *duty* to alter practices and structures.⁷² Hepple calls this an ‘inclusive, proactive approach’ to ensure protection for dignity and increased participation in society.⁷³ Crowley argues that such a vision ‘stimulates a proactive, planned, and systematic approach to equality.’⁷⁴ Fredman adds that this ‘fourth generation’ of equality laws, is essential ‘not just to address previous disadvantage, but to achieve an equal distribution of social goods.’⁷⁵

Despite its intellectual attraction, the dignity vision of equality is also not without its detractors or limitations. Jeremy Waldron, in an excellent lecture addressing the question, *What do Philosophers have against Dignity?* discusses the many objections to the concept; including that, it is ‘overused and meaningless’ ‘squishy,’ and ‘hopelessly vague.’ Notably, these are many of the same criticisms levied at the concept of equality. While I do not necessarily agree with Waldron that ‘sometimes clarity and determinacy are overrated,’ I do think that competing definitions are less important than the broad array of equality measures this particular vision endorses.⁷⁶ This is not to ignore the fact that, as the vision focuses largely on ‘soft law’ strategies, there are problems with enforcement, as the discussion later in this Chapter will highlight. Certainly, the strategy of gender mainstreaming makes clear that negative rights are stronger than positive duties. An example of gender mainstreaming and these problems are found in the ‘public sector equality duty’ (PSED) contained in the UK’s Equality Act 2010 (EA), a short discussion of which is appropriate.⁷⁷

The EA mandates UK governmental authorities have ‘due regard’ to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities.⁷⁸ However, the duty does not create a privately enforceable legal right. Instead, enforcement of the PSED is achieved

⁷² S Fredman, ‘Transformation or Dilution: Fundamental Rights in the EU Social Space’ (2006) 12 Eur LJ 41, 56.

⁷³ Hepple, ‘Equality and Empowerment for Decent Work’ (n 65) 12.

⁷⁴ Crowley (n 22) 111.

⁷⁵ Fredman, ‘Equality: A New Generation?’ (n 66) 156.

⁷⁶ Jeremy Waldron, ‘What do the Philosophers Have against Dignity?’ [2014] NYU Pub Law & Legal Theory Working Papers, Paper 496 1, 8.

⁷⁷ See Chapters 3 and 7.

⁷⁸ Section 149, Equality Act 2010.

through an application for judicial review. A close review of the case law reveals that in the absence of any legislative clarification, the UK courts are left to determine the substance and rigour required by the ‘due regard’ standard.⁷⁹The result has been an approach that holds that so long as the public sector’s procedure is not a ‘cosmetic exercise,’ and there has been a detailed and comprehensive analysis of how the probable adverse effects may be mitigated, Courts defer to the judgement of the body.⁸⁰In effect:

*‘Due regard’ is the regard that is appropriate, in all the particular circumstances in which the public authority concerned is carrying out its function as a public authority. The weight to be given to the countervailing factors is a matter for the public authority concerned rather than the Court, unless the assessment by the public authority is unreasonable or irrational.*⁸¹

Based upon the results of this review, this thesis concludes that although the PSED clearly represents a new generation of anti-discrimination legislation that has no real correlative in the US, the lack of legislative clarification serves to circumscribe its role in addressing gender discrimination generally and pregnancy discrimination specifically. This is because, in the cases that have come before them, the UK courts have generally interpreted the PSED to be procedural rather than substantive in its mandate.⁸²In light of which, the duty has been fairly criticized by Fredman as being ‘too deferent and too narrowly cast to further equality standards effectively.’⁸³

III Terminology

In addition to the conceptual underpinnings of EU and US antidiscrimination law, some key terms are utilized throughout this thesis, including ‘hard’ and ‘soft’ law, positive/affirmative action, gender mainstreaming and holism. Here, these terms are

⁷⁹ See: *R (on the application of Williams) v Surrey CC* [2012] EWHC 867(QB) (Admin).

⁸⁰ *R (on the application of JG) v Lancashire CC* [2012] EWHC 2295(Admin).

⁸¹ *R (Baker) v SS Communities and Local Government* [2008] LGR 239 at paragraph 31, and *R (Brown) v SS Work and Pensions* [2008] EWHC 3158 (Admin) at paragraph 82.

⁸² *R. (on the application of Unison) v Lord Chancellor* [2014] EWHC 218 (Admin) For a criticism of this approach, see: S Fredman, ‘Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty’ (2014) 43 Ind Law J 349.

⁸³ S Fredman, ‘Breaking the Mold: Equality as a Proactive Duty’ (2012) 60 Am J Comp L 265, 266.

defined and explored, in order to lay the foundation for their consideration in subsequent Chapters.

a Hard and soft law.

In comparing and contrasting EU and the US antidiscrimination law, a distinction is sought to be made throughout this thesis between those measures defined as ‘hard law,’ and those defined as ‘soft’ law. The term ‘hard law’ refers to:

Legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.⁸⁴

Historically, ‘soft law’ has been defined by stating what it is not. That it is not usually legally binding upon those to whom it is addressed, as it lacks legal sanctions. More recent literature, and in particular, the work of Linda Senden has clarified the concept with regard to soft law in the context of the European Union. Drawing on the work of Francis Snyder, Senden notes that there are three core elements to EU soft law. These are rules of conduct that have no legally binding force, but have practical effects, or impact upon behaviour. On the basis of these elements, Senden proposes a definition of soft law as:

The rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain indirect legal effects, and that are aimed at and may produce practical effects.⁸⁵

Other academics also reject a binary divide in favour of defining ‘soft law’ as an ‘umbrella concept,’ wherein governments are not necessarily faced with a binary choice, but rather with ‘choices arrayed along a continuum.’⁸⁶ These choices are highlighted by the fact that soft law measures are not required to be in any particular form, and include,

⁸⁴ Kenneth W. Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 Int’l Org 421, 421.

⁸⁵ Linda Senden, ‘Soft law, self-regulation, and co-regulation in European law: where do they meet?’ (2005) 9 EJCL <<http://ssrn.com/abstract=943063>> accessed 30/07/15.

⁸⁶ E. Korkea-Aho, ‘EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?’ (2009) 16 MJ 271, 274; See also: G.C Shaffer and Mark A. Pollack, ‘Hard versus Soft Law in International Security’ (2011) 52 BC Law Rev 1147, 1159.

but are not limited to, non-binding agreements, action plans, best practices, communications, notices, guidelines, principles, targets, benchmarking, recommendations, opinions and strategies. As this list illustrates, soft law instruments are varied and constitute ‘a richly kaleidoscopic variety of forms.’⁸⁷

A further distinction by which ‘soft law’ is often defined in the academic literature is that unlike hard law, which is ‘precise, clear, and unambiguous,’ soft law is often vague in the obligations that it imposes.⁸⁸This vagueness contributes to its attractiveness to the actors. In situations in which ‘hard’ law can, ‘constrain the techniques of dispute settlement and negotiation, soft law offers, ‘a rational adaptation to uncertainty.’⁸⁹Soft law offers both flexibility, due to its ability to be amended more easily, and the opportunity to reach some agreement in circumstances where total agreement would be impossible. As Abbott and Snidal observe, soft law ‘facilitates compromise,’ where the form of soft law chosen reflects the problem sought to be resolved.⁹⁰Indeed, the results of this research reveal that soft law is increasingly being used as a tool to move equality forward in the EU and the US, in circumstances in which objections to governmental intrusion into the employer/employee relationship, feminist concerns, and/or economic considerations weigh heavily against the further enactment of antidiscrimination legislation. In such a milieu, soft law constitutes regulatory sensitivity and awareness that there are situations in which hard law measures are not politically feasible, or attainable. This is particularly true of the US, where it is suggested that the adoption of gender mainstreaming via Executive Order reflects sensitivity to Congressional objection to social legislation.

Soft law also reflects institutional awareness of limits to the ‘equality’ that hard law can achieve. The reality, as Fredman observes, is that ‘three decades of anti-discrimination legislation have not been able to address deep-seated discriminatory structures.’⁹¹While her observation was made with regard to EU law, it is equally applicable to US law. Faced with the lacuna that hard law has left, and that any

⁸⁷ John Kirkton and Michael Trebilock, *Hard Choices, Soft Law: Voluntary Standards in Global Trade Environment and Social Governance* (Ashgate 2004) 4.

⁸⁸ Abbott and Snidal (n 84).

⁸⁹ *ibid* 444.

⁹⁰ *ibid* 423.

⁹¹ Fredman, *Discrimination law* (n 21) 6.

prohibition against pregnancy discrimination has been ineffective in resolving, the results of this study suggest that EU and US policy-makers are increasingly relying upon soft law measures, in an effort to address this pernicious issue and continue the momentum for parity. It may also be deduced that soft law measures serve as recognition that while the state is primarily responsible for ending discrimination and ensuring the health and safety of pregnant workers, it cannot be completely successful when it acts alone. Collaboration is essential for overcoming the limitations of an environment hostile to change, and is fundamental to creating a national concern for achieving equality. As Joanne Conaghan has observed, ‘The path to equality through law is narrow and uneven.’⁹²

b Positive/Affirmative Action

As positive/affirmative action is a key strategy in both the EU and US models of equality, it is comparatively discussed in this thesis, and its role, if any, in helping to address the inequalities suffered by pregnant workers is explored. Here, terminology is explained and similarities and differences are introduced.

Positive action, as it is called in the EU, is termed affirmative action in the US, and refers to a remedial strategy, which is designed to provide ‘preferential treatment’ for specific groups as a remedy for past discrimination and achieve equality of opportunity. In the EU, both primary and secondary legislation expressly confers permission for *gender* based positive action by the EU institutions and the member states. Article 141(4) EC was revised in the Amsterdam Treaty to institutionalize positive action and gender mainstreaming, as part of EU gender policy.⁹³ Furthermore, Article 23 of the EU Charter of Fundamental Rights provides that:

*The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.*⁹⁴

⁹² Joanne Conaghan, ‘Following the Path to Equality Through Law: Reflections on Baker et al. Equality: From Theory to Action’ (2007) 13 Res Publica 159, 161.

⁹³ Treaty of Amsterdam Amending the Treaty of European Union, The Treaties Establishing The European Communities and Certain Related Acts, OJ C340, 10/11/1997 P.001- 0144.

⁹⁴ Charter of Fundamental Rights of the European Union, OJ C83, 30.3.2010, p 389-403.

Finally, Article 3 of the Equality Directive (Recast) provides that:

*The Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.*⁹⁵

In the US, gender-based affirmative action measures in employment are also constitutionally and statutorily permissible. They may be court ordered as a remedial measure, pursuant to the Civil Rights Act of 1964, as amended, or required by Presidential Order where an employer is a government contractor. They may also be voluntarily adopted by private employers as an ‘affirmative action plan.’⁹⁶ A close review of positive and affirmative action in Chapters 3 and 5 reveals that while there is a significant difference in support and broader legal basis for the strategy in the EU compared to the US, there are also some unexpected similarities. It is suggested that these similarities operate to render the strategy less effective in addressing the workplace inequalities suffered by women. Here, these similarities are briefly introduced as part of the terminology used in this thesis.

The first and chief similarity is that the strategy does not permit employers in the EU or the US to simply hire or promote more women in order to achieve gender balance in the workplace. As the strategy seeks equality of opportunity, not of results, general quotas and targets are impermissible. In the US, the voluntary use of ‘class based’ remedies is generally not permissible.⁹⁷ Likewise, the EU Equal Treatment Directive prohibits a system of strict targets and quotas.⁹⁸

A second similarity is the lack of any express definition or clarification of the strategy in EU and US legislation. As a result, their highest courts have been left to determine the permissible boundaries of voluntary action, and the resulting confusion

⁹⁵ Recast Directive (n 15).

⁹⁶ See: Construction Contractors, Affirmative Action Requirements; Construction Industry, Goals for Minority Participation, Federal Register, Vol. 45 No. 194/Friday, October 3, 1980/Rules and Regulations DOL, ‘Office of Federal Contract Compliance Programmes (OFCCP) Facts on Executive Order 11246-Affirmative Action’ (2002) <<http://www.dol.gov/ofccp/regs/compliance/aa.htm>> accessed 02/10/2013; *Lochren v. County of Suffolk* 344 Fed Appx 706 (2nd Cir 2009).

⁹⁷ *University of California Regents v. Bakke* 438 US 265 (1978).

⁹⁸ See: Case C-450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051.

has had a direct impact upon the willingness of governments and private employers to rely on the strategy to advance gender equality.

A final similarity is the temporal quality of the strategy as a tool for advancing equality. The EU institutions and the US Supreme Court have declared that positive/affirmative action is a short-term strategy for achieving greater substantive equality. This is to say that it is anticipated that the strategy will have achieved its goal by a date certain.

Ultimately, the results of this study suggest that the temporal quality of the strategy, coupled with the confusion and divisive debate surrounding its use, particularly in the US, render it a less attractive measure for advancing gender equality than gender mainstreaming.

c Gender mainstreaming.

In this thesis the strategy of gender mainstreaming is underscored for its potential in achieving transformative change, and enabling the US, in particular, to transcend the divide between civil and political rights, and social and economic rights, as well as the public/private sphere divide that epitomizes its antidiscrimination measures for this category of workers.⁹⁹

There are two conventional definitions of gender mainstreaming. That is, either the definition of the Economic and Social Council of the UN (ECOSOC) agreed conclusions 1997/2:

The process of assessing the implications for women and men of any planned action, including legislation, policies, or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality,¹⁰⁰

⁹⁹ See Chapters 5, 6, and 7 for a discussion of the US model of equality.

¹⁰⁰ UN, *Gender Mainstreaming: An Overview* (2002).

Alternatively, the definition of the Group of Specialists of the Council of Europe, that:

*Gender mainstreaming is the organization, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages by the actors normally involved in policy-making.*¹⁰¹

This thesis considers and acknowledges the significant discursive debate surrounding definitional problems and problems in approaches and implementation, and challenges to the strategy in the EU. Nevertheless, it is asserted that the benefits of the strategy outweigh any limitations and pitfalls, making definitional preciseness less important than the transformation the strategy promises. From a pragmatic standpoint, the importance of the strategy for the US lies in the fact that it is a far less controversial means of achieving gender equality than the adoption of affirmative action measures, while being similarly focused on group based/collective disadvantage.¹⁰² That being said, this thesis recognizes that gender mainstreaming cannot, and should not replace existing legal rights, and is not a standalone strategy. Rather, as a soft law measure, gender mainstreaming is a complementary strategy that can forge a middle course. It requires policy-makers and implementers not to accept that existing policy, or the policy being advanced or considered is in effect gender-neutral, or free of bias towards the male norm. As such, it offers an additional tool with which to address the seemingly intractable problem of pregnancy discrimination.

d Reconciliation measures

Reconciliation refers to the EU soft law strategy that encourages EU member States to adopt measures to enable men and women to balance the conflicting demands of work, private life, and caring responsibilities, which in turn, increase labour market participation rates and birth rates. While the measures, including the provision of

¹⁰¹ Council, *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practice, EG-S-MS (98) 2. Strasbourg. Council of Europe (1998) 12.* <http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/EG_S_MS_98_2_rev_en.pdf> accessed 2/3/15. See also: Verloo (n 11) 2.

¹⁰² See the discussion of affirmative action in Chapter 5.

childcare, paid leave, and flexible working arrangements have been the subject of extensive criticism, debate and reformulation in the EU, their adoption has become the focus of recent national policy efforts in the US, as discussed in Chapters 4, 6, and 7.¹⁰³

e Holism

The initial objective of this study was to investigate how the EU and the US had approached the problem of pregnancy discrimination in such seemingly different ways. However, on examining closely the substantive law, it emerged that that the US approach is gradually converging with the EU approach, within the limits of its unique legal and conceptual barriers. The increasing number of US measures providing for workplace accommodation, job protected paid leave, and gender mainstreaming, indicate a move away from a traditional ‘rights based’ approach, seeking only formal equality, and towards the EU approach, which recognizes the difference that pregnancy makes. From this convergence may be deduced a common understanding that as the workplace does not exist in a vacuum, addressing discrimination in one forum, without considering the impact of issues, including the household division of labour, the costs and availability of child and dependent care, and the need to balance the competing demands of work and family life, will render inadequate any single response to the problem. Rather, what is required, and what this research seeks to suggest is emerging is a broader and more holistic approach to a seemingly intractable problem. What is meant by a holistic approach requires some elaboration.

Holism is an approach most commonly associated with biology and medicine.¹⁰⁴The term was ‘coined in 1926, from the Greek holos (whole), by the South African statesman general Jan Smuts. As an approach that considers the whole person, rather than individual parts, it counteracts ‘the cold precision of scientific medicine.’¹⁰⁵In treating a patient, Hippocrates, more than 2300 years ago emphasized that:

¹⁰³ See: ‘The White House Summit on Working Families: The Issues’ (*Centre for American Progress*, June 23 2014) <<http://workingfamiliesummit.org/issues/>> accessed 24/6/2014.

¹⁰⁴ Nick Hopwood, ‘holism’ in Colin Blakemore and Sheila Jennett (eds), *The Oxford Companion to the Body* (OUP 2001).

¹⁰⁵ *ibid.*

*Physicians must consider the whole man to diagnose and treat properly health care problems... That the well-being of a person is influenced by social and environmental as well as physiological changes, and that the art and science of medicine include consideration of all these factors.*¹⁰⁶

In medicine, holism is not only an approach that emphasizes treating the whole patient rather than just the affected parts, it also defines alternative approaches to healthcare and ‘alternative’ healers, including, but also not limited to, psychotherapy, hypnosis, massage therapy, herbal medicine, homeopathy, oriental medicine, and environmental medicine.¹⁰⁷ This holistic approach has expanded to areas beyond science and medicine, to encompass education and law. For instance, in environmental law, holism holds that the interconnectivity of all parts of the ecosystem must be understood, in order to comprehend any individual part.¹⁰⁸ Holism is also used to describe non-litigious approaches to settling disputes, including mediation, arbitration, and conciliation, as provided for in the areas of environmental law, family law, domestic relations, corporate governance, discrimination and criminal justice, in both the US and EU member state countries.¹⁰⁹ As in medicine, holism seeks to bring alternative approaches to conflict resolution, and while there are ‘holistic lawyers’,¹¹⁰ ‘holistic law’ does not exist.¹¹¹ Rather, holism is an approach wherein the emphasis is using a non-litigious means for reaching a solution that works for all parties, rather than one individual. Additionally, it is forward looking, rather than focused on past events.

Applying holism to the problem of pregnancy discrimination, it is suggested that four elements must exist before a policy approach may be considered to be truly holistic. These elements are as follows:

¹⁰⁶ Malcom C. Todd, ‘Interface: Holistic Health and Traditional Medicine’ (1979) 13641 West J Med, 465.

¹⁰⁷ Barbara M. Dossey, ‘Holistic Modalities & Healing Moments’ (1998) 98 Am J of Nursing 44, 44.

¹⁰⁸ Robert R.M. Verchick, ‘Steinbeck’s Holism: Science, Literature, and Environmental Law’ (2003) 22 Stan Envit LJ 3.

¹⁰⁹ See: J. Kirkbride and S. Letza, ‘Regulation, Governance and Regulatory Collibration: achieving an “holistic” approach’ (2004) 12 Corporate Governance: An International Review 85; Lisa Blomgren Bingham, ‘Designing Justice: Legal Institutions and Other Systems for Managing Conflict’ (2008) 24 Ohio St J on Disp Resol 1.

¹¹⁰ See: Carolyn E. Hansen, ‘The bigger picture’ (2006) 156 NLJ 412, for a discussion of a holistic approach to law.

¹¹¹ For a discussion of what ‘Holistic Law’ would be defined by, see: J.G. Mowatt, ‘Holism and the Law’ (1991) 108 SAfrican LJ 343, 348.

1. The problem of pregnancy discrimination is considered within the wider context of gender equality;
2. There is collaboration between government and non-government stakeholders, with the purpose of informing policy and creating greater support for governmental initiatives;
3. There exists a combination of ‘hard’ and ‘soft’ law initiatives that go beyond a prohibition of discrimination, to include measures designed to actively advance substantive equality and impose a duty to promote equality of opportunity;
4. The approach to pregnancy discrimination is forward-looking, in the sense that there is active reconsideration and redirection of policy efforts where evaluations, reports, and studies suggest that tweaking is necessary to achieve greater substantive equality between women and men.

On the basis of this research, this thesis proposes that there is evidence that such an approach exists in the EU, and that the US is moving slowly towards a more holistic approach in its attempts to tackle the problem of pregnancy discrimination. More specifically, a close review of EU and US antidiscrimination law in the following Chapters will reveal an increasing number of measures designed to address pregnancy discrimination that form part of a larger goal of achieving greater substantive equality between women and men, where the prohibition of discrimination is supplemented by the provision of rights specific to pregnant, breastfeeding workers and women on maternity leave, positive/affirmative action measures, gender mainstreaming, and other measures that impose a duty upon governmental actors to advance equality, while also emphasizing the role that men play in achieving equality.

IV Overview of the Chapters.

The structure of this thesis is as follows: In Chapter 2, using the experiences of five employees at a hypothetical manufacturing company located in the state of Mississippi (Benmore, Inc.), the US approach to ending pregnancy discrimination is introduced and contrasted with the treatment afforded to workers at a hypothetical

manufacturing company (Widget Co.), located in an EU member state (the UK). Each of the five examples reveals the acute loophole in US national legislation seeking to prohibit discrimination and achieve substantive equality for a particular segment of workers, while also suggesting the availability of additional equality measures to address the problem presented.

Chapter 2 also presents the comparative methodology and theoretical framework used to consider this specific issue of discrimination. One of the main goals of this comparative study is explanatory: to better understand EU and US substantive law seeking to address pregnancy discrimination, to consider their historical, legal, and conceptual backgrounds, and to bring to the fore feminist concerns relating to the provision of what are described by some as ‘special’ rights to address the inequality, disadvantage, and exclusion suffered by pregnant workers. These rights generally refer to the provision of job protected paid leave and workplace accommodations.

Another goal of this comparative study is to draw lessons from EU experience with these measures and with the strategy of gender mainstreaming, and to consider the future development of EU and US antidiscrimination law.

Having laid the foundation for an in-depth examination of the EU and US models of equality, the subsequent five Chapters undertake the central discussion of this thesis. Chapters 3 and 4 examine the EU model of equality. Chapter 3 sets forth the historical context in which EU antidiscrimination law has developed, which is then followed by an examination of its substantive provisions. In this discussion, evidence will be presented that seeks to show that by carving out ‘special rights’ from ‘equal treatment’ legislation, combined with positive action measures and the soft law strategy of gender mainstreaming, the EU strives for a proactive and holistic approach to tackling discrimination and seeks to do more than merely addressing discriminatory acts, *ex post facto*. Chapter 4 continues the discussion with a detailed and critical analysis of the EU model in practice, revealing the gap between the substantive equality that EU law seeks to achieve for pregnant workers and equality in fact. This Chapter also addresses feminist criticisms of an equality policy focused overwhelmingly on women and presents evidence that the EU has responded to the limitations of its equality model by

redirecting its policy efforts, and seeking to include men more fully in the equality equation.

In Chapter 5, 6, and 7, the discussion turns to the US model of equality. The central purpose of these Chapters is to provide compelling evidence of developments on the national and state level that suggest the trajectory of US antidiscrimination law is shifting away from a purely individual rights-based approach to addressing pregnancy discrimination, towards a more holistic approach that seeks greater substantive equality, and imposes a duty to promote or achieve equality. Chapter 5 begins the discussion by presenting the national equality model against which this shift is taking place. Following on from this, federal court jurisprudence is used to illustrate the US model in practice, revealing the limited rights afforded by a national Constitution that has no explicit guarantee of sex equality, and national legislation that fails consider pregnancy as *sui generis*, or the shortcomings of workplace design. The Chapter then closes with a discussion of several national measures offering a right to unpaid leave and workplace accommodations, and with the suggestion that these patchwork protections offer evidence that the US is moving towards a more holistic approach to achieving equality for pregnant workers, albeit slowly.

Chapter 6 seeks to explain, justify, and elaborate upon these developments, focusing on the state measures adopted to address pregnancy discrimination. Chapter 6 also follows on from the discussion of the differences between EU and US antidiscrimination law outlined in earlier Chapters, revealing why legal and conceptual barriers prohibit the US model of equality from ever completely converging with that of the EU, even if it were desired. The discussion will reveal that the US Constitution presents a legal barrier to the adoption of mandatory leave, but not to job protected, paid leave, workplace accommodations, or gender mainstreaming. It will also reveal that adherence to the concept of formal equality presents a significant barrier to the adoption of measures that recognize the difference that pregnancy makes to women's careers, but more so at the national, than at the state level. Finally, an in depth and rigorous critical comparison is undertaken of the equality measures enacted and, or proposed by the legislatures of the fifty US states and Washington D.C. These measures are considered for their ability to broaden the rights and protections afforded by national law and for

their limitations compared to EU's Pregnant Workers Directive.¹¹² While finding the state measures are not as expansive as their EU cousins, this Chapter concludes that they signal a shift in the trajectory of US antidiscrimination law. This conclusion is bolstered by the bold and novel assertion made in Chapter 7, that gender mainstreaming has become a US domestic equality strategy. In what is a key Chapter, it is asserted that with President Obama's issuance of Executive Order No. 13506 in 2009, 'Establishing a Whitehouse Council on Women and Girls,' the US has adopted the strategy of gender mainstreaming domestically.¹¹³ Advancing evidence in support of this claim and considering lessons from EU experience with the strategy, the Order is explored in depth, and an original assessment is made of the implementation efforts taken to date, and of the Order's overall likelihood of success in moving the trajectory of US towards greater substantive equality for women generally and pregnant workers specifically.

Chapter 8 will provide a conclusion to this thesis and answer the primary and ancillary research questions.

¹¹² Council Directive 92/85/EEC of 19 October 1992 concerning the implementation of measures to encourage improvements in the safety and health of pregnant workers, workers who have recently given birth and women who are breastfeeding (Tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) [1992] OJ L348/28 (PWD). See also the discussion in Chapters 3 and 4.

¹¹³ See: Executive Order No. 13506 (n 12).

Chapter 2: Problem, Theory, and Method

*Outdated models of work structure and culture act as barriers to success and economic security for millions of working people in America.*¹¹⁴

I Introduction

A primary aim of this Chapter is to illustrate in comparative detail several aspects of the EU and US models for gender equality. Using the experiences of five employees at a hypothetical manufacturing company located in the state of Mississippi (Benmore, Inc.), the US ‘equal rights’ based approach to ending pregnancy discrimination is introduced and contrasted with the ‘special rights’ afforded by EU law to workers at a hypothetical manufacturing company (Widget Co.), located in an EU member state (the UK). Each of these examples will reveal an acute loophole in US legislation seeking to prohibit pregnancy discrimination, while also suggesting the availability of additional equality measures for addressing this problem.

Then, in Part III, the concerns of feminist legal theorists are presented because of their key role in highlighting how anti-discrimination measures help overcome, or contribute to the disadvantage of women. This discussion will lay a foundation for the examination and evaluation of EU law undertaken in Chapters 3 and 4, which reveals that while EU ‘special treatment’ measures are not without gender negative effects, these effects do not include job loss. In the fourth Part of this Chapter, the comparative methodology used to examine the problem of pregnancy discrimination is discussed and the reasons for using this method are outlined. In particular, the debate surrounding the concepts of legal ‘transplants’ and ‘convergence’ is addressed, because the results of this study serve to suggest the trajectory of US anti-discrimination law is shifting and converging with that of the EU, albeit on a limited basis and at an ad hoc level.

¹¹⁴ Latifa Lyles, ‘41 Million Stories’ (*DOL*, June 18, 2014) <<http://social.dol.gov/blog/41-million-stories/>> Accessed 8/8/2014.

II Contrasting legal rights.

There are three good reasons for setting out hypothetical examples at the beginning of this thesis. First, these examples will serve to catalogue some of the real or potential disadvantages faced by women who are either pregnant, seeking to become pregnant, or who wish to continue to breastfeed their child upon a return to work. Secondly, they will reveal how differently these disadvantages are addressed by US and EU antidiscrimination law. In doing so, they serve to show that government is not a passive actor; rather its policies serve to encourage or discourage equality in the workplace.¹¹⁵ Finally, the hypothetical examples will highlight potential areas for further development of US and EU antidiscrimination law.

a Five employees and different treatment.

Benmore, Inc. (Benmore) is a small company. It has eighteen employees and is located in the US state of Mississippi. Mary Smith has worked as an accountant for Benmore for eleven years. Her annual performance reviews have always been listed as ‘above satisfactory’ and declare her to be, ‘a valuable and valued employee.’ Lately, she has had a problem with absenteeism. She has had twenty unexcused absences in the last four months; twelve occurred after she became pregnant and were due to severe morning sickness. Mary received two written warnings prior to the last two absences and Benmore terminated her employment, two days after her last absence.

Another employee, Karen Jones works in the shipping department of Benmore. At the time she was hired, she signed a form indicating that she could bear the occasional strain that the job required, and specifically indicated that she could tolerate the occasional bending, twisting, climbing, squatting, crouching, and balancing that the position necessitated. Jones understood that her job could require her to use a dolly to push or pull goods weighing up to 68 kilograms. After two years of working at Benmore, Karen Jones notified the company that she was pregnant and that her obstetrician had signed a letter that restricted her to ‘light work/duty and to lifting no

¹¹⁵ See the discussion in: JC Gornick and MK Meyers, ‘Welfare Regimes in Relation to Paid Work and Care’ in Janet Zollinger Giele and Elke Holst (eds), *Chapter 3 in Changing Life Patterns in Western Industrial Societies* (Netherlands: Elsevier Science Press 2004) 167.

more than 11 kilograms.’ She requested that her supervisor transfer her to a ‘light-duty’ assignment for the duration of her pregnancy. The supervisor informed Jones that Benmore had a policy of limiting light-duty assignments to employees who had suffered job-related injuries, and that he had no work for her to do. Karen Jones stayed at home. Two weeks later, Karen Jones’ employment was terminated.

Carol King has worked as an administrative secretary in the quality control department of Benmore for four years. She has been undergoing in-vitro fertilization treatment (IVF), in the hopes of conceiving a child.¹¹⁶ King had previously received approval for, and taken a six-week leave of absence for the treatment. The procedure was not successful and King requested another leave of absence, to occur in three months. At the time of King’s second request, Benmore was undergoing a reorganization effort and had decided to consolidate the quality control department with the returns department. Benmore was planning to retain only one of the two administrative secretaries serving those departments. King was informed by her manager that her employment was to be terminated and that it was best, ‘in light of her health condition.’

Janet Mbu has worked for Benmore for three years as an account representative. Janet received approval for and took a six week unpaid leave of absence to have her baby. However, Janet suffered complications from a difficult birth and did not return to work. She did not notify Benmore of her need of further leave and her employment was terminated for failure to return to work, or failure to obtain an extension of her leave of absence.

A fifth employee of the company, May Prentice, returned to work at Benmore after giving birth, four-weeks earlier. She requested and received accommodation to pump breast milk during her one-hour lunch break each day. May decided that she could not wait until lunchtime to pump breast milk and began to take two short additional breaks in the morning and one in the afternoon, in order to pump milk. She continued to take her one-hour lunch break and did not inform, nor request from Human Resources a

¹¹⁶ IVF involves combining eggs and sperm outside the body in a laboratory. Once an embryo or embryos form, they are then placed in the uterus.

different accommodation. Her employment was terminated for unauthorized absences from the work floor.

b US and EU antidiscrimination law.

Having highlighted several real or potential disadvantages faced by women in the US workplace, the ensuing discussion will reveal that these situations would have required a different response had these women been employees of Widget Co., a company in the UK, which is an EU member state. Furthermore, had the treatment by the employer not been different, the likelihood of success of an action for redress against their former employer would have been greater. This is because infertility treatment, pregnancy, childbirth, related medical conditions, and breastfeeding in the workplace, are addressed differently by EU law. The crux of the difference is that the US model of equality emphasizes equal treatment whereas the EU model of equality combines equal treatment with protective measures, complemented by the soft law strategy of gender mainstreaming.

In the US, the most current national law prohibiting pregnancy discrimination is contained in the Pregnancy Discrimination Act (PDA), an amendment to the Civil Rights Act of 1964 (Title VII).¹¹⁷ It requires that:

Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programmes, as other persons not so affected but similar in their ability or inability to work.

Declared ‘a sweeping bill of rights for employees of childbearing age,’ at the time of its adoption in 1978, the PDA is applicable to private employers of 15, or more employees, making it the central measure affording legal rights to the women working at Benmore.¹¹⁸

The Family and Medical Leave Act (FMLA), is a separate national law that mandates the provision of 12 weeks of unpaid family and medical leave for eligible

¹¹⁷ The Pregnancy Discrimination Act, 42 US Code Chapter 21 Sec. 701 (k) of Civil Rights Act of 1964. (PDA).

¹¹⁸ See: Jane Bryan Quinn, ‘Legislation Protects Pregnant Employees’ *The Washington Post* (DC, November 27, 1978) D 10 <lexis/nexis> accessed 24/2/2014.

employees in workplaces of more than 50 employees.¹¹⁹ Additionally, the 2010 amendments to the Fair Labor Standards Act (FLSA), requires employers of 50 or more employees to provide unpaid, reasonable break time to express breast milk for one year after a child's birth, as well as 'a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public,' to be used by female employees to express milk.¹²⁰

As Benmore is a workplace of less than 50 employees, the mandates of the PDA apply, but the provisions of the FMLA and the FLSA do not. Moreover, even though the PDA applies, its mandate is formal equality. This means that Benmore is not required to take steps to make it easier for women to work. Recalling from the discussion of equality concepts in Chapter 1, a requirement of formal equality means that, 'employers can treat pregnant women as badly as they treat similarly affected, but non-pregnant employees.'¹²¹

In contrast, the Equal Treatment Directive 2006/54/EC (ETD), and the Pregnant Workers Directive 92/85/EEC (PWD) provide minimum standards of treatment for this category of workers in the EU.¹²² These minimum standards offer protection from dismissal from the beginning of pregnancy until the end of maternity leave, and mandate workplace accommodation and job-protected paid leave for illness and maternity. As the UK is a member state of the EU, it has transposed the provisions of these Directives into national law, which is found in Chapter 2, Section 18 of the Equality Act 2010, and its supplemental Regulations.

But, what is the effect of these legal differences for Mary, Karen, Carol, Janet, and May? As employees in the US, they can bring individual actions alleging

¹¹⁹ Family and Medical Leave Act 1993, 29 USCS 28 (FMLA).

¹²⁰ Fair Labor Standards Act of 1938 (29 U.S.C. 207) (FLSA). Patient Protection and Affordable Care Act, Public Law 111-148, Section 4207. As of March 23, 2010 amended section 7 (ACA).

¹²¹ *Troupe v. May Department Stores Co* 20 F 3d 734 (7th Cir 1994), at 738; See also: *Victoria Serednyj v. Beverly Healthcare, LLC*. 656 F3d 540 (7th Cir 2011) 548.

¹²² See: Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions [1976] OJ 1976 L39/40 (Equal Treatment Directive), as amended by Council Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L269/15, as repealed by Recast Directive (n 15). The Pregnant Workers Directive (n 112).

discrimination by their employer contrary, to Title VII. However, as the following discussion will show, their likelihood of success is questionable, if not unlikely.

c Mary Smith

The PDA does not protect Mary Smith from being discharged from work because of absenteeism, even where her absences are due to complications of pregnancy. Unless Mary can establish that Benmore overlooks the absences of non-pregnant employees and treats pregnant employees differently, she will be unable to establish a claim under the PDA.¹²³ Mary is without her job and likely without any redress from Benmore.

Had Mary been an employee in Widget Co., in the UK, when she informed her employer of her pregnancy, her situation would likely have been different. Article 10 of the PWD prohibits the dismissal of pregnant workers and workers on maternity leave, other than in exceptional circumstances, unconnected with their pregnancy or maternity leave. The fact that Mary was dismissed for absenteeism pursuant to the same rule that applied to both male and female employees, is irrelevant. In the case of a pregnant worker, there can be *no* comparator, not even a sick one. The position of a pregnant worker who is unfit for work through pregnancy-related illness cannot be considered the same as that of a male employee who is ill and absent through incapacity for the same period of time.¹²⁴ This is in view of:

*The harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, women who have recently given birth or women who are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy.*¹²⁵

Mary Smith, working in the UK, would have redress under Section 18 of the Equality Act 2010, in the event of dismissal from her employment. However, if Mary had repeated periods of sick leave, that occurred *after* her return from authorised leave,

¹²³ See: *Dormeyer* (n 39) and *Armando v Padlocker, Inc.* 209 F3d 1319 (2000). See also: *Lisa Mershon v. Woodbourne Family Practice, LLC*. Civil Action No 06-00253, 2006 US Dist LEXIS 4957, (ED Pa May 30, 2006).

¹²⁴ Case C-394/96 *Mary Brown v Rentokil Limited* [1998] ECR I-4185, para 31.

¹²⁵ Case C-32/93 *Webb v. EMO Cargo (UK.) Ltd.* [1994] ECR I-3567, 746, para 21.

and not attributable to pregnancy or confinement, she could be lawfully dismissed from her employment. So long as Widget Co. could show that sick leave would lead to the dismissal of a male worker in the same circumstances.¹²⁶ As discussed in Chapters 3 and 4, protection is temporally limited under the PWD, in that it is afforded from the beginning of pregnancy until the end of maternity leave.

Here, some initial commentary on the protections afforded to Mary by EU law is warranted, which the discussion in Part III and in subsequent Chapters will address more fully. In light of the fact that statistics suggest that as many as 90% of all pregnant women experience some nausea, while one-third actually vomit due to this condition, which usually begins at 4-6 weeks after conception and continues until approximately the sixteenth week of gestation, few would be expected to argue that a right to leave provides a practical solution to dismissal for absenteeism due to severe morning sickness.¹²⁷ However, the problem with a leave right, or protection against dismissal that feminists, academics and others have highlighted, is that when this right is limited to women it reinforces gender stereotypes and deters employers from hiring women of childbearing age.¹²⁸ Indeed, the results of a recent survey of 500 managers by the law firm Slater and Gordon, certainly lends support to these observations. In that survey, a third of managers stated that they preferred to employ a man in his 20s or 30s rather than a woman, for fear of maternity leave.¹²⁹ However, while a better solution may be legislation providing for shared ‘maternity’ leave, as has been adopted in many EU member states, the reality is that unless men actually take leave, the legislation will do little to change existing stereotypes. It will also do little to address the fact that morning

¹²⁶ See: Case C-179/88 *Handels-og Kontorfunktionaerernes Forbund i Danmark (Union of Clerical and Commercial Employees) (for Hertz) v Dansk Arbejdsgiverforening (Danish Employers Association) (for Aldi Marked K/S)* [1990] ECR I -3979, as mentioned by Case C-232/09 *Dita Danosa v. LKB Lizings SIA* [2011] 2 CMR 2; ECJ (2nd Chamber).

¹²⁷ U. Maryland Medical Centre, ‘Morning Sickness’ (*U Maryland*, 2014).

<<http://umm.edu/health/medical/pregnancy/staying-healthy-during-pregnancy/morning-sickness>> accessed 17/11/2014

¹²⁸ See, for example: A Morris, ‘Which is it you want—equality or maternity leave?’ (2006) 14 Fem LS 87.

¹²⁹ Press Association, ‘40% of managers avoid hiring young women to get around maternity leave’ *The Guardian* (London, 11 August 2014) <<http://www.theguardian.com/money/2014/aug/12/managers-avoid-hiring-younger-women-maternity-leave>> accessed 17/11/2014.

sickness is a condition unique to pregnant women, which no amount of gender neutrality can address.

d Janet Mbu

For Janet Mbu, failure to return upon exhaustion of approved leave could result in lawful dismissal under the PDA, and under the FMLA, if Benmore were a covered workplace.¹³⁰ While failure to return could also result in lawful dismissal in the UK, there is an important difference in the *length* of maternity leave available to Janet, and other workers like her. A brief comparison of US and EU antidiscrimination law will make this point more graphically.

The PDA does not require Benmore, or any other employer to grant maternity leave, or to reinstate an employee after maternity leave.¹³¹ In fact, even if Benmore voluntarily provided maternity leave, it could lawfully have replaced Janet while she was on leave, for business need, if it had a written policy of not guaranteeing reinstatement.¹³² As stated in the opinion of Circuit Judge Greenburg, in *Re Carnegie Centre Associates*, ‘the PDA is a shield against discrimination, not a sword in the hands of a pregnant employee.’¹³³

In contrast, were Janet Mbu employed in the UK by Widget Co., she would be entitled to *paid* maternity leave beyond the 6 weeks of unpaid leave authorized by Benmore, and beyond the 14 week mandatory minimum laid down by Article 8 (1) of the PWD. In fact, under UK law, Janet would be entitled to up to 52 weeks of Statutory Maternity leave, of which, up to 39 weeks may be paid.¹³⁴ The first 6 weeks of leave are paid at a rate equivalent to 90% of Janet’s average weekly earnings (AWE), before tax. Thereafter, the remaining 33 weeks are paid at a rate of £138.18 or 90% of Janet’s

¹³⁰ See: *Grace v Adtran, Inc.* 470 Fed Appx 812 (11th Cir 2012); *Sheila Morrissey v. Symbol Technologies, Inc* 910 FSupp 117 (EDNY 1996).

¹³¹ See: *In Re: Carnegie Center Associates; Deborah Rhett v. Carnegie Center Associates* 129 F3d 290 (3d Cir 1997) 297.

¹³² See: *Soreo-Yasher v. First Office Management* 926 F Supp 646 (ND Ohio 1996).

¹³³ *Carnegie* (n 131) 297.

¹³⁴ The Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amendment) Regulations 2006.

AWE, whichever is lower.¹³⁵ Moreover, Widget Co. could not override EU law with a written reinstatement policy. Therefore, if Janet had returned to work at Widget Co. after exhaustion of her 26 weeks of what is termed ‘Ordinary Maternity Leave,’ she would have been legally entitled to return to her position as an account representative. However, if she had continued on what is termed, ‘Additional Maternity Leave,’ beyond 26 weeks, and up to 52 weeks, Widget Co. could have replaced her, but would have been required to offer her a similar position in the company. Only if Janet either refused the similar position, or failed to return to work after the exhaustion of her 52 weeks of leave, could Widget Co. lawfully consider her actions as amounting to a resignation. This is so, even if Janet’s failure to return to work after 52 weeks was due to a medical condition arising out of pregnancy or childbirth.¹³⁶

The legal differences outlined above are important because they highlight the role that job protected paid leave plays in helping to offset the workplace difficulties that pregnancy and childbirth create. They also serve to illustrate the role played by EU member state legislatures in providing broader rights than mandated by EU law. A detailed survey of US law in Chapters 5 and 6 will reveal that US state legislatures are similarly imbued with the power to enact broader rights for pregnant workers than those provided by Congress. The results of this survey will suggest that these powers have been extremely important for progress in addressing discrimination in the US, as they have provided an additional forum in which to enact antidiscrimination laws seeking substantive rather than formal equality.

e Karen Jones

Karen Jones will likely have no greater success than Mary or Janet in her suit against Benmore. First, because federal judicial interpretation of the PDA is that the statute does not require pregnant workers receive ‘special treatment,’ only the same treatment. Secondly, because Benmore will argue that it has articulated a legitimate, non-discriminatory reason for its actions, based neither on sex, nor on pregnancy.

¹³⁵ HM Government, ‘Statutory Maternity Pay and Leave: employer guide’ (*Gov.UK*). <<https://www.gov.uk/employers-maternity-pay-leave>> accessed 12/3/15

¹³⁶ *Brown v Rentokil* (n 124), para 26.

Benmore has a policy to provide light duties only to those employees who have suffered an occupational injury.¹³⁷ Unless Karen can show that any other employee with a *non-job-related* disability received different treatment than her, or that the explanation given by Benmore was merely a pretext for intentional discrimination, as discussed in Chapters 5 and 6, her claim will likely be dismissed.

If Karen had been an employee at Widget Co. in the UK, she would have been entitled to different and arguably better treatment. The PWD is concerned with health and safety and provides for *different* treatment for women in any of the listed situations.¹³⁸ In some circumstances, it requires a risk analysis to determine whether an adjustment in working conditions or hours is required, or is feasible. If not feasible, the pregnant worker is granted paid leave. In accordance with these mandates, the UK has adopted measures that would have entitled Karen, when her doctor placed her on restricted duties, to request that she be given either an adjustment, or the opportunity to go on paid leave.¹³⁹ The fact that she was not suffering from an occupational injury would not have been a valid ground to deny her request for light duties.

As stated previously, the only national law providing a right of up to twelve weeks of *unpaid* leave in the US is the FMLA. Karen would be unable to take advantage of the provisions of the FMLA, as it is inapplicable to workplaces of less than 50 employees. Unfortunately, Mississippi, the state in which Benmore is located has not chosen to enact a separate leave provision upon which Karen and her co-workers may rely. This last point is particularly important, as it serves to highlight the role of state legislatures in addressing the lacuna in national law. While the majority of US states have not enacted legislation providing job protected paid leave and workplace accommodations to women who are pregnant or breastfeeding, the evidence presented in Chapter 6 reveals that an increasing number are choosing to do so.

¹³⁷ See: *Young v United Parcel Service, Inc.* 707 F3d 437 (4th Cir 2013). See: Chapters 5 and 6, for a discussion of the conflict between the US federal courts on the issue of workplace practices, and the role of US State legislatures in enacting measures mandating employer accommodation of pregnancy.

¹³⁸ See the discussion in, S Fredman, 'European Community discrimination law: a critique' (1992) 21 ILJ 119; S Fredman, 'A difference with distinction: pregnancy and parenthood reassessed' (1994) 110 LQR 106.

¹³⁹ See: The Management of Health and Safety at Work Regulations Order 1999, SI 1999/3242 (amended by SI 2006/48).

f Carol King

The situation of Carol King is different from that of her co-workers at Benmore. At the time of her employment termination, Carol was not pregnant, or on maternity leave, or breastfeeding. Carol had been diagnosed with infertility and had been undergoing in IVF, in the hopes of becoming pregnant. Before embarking on a consideration of the legality of Carol's termination, a brief comparison of reproductive health care provision in the US and the EU is appropriate, because until 2014, the US insurance market was not standardized and certain medical services could lawfully be excluded from coverage, so long as they were excluded for both sexes. This means that at the time of Carol's employment, Benmore insurance policy could have lawfully excluded coverage for her IVF treatment under its employee health benefits plan, *so long as* both male and female infertility treatments were excluded. IVF would not have presented an issue for Carol, if she had been working at Widget Co. in the UK, as EU workers are entitled to state provided health care, which includes IVF. Importantly, now, because of the changes wrought to federal law by the new Patient Protection and Affordable Care Act (ACA), IVF treatment may no longer be excluded from most US insurance plans.¹⁴⁰ In Chapter 5, I argue that because of this, and other changes that help to address the disadvantage, inequality, and exclusion suffered by women in the workplace, the Act has the potential to advance substantive equality beyond that achieved by the PDA and the FMLA. I also argue that these changes are part of other promising developments on the national, state, and local level in the US that signal a shift in the trajectory of US antidiscrimination law, from a purely formal equality approach to tackling pregnancy discrimination, towards a more holistic one that seeks to achieve greater substantive equality.¹⁴¹

Turning to Carol's dismissal, it can be said that Carol has a cause of action for sex discrimination, whether or not she is a worker in the US or in UK, so long as she can establish that her dismissal was based on the fact that she had undergone IVF treatment.

¹⁴⁰ Patient Protection and Affordable Care Act, Public Law 111-148, Section 4207. NB: As the Act is not retroactive, its provisions would not have helped Carol.

¹⁴¹ The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, as amended by An Act to restore the intent and protections of the Americans with Disabilities Act of 1990. 42 USCA § 12101 (2008). See Chapter 1 for a definition of holism.

Under US law, while infertility is acknowledged to be a gender-neutral condition, IVF treatment is a surgical procedure that is exclusively performed on women.¹⁴² Therefore, employees terminated for taking time off to undergo IVF will always be women. Consequently, Carol has a valid claim of *sex discrimination* against Benmore. As was the case in *Hall v. Nalco*, Benmore can be said to have terminated Carol's employment, 'not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity.'¹⁴³

Under EU law, pregnancy begins when there has been the implantation of fertilised ova into the woman's uterus.¹⁴⁴ For Carol, as this had not occurred at the time of her dismissal/termination from employment, she could not rely on the PWD in a claim for wrongful dismissal against Widget Co. She could, however rely on the ETD, as 'dismissal of a female worker essentially because she is undergoing that important stage of in vitro fertilisation treatment constitutes direct discrimination on grounds of sex.'¹⁴⁵ Carol should be aware however, that the period of protection is a closely defined and limited period within which dismissal may constitute sex discrimination.¹⁴⁶ Carol should also be aware that while under the UK Equality Act 2010 Statutory Code of Practice, she does not have a statutory right to time off in order to undergo IVF, but once pregnant, she is entitled to time off for antenatal care.¹⁴⁷

g May Prentice

May Prentice was also not pregnant at the time of her dismissal. Under the circumstances, Benmore would likely assert that as it treated May no differently than it treated any other employee who took breaks for personal reasons there was no disparate treatment on the basis of sex, under Title VII.¹⁴⁸ Such an assertion would be supported

¹⁴² See: *Hall v Nalco Company* 534 F 3d 644 (7th Cir 2008) 649.

¹⁴³ *ibid* 649.

¹⁴⁴ See: Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017, para 53.

¹⁴⁵ *ibid*, paras 52-54.

¹⁴⁶ See: *Sahota v Home Office* (2009) UKEAT/342/09 [2010] CMLR 771.

¹⁴⁷ Equality Act 2010: Employment Statutory Code of Practice, para 17.28.

¹⁴⁸ See: *Stanley v. Abacus Technology Corporation* 359 Fed Appx 926 (10th Cir 2010); *Allen v. Totes/Isotoner Corporation* 119 Ohio St 3d 1443, 2008-Ohio-0845 (unpublished decision); *Martinez v. NBC, Inc.* 49 F Supp 2d 305 (SDNY 1999). See also: Chapters 5 and 6.

by several federal court judgments, which make clear that lactation is not a ‘condition related to pregnancy,’ but is a condition related to breastfeeding, and breastfeeding discrimination does not constitute gender discrimination under US national law. For it to be afforded protected status under Title VII, the Courts have stated that ‘it is Congress alone that may do so.’¹⁴⁹ Congress has responded with the ACA, which amended Section 7 of the FLSA in 2010.¹⁵⁰ However, as Benmore is not an employer of more than 50 employees, the provisions of the FLSA, requiring reasonable break time and a place for nursing mothers are *not* applicable to May.

In summary, May Prentice cannot seek redress against Benmore using federal law. Nor can she rely upon the specific provisions of Mississippi state law for protection. Enacted in 2006, prior to the FLSA, the Mississippi Code prohibits discrimination against nursing mothers, providing that ‘no employer shall prohibit an employee from expressing breast milk during any meal period or other break period provided by the employer.’¹⁵¹ Arguably, as May was not prohibited from using her break time to express breast milk, and sought no further accommodation from her employer, any claim of discrimination under the state statute would likely fail. Of note too, is the fact that the Code places the burden upon the employee to ensure that this limited workplace accommodation is afforded to her. This stands in direct contrast to EU law, where the burden is more properly placed upon the employer, and where the termination of a worker on the grounds of breastfeeding, or prohibiting an employee from breastfeeding, or exercising a right to leave for breastfeeding constitutes unlawful sex discrimination, rather than an unfair labour practice.¹⁵² The importance of this distinction lay in the remedies afforded to an employee, as discussed in Chapter 5 and 6.

Furthermore, a specific risk assessment would have been *required* once May provided written notification to the UK Widget Co. that she was breastfeeding.¹⁵³ If risks were identified, Widget Co. would have been required to take all reasonably practicable

¹⁴⁹ *Martinez* (n 148) 311.

¹⁵⁰ Fair Labor Standards Act of 1938 (29 U.S.C. 207) Patient Protection and Affordable Care Act, Public Law 111-148, Section 4207. As of March 23, 2010 amended section 7.

¹⁵¹ Miss. Code Ann. § 71-1-55 (2013).

¹⁵² Equality Act 2010, Chapter 2 Prohibited Conduct, Section 13(6) (a).

¹⁵³ The Management of Health and Safety at Work Regulations Order 1999, SI 1999/3242 (amended by SI 2006/48).

measures to remove, reduce, or control the risk. If there were significant risks that could not be removed, then steps would have been taken in order to remove May from any significant health and safety risk identified. These steps include temporary alterations to working conditions, such as breaks to express milk, or shorter shifts.

h Inadequate responses.

If the hypothetical examples discussed above were at all clear, a central point will have thus far emerged: the right of women to equal treatment in the US workplace results in disadvantages that do not exist in the EU. However, before advancing the assertion that the protection afforded by EU law is the solution to these disadvantages, some sophisticated arguments must be considered, which suggest that while different or ‘special treatment’ measures address one area of inequality in the workplace, they also serve to perpetuate the gender stereotype of women as child bearers and child carers. These arguments form part of a large body of feminist legal theory, to which the discussion in this third Part now turns.

III Feminist legal theory.

*Equality arguments... are stepping stones, not destinations, in the struggle for women's human rights.*¹⁵⁴

This thesis cannot hope to provide a better understanding of EU and US pregnancy discrimination law without engaging with the discursive debate of feminist legal theorists regarding the role of law in both subordinating women, and in helping to end their inequality, disadvantage, and exclusion. Feminist legal theorists have produced a vast amount of literature in which they have sought to identify and expose the overt and covert sources of oppression and exclusion in laws related to women. Naturally, this literature has considered the difference that pregnancy makes in the workplace, and then, having asked what Katherine Bartlett calls ‘the woman question,’ or ‘the question of the excluded,’ these theorists have suggested ways in which law’s failings may be

¹⁵⁴ JS Hendricks, ‘Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion’ (2010) 45 Harv CR-CL L Rev, 4.

corrected.¹⁵⁵This thesis will address this discursive debate, particularly as it relates to the provision of what many feminists refer to as ‘special’ treatment measures, including workplace accommodations and maternity leave. In doing so, it will be revealed that this debate is chiefly defined by deep and trenchant arguments, which on one side hold that special measures are necessary to advance substantive equality, and on the other side argue that such measures have a tendency to reinforce gender stereotypes and institutionalize motherhood. The evidence presented in this research will also reveal that while there is a significant gap between the substantive equality sought and the reality of what EU ‘special treatment’ measures have achieved thus far, these measures have served to end certain workplace disadvantages for pregnant women that remain largely unaddressed in the US.

However, before engaging in the debate, it will be helpful to explain here what is meant by the term feminist legal theory (FLT), and to outline the theoretical arguments of feminists. This explanation begins with an acknowledgement that although FLT is not one theory and there is no authoritative articulation of feminism there are some general statements that can be made, which will aid our understanding.¹⁵⁶First, it can be said that FLT is a critical approach to studying the relationship between gender and the law.¹⁵⁷It ‘presents a theory of gender and challenges the assumptions of gender-neutrality and objectivity in received disciplinary knowledge.’¹⁵⁸By considering and analysing law as ‘male,’ FLT highlights how law is unjust and has contributed to the subordination of women. In so doing, it generates debate about the nature of oppression and exclusion of women, and the necessary means to tackle it. Consequently FLT may generally be said to have a ‘common commitment to analysing the cause and nature of women’s oppression and disadvantage, law’s contribution to that disadvantage, and use of legal means to improve women’s position.’¹⁵⁹However, this ‘common commitment’ has not translated into agreement of how best to address the disadvantages, inequality, and exclusion suffered by pregnant workers in the US. This is because there is ‘multifaceted

¹⁵⁵ Katharine T. Bartlett, ‘Feminist Legal Methods’ (1989) 103 Harv L Rev 829, 837.

¹⁵⁶ A.R. Baehr, ‘*Perfectionism, Feminism and Public Reason*’ (2008) 27 Law & Philosophy 193,193.

¹⁵⁷ M.A. Fineman, ‘Feminist Legal Theory’ (2005) 13 Jnl of Gender Social Policy & L 13, 13.

¹⁵⁸ *ibid.*

¹⁵⁹ N Lacey, ‘Feminist Legal Theory’ (1989) 9 Oxford J Legal Stud 383, 394.

theoretical disagreement about what forms women's exclusion takes and how to correct it...'¹⁶⁰The severity of these disagreements has led some commentators to conclude that 'feminism has become a victim of polarization.'¹⁶¹The results of this research support such a conclusion, and show that disagreements have been sufficiently entrenched as to affect the types of anti-discrimination measures proposed and, or adopted by the US Congress. As US Supreme Court Associate Justice Ruth Bader Ginsburg noted in her dissent in *Coleman v. Court of Appeals*, the provision of protective measures for pregnant workers has 'sharply divided women's rights advocates.'¹⁶²

Having outlined what FLT is, this section will now explore the multiple forms of *feminist* thought and multiple 'waves,' or stages of feminism, which have resulted in differences of approach to addressing gender discrimination generally, and pregnancy discrimination in particular. This exploration is undertaken in the knowledge that as the research and scholarly discourse on the subject of feminism and feminist legal theory is both rich and broad, amounting to a 'diverse, contradictory, and internally contested field of scholarly activity,' what is offered below can only be an examination of basic concepts and theories.¹⁶³

a Waves of feminism—first and second.

Scales writes that 'feminism has a tumultuous history, complex contested meanings, and conflicted constituencies.'¹⁶⁴The history of feminism is also often described in terms of different 'stages,' 'generations,' or 'waves,' referring both to its theoretical development as an academic discipline, and to the activities of a political movement. While the use of such metaphors has been criticised by writers and scholars as producing antagonism and antipathy, they are nonetheless useful to explain the

¹⁶⁰ Denise G. Réaume, 'What's Distinctive about Feminist Analysis of Law? A Conceptual Analysis of Women's Exclusion from 'Law' (1996) 2 LEG 265, 298.

¹⁶¹ Jane Caro and Catherine Fox, *The F word how we learned to swear by feminism* (University of New South Wales Press 2008) 223.

¹⁶² *Daniel Coleman v. Court of Appeals of Maryland et al.* 132 S.Ct 1327 (2012) 1340, 1341; see also, Ronald D Elving, *Conflict and Compromise: How Congress Makes the Law* (Simon & Shuster 1995).

¹⁶³ Margaret Davies, 'Unity and Diversity in Feminist Legal Theory' (2007) 2 Philosophy Compass 650 651.

¹⁶⁴ Ann Scales, *Legal Feminism: Activism, Lawyering and Legal Theory* (NYU Press 2006)7.

evolution of feminism.¹⁶⁵Therefore, in this thesis, the term ‘wave’ is utilized to explain and contrast the different stages and ages of feminism, beginning with a discussion of the first and second waves.

The touchstone of the ‘first wave’ in feminism in the US and in Europe is generally described by the political activism of the suffragists in the 1800s, advocating voting rights for women.¹⁶⁶The ‘second wave’ of feminism signifies the progress of feminism from the first stage, which occurred predominantly in the US, beginning in the late 1960s. The legal feminism of this period ‘involved challenging the exclusion of women from equal opportunities of all sorts,’ and was defined by legal study and legal reform.¹⁶⁷Much of this reform has been attributed to women entering law school and the legal profession in significant numbers in the 1960s and 1970s, having a mantra of reform.¹⁶⁸These second wave feminists also had a motto declaring that ‘the personal is political,’ which referred to the use of conscious-raising efforts made by political action groups seeking legal rights.¹⁶⁹These efforts were intended to highlight the fact that as, ‘women’s problems are not hers individually but those of women as a whole, they cannot be addressed except as a whole.’¹⁷⁰Indeed, it was during this ‘second wave’ of feminism that key civil rights legislation in the US and anti-discrimination measures in the EU were adopted. In the US, this included The Equal Pay Act of 1963, The Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, and The Educational Amendments of 1972.¹⁷¹In the EU, antidiscrimination provisions included

¹⁶⁵ See: S. Budgeon, *Third Wave Feminism and the Politics of Gender in Later Modernity* (Palgrave 2011)7; Astrid Henry, *Not my mother’s sister: generational conflict and third-wave feminism* (Bloomington: IUP 2004), for a critical discussion of the use of familial metaphors in describing feminist generations.

¹⁶⁶ See: Nancy A. Hewitt (ed) *No Permanent Waves: Recasting Histories of U.S. Feminism* (RUP 2010) Part One.

¹⁶⁷ Scales (n 164) 84.

¹⁶⁸ See: Cynthia Fuchs Epstein, ‘Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors’ (2000) 49 U Kan L Rev 736; Cynthia Grant Bowman, ‘Women in the Legal Profession from the 1920’s to the 1970’s: What We Can Learn From Their Experience About Law and Social Change’ (2009) Cornell Faculty Publications Paper 12; Fineman, ‘Feminist Legal Theory’ (n 157)15.

¹⁶⁹ See: Carol Hanisch, ‘The Personal is Political.’(2006).

<<http://www.carolhanisch.org/CHwritings/PersonalisPol.pdf>> accessed 16/1/2014

¹⁷⁰ Catharine A MacKinnon, *Toward a Feminist Theory of the State* (HUP 1989) 95.

¹⁷¹ The Equal Pay Act of 1963 (EPA) (Pub. L. 88-38) 29 U.S.C.; Civil Rights Act of 1964 (Title VII) § 7, 42 U.S.C. § 2000e et seq (1964); Age Discrimination in Employment Act of 1967(Pub. L. 90-202) (ADEA); Title IX, Education Amendments of 1972, Title 20 U.S.C. Sections 1681-1688.

the Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women,¹⁷² Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions,¹⁷³ and Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.¹⁷⁴ This second-stage of feminism was also clearly defined by the rise of the legal theories of ‘liberal feminism,’ ‘radical feminism’ and ‘difference feminism.’¹⁷⁵ As Davies observes, liberal feminism ‘is historically the most influential and recognizable form of feminism.’¹⁷⁶ It demands that women have equal legal and political rights with men. Therefore, it may be said that the ‘overriding goal of liberal feminism has always been the application of liberal principles to women as well as men... that laws should not grant to women fewer rights than they allow to men.’¹⁷⁷ It was because of the political activities of liberal feminists seeking formal equality during second wave feminism that monumental equal rights legislation was adopted in the US. These achievements led various writers to extol the ‘success’ of feminism in advancing the interests of women, and to conclude that ‘shifting the legal spotlight onto women has resulted in significant political gains.’¹⁷⁸

However, other writers have been openly critical of the gains of liberal feminists. Their criticisms are founded on an assertion that ‘the equality standard did change, but the world didn’t, except for the privileged few,’¹⁷⁹ and ‘victories were narrower than the

¹⁷² Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women OJ L 45, 19.2.1975, pp. 19–20 (EPD).

¹⁷³ Equal Treatment Directive (n 122).

¹⁷⁴ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6, 10.1.1979, pp. 24–25.

¹⁷⁵ For a discussion of feminist theories, see: Valerie Bryson, *Feminist Political Theory: An Introduction* (2nd edn, Palgrave Macmillan 2003).

¹⁷⁶ Davies (n 163) 653.

¹⁷⁷ Alison M. Jaggar, *Feminist Politics, and Human Nature* (Rowman & Littlefield Publishers, Inc. 1983) 35.

¹⁷⁸ Joanne Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ (2000) 27 *JL & Soc* 351, 365.

¹⁷⁹ Scales (n 164) 84.

intentions of the larger movement.¹⁸⁰ These criticisms form part of a large body of FLT, wherein there is:

*Disagreement on whether second-stage feminism has succeeded, or failed, is alive, or dead, or merely sleeping, or is in stasis, crisis, or disarray, or is a positive or negative force in society.*¹⁸¹

Radical feminist, Catherine MacKinnon is ‘widely recognized as one of the outstanding voices of feminist legal scholarship.’¹⁸² She argues that US equality laws have been inadequate, and in some cases actually operate to disadvantage women. She observes that formal equality merely reinforces and reproduces social and structural inequalities, and concludes that it is a tool that is, ‘impotent, even regressive.’¹⁸³ In MacKinnon’s opinion, feminism fails to accurately understand that law institutionalizes male power and that division of power is the focus of women’s oppression.¹⁸⁴ For MacKinnon, equality laws ‘view women’s situation from the standpoint of male dominance,’ and assume that women are socially equal to men, which they are not.¹⁸⁵ She concludes that despite ‘trying to change the status of women by law and every other available means,’ feminism has failed.¹⁸⁶ This is a hard judgement to pass on the efforts of feminism. Arguably, the problem for pregnant workers is not so much that feminism has failed; it is that its task is not yet finished.

Regardless, MacKinnon is not alone in her criticisms. While US ‘difference feminists’ also criticise the achievements of liberal feminist law reform, they offer another perspective, and one which most closely resembles the approach taken by the EU institutions in addressing pregnancy discrimination. Difference feminists accept that ‘the assimilationist view of equality’ (equal rights) embodied in antidiscrimination law has been effective in combating sex discrimination, but note that this has only occurred

¹⁸⁰ Barbara Leslie Epstein, ‘The Successes and Failures of Feminism’ (2002) 14 J Womens Hist 118, 121

¹⁸¹ Scales (n 164) 84.

¹⁸² Lacey (n 159) 392.

¹⁸³ MacKinnon, *Sex Equality* (n 8) Ch. 1, 12.

¹⁸⁴ Catherine A. MacKinnon, ‘The Liberal State’ in Mona Lena Krook and Sarah Childs (eds), *Women, Gender and Politics: A Reader* (OUP 2010) 294; see also the writings of radical feminist, Andrea Dworkin, *Pornography: men possessing women* (Women’s Press 1981); Andrea Dworkin, ‘Against the Male Flood: Censorship, Pornography, and Equality’ (1985) 8 Harv Women’s LJ 24.

¹⁸⁵ Krook and Childs (n 184).

¹⁸⁶ Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (9th edn, HUP 1994) 2

‘where the two groups being compared are not different in any relevant way.’¹⁸⁷ Consequently, difference feminists reject the liberal feminist call for ‘gender neutral’ laws and demand that law recognize ‘gendered reality.’¹⁸⁸ Asserting the uniqueness of pregnancy, difference feminists support measures providing for different treatment, ‘as a way of ensuring that women will be equal to men with respect to their overall employment opportunities.’¹⁸⁹

Unsurprisingly, as liberal, radical, and difference feminism highlight different sources of women’s oppression, their focus for legal reform has been different. As a close study of the FMLA in Chapters 5 and 6 will reveal, the drive for formal equality directly affected the adoption of a national maternity leave law, arguably because, as Joan Williams concludes, ‘assimilation feminists may well be stronger in the United States than anywhere else in the world.’¹⁹⁰ In contrast, and as Kenney has observed:

*British and EU feminists have not shown the same attachment as US feminists to the equal treatment model of feminism for both institutional and ideological reasons... they have always embraced some forms of special treatment....*¹⁹¹

In light of the foregoing discussion, it could be concluded that second wave feminism is largely defined by the passage of equal rights legislation and its internal theoretical disagreements, but, as the following section seeks to explain, it is also defined by the criticisms of so-called ‘post-feminists.’

b Post-feminism

The term ‘post feminism’ warrants glossing. Although post-feminism became a ‘buzzword’ of the UK and US popular media in the 1990s, its meaning is contested, resulting in some semantic confusion. This confusion is illustrated by the research of Genz and Brabon, which identifies at least three competing meanings, with two of them

¹⁸⁷ Kay (n 32) 33.

¹⁸⁸ For a consideration of these arguments as they relate to pregnancy, see: W.W. Williams, ‘Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate’ (n 8).

¹⁸⁹ Kay (n 32) 34.

¹⁹⁰ Williams, ‘Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA’ (n 8) 96.

¹⁹¹ Kenney (n 8) 359.

being diametrically opposed.¹⁹²First, they note that some writers interpret the term ‘post’ to connote the death, or passing of feminism. While, others hold that it denotes only an ongoing transformation of feminism. The third, and they argue, ‘more problematic’ interpretation, is that it signifies feminism is stuck in a middle ground, with a trajectory that is ‘bewilderingly uncertain.’¹⁹³In conclusion, the authors argue that any attempt to fix a meaning to post-feminism, ‘looks futile and even misguided,’ and they prefer to understand the term as a ‘junction between a number of often competing discourses and interests.’¹⁹⁴Martha Chamallas calls these competing discourses ‘antifeminist criticism,’ and suggests that there were at least ‘three distinct genres’ of antifeminist criticism’ proliferating in the 1990s.¹⁹⁵She argues that the first genre used evolutionary biology to explain and justify the existence of gender inequality. The second genre claimed an excessive focus by feminists on the victimization of women, and the third and final genre argued that women had achieved equality.¹⁹⁶Whatever the genre chosen, these post feminists appear to share a common theme, which ignores the gender wage gap and the particular obstacles that pregnancy and childbirth present to working women, and assert that the goals of feminism have been achieved, to the extent that they can ever be achieved.

According to Heywood and Drake, these post-feminists were ‘a group of young conservative feminists who explicitly defined themselves against and criticized feminists of the second wave.’ As such, they were ‘antifeminists’ who viewed feminism as a historical artefact, a ‘dirty word’ and feminism as ‘women’s worst enemy.’¹⁹⁷These antifeminist views are exemplified in the writings of journalist Caitlin Flanagan, who asserts that equal rights and opportunities brought a ‘prescription for unhappiness’ for the modern woman. Waxing nostalgic for the time before second-wave feminism emerged as a political movement, Flanagan considers the choices brought by feminism

¹⁹² Stéphanie Genz and Benjamin A. Brabon, *Postfeminism cultural texts and theories* (Edinburgh University Press 2009) 3.

¹⁹³ *ibid.*

¹⁹⁴ *ibid* 3-6.

¹⁹⁵ Martha ‘Chamallas, ‘The Backlash Against Feminist Legal Theory’ in Anita M. Superson and Anne E. Cudd (eds), *Theorizing Backlash: Philosophical Reflections on the Resistance to Feminism* (Row and Littlefield 2002) 70.

¹⁹⁶ *ibid.*

¹⁹⁷ L Heywood and J Drake (eds), *Third Wave Agenda: Being Feminist, Doing Feminism* (4th edn, University of Minnesota Press 2003) 33.

to have torn women away from marriage, family, and running a household.¹⁹⁸ While not asserting that women were, or are better off in the home, the scholarly writings of Christina Hoff Sommers, Katie Roiphe, and Camille Paglia, also argue that second wave feminism has failed women.¹⁹⁹ More accurately, Sommers argues that some feminists have caused feminism to take a ‘wrong turn.’ Rejecting the idea that women are oppressed, or that men and women are essentially the same, Sommers argues that the ‘major battles of American women for equal treatment have been fought and won.’ Labelling MacKinnon, Faludi and others ‘gender feminists’ and ‘gender war eccentrics,’ she criticises them for taking what she argues to be a dim view of men and for overly stating the victim status of women.²⁰⁰ Much of this vituperative discourse against second wave feminism is captured in Susan Faludi’s landmark book, ‘Backlash: The Undeclared War Against American Women,’ in which she argues that:

*The antifeminist backlash has been set off not by women’s achievement of full equality but by the increased possibility that they might win. A pre-emptive strike stops women long before they reach the finishing line.*²⁰¹

Ultimately, post-feminism has proclaimed a ‘female crisis’ that is being laid at the door of a feminist movement that has gone too far. Fuelled by media representations of women, this post-feminist discourse proclaims that feminism has resulted in all manner of ailments for women, including infertility, and mental health issues.²⁰² As Genz observes, ‘feminism was blamed both for doing not enough and for doing too much’ to change the lives of women.²⁰³

¹⁹⁸ Caitlin Flanagan, *To Hell with All That: Loving and Loathing our Inner Housewife*. (Back Bay Books 2006), xxii.

¹⁹⁹ Christina Hoff Sommers, *Lecture: What’s Wrong and What’s Right with Contemporary Feminism?* (2008); Katie Roiphe, ‘Date Rape’s Other Victim’ *The New York Times Magazine* (New York, June 13 1995) <<http://www.taasa.org/library/pdfs/TAASALibrary47.pdf>> accessed 7/2/2014; Camille Paglia, ‘Feminism Past and Present: Ideology, Action, and Reform’ (2008) 16 *J Human & the Classics* 1.

²⁰⁰ *ibid*, Sommers.

²⁰¹ Susan Faludi, *Backlash: The Undeclared War Against Women* (Vintage 1993) 14.

²⁰² *ibid* 8. Media portrayals include the single woman in the 1987 movie ‘Fatal Attraction,’ see: Genz and Brabon (n 192).

²⁰³ Stephanie Genz, ‘Singled Out: Postfeminism’s “New Woman” and the Dilemma of Having It All’ (2010) 43 *J Popular Culture* 97,104; Henry (n 165) 21.

c Third wave.

A belief that feminism has achieved its goal serves to distinguish post-feminists from the ‘third wave’ feminists discussed here. While this ‘third wave’ of feminist legal theory is also heralded as beginning in the early 1990s, the feminists of this stage are generationally defined.²⁰⁴ Heywood and Drake observe that these feminists are those, ‘whose birthdates fall between 1963 and 1974.’²⁰⁵ Similarly, Baumgardner and Richards calls these feminists, ‘younger women [who] grew up in a feminist influenced time’²⁰⁶ While acknowledging that ‘third wave’ feminism is another ‘contestable signifier,’ there are arguably several dominant strands that help explain this body of FLT.²⁰⁷ First, as noted above, the literature suggests that this new iteration of feminism is dominated by a generational demographic of younger feminists, but it is also defined by the ‘challenge by women of color to white feminists and the racism within the second wave.’²⁰⁸ Rebecca Walker is credited with having begun this new wave of feminism when she distinguished herself from post-feminists in 1992, by stating that she was ‘sick of the way women are being ‘negated, violated, devalued, ignored.’²⁰⁹ Writing that she sought to translate her awareness into action, she intoned that ‘I am not a post-feminist feminist. I am the Third Wave.’²¹⁰ The third wave feminism espoused by Walker was intended to represent a continuity of feminist legal theory, while also demanding recognition of diversity. Thus, where second wave feminism was thought to claim a universal experience for women, it was criticised for focusing only on the experiences of a privileged few. Third wave feminism sought to respond to this perceived failure of second wave feminism to recognise that gender is only one source of identity. In particular, the defining work of Kimberley Crenshaw argued that black women have

²⁰⁴ Henry (n 165) 23.

²⁰⁵ Heywood and Drake (n 197) 4.

²⁰⁶ Jennifer Baumgardner and Amy Richards, ‘Feminism and Femininity: Or How We Learned To Stop Worrying and Love the Thong’ in Anita Harris (ed) *All About the Girl: Culture, Power, and Identity* (Routledge 2004) 63.

²⁰⁷ Jonathan Dean, ‘Who’s Afraid of Third Wave Feminism?’ (2009) 11 *Int’l Fem J Politics* 334, 335

²⁰⁸ Henry (n 165) 62.

²⁰⁹ Rebecca Walker, ‘Becoming the Third Wave’ in Barbara Ryan (ed) *Identity Politics in the Women’s Movement* (NYU Press 2001) 78.

²¹⁰ *ibid.*

often been marginalized in second wave feminist scholarship.²¹¹ Likewise, bell hooks' influential book, 'Ain't I a Woman: Black Women and Feminism' observed that the feminist movement had failed to address race and class.²¹² Overall, the hope of third-wave feminists was that feminism 'no longer ascribes to a policy of assimilation, but wants to be multicultural.'²¹³

Secondly, this new wave of feminism appears to have grown out of the desert of disillusion that first appeared in the writings of the post-feminists discussed above. But, unlike the post-feminists, these third stage feminists believe that the fight for equality and liberation is *not* over.

Thirdly, with this new iteration, there is both continuity and disunity in feminism. This is to say that while feminists of the third stage have continued to build upon the developments of the second stage, there is also generational rivalry. These younger feminists criticize second-wave feminists, for being 'ethnocentric and overly concerned with imposing similarity upon women's difference.'²¹⁴ In general, they object to the homogeneity and common identity of a 'united sisterhood' propounded by second wave feminists. They observe that not all women are white, Western, heterosexual, middle class, or able-bodied. They also accuse second wave feminists of 'Puritanism and of imposing their sexual morality on other feminists and society-at-large.'²¹⁵ As a result, Gilmore concludes, 'Third wave feminists are demanding attention to their individuality, complexities, and contradictions.'²¹⁶

In a sense, third wave feminism is 'more global in its analysis' than the second wave.²¹⁷ Arguably, much of this global analysis is due to the influence of gay, lesbian, and queer studies, which posit that gender and sexuality are fluid categories and demand

²¹¹ Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour' (1991) 43 Stan L Rev 1241. See also the discussion in Chapter 3 of 'multiple' discrimination.

²¹² bell hooks, *Ain't I a Woman: Black Women and Feminism* (London: Pluto Press 1982).

²¹³ Reina Lewis and Sarah Mills (eds), *Feminist Postcolonial Theory: A Reader* (Routledge 2003) 190.

²¹⁴ Budgeon (n 165) 5.

²¹⁵ Henry (n 165) 115.

²¹⁶ S Gilmore, 'Looking Back, Thinking Ahead: Third Wave Feminism in the United States' (2001) 12 J Womens Hist 215, 218.

²¹⁷ Colleen Mack-Canty, 'Third-Wave Feminism and the Need to Reweave the Nature/Culture Duality' (2004) 16 NWSA Journal 154, 174.

FLT understand these identities.²¹⁸As Snyder's review of third-wave literature observes, 'Third-wavers want their own version of feminism that addresses their different societal contexts and the particular set of challenges they face.'²¹⁹Nevertheless, like their forebears, third wave feminists have been criticised, both for 'overstating their distinctiveness' from second wave feminists, and for 'being overly defensive.' They have also been lauded for their efforts, and for using a 'different set of tactics for achieving those goals.'²²⁰

d A fourth wave?

It is debatable whether feminism has entered a new 'fourth wave.' If it has, then it is said to be defined by technology and by the age of the women claiming to be feminists. Identified as a generation of women between their teen years and early twenties who use the internet to 'build a strong, popular, reactive movement online,'²²¹ these women are defined by their public demonstrations, protests, and individualized campaigns. They are the 'cyber feminists' who are involved in local and global politics, who use technology to make feminism a collective and global project. They use the internet to connect women and men, of all ages to issues of social justice, demonstrating against media sexism, domestic violence, and rape, and campaigning for equal pay, maternity leave, affordable childcare, and abortion rights.²²²

Arguably, this is not a 'fourth wave' of feminism, but merely evidence of the ongoing struggle for gender equality, which has been joined by yet another generation of women experiencing, or responding to the continuing inequalities faced by women, whether at home, or abroad. In my view, even their use of the internet to plan and organize campaigns and demonstrations can be viewed as merely a continuation of 'the personal is political' consciousness-raising efforts utilized by second wave feminists,

²¹⁸ See: 'Feminisms and their Contributions to Gender Equality,' in Judith Lorber (ed) *Gender Inequality: Feminist Theories and Politics* (Roxbury 2010).

²¹⁹ R. Claire Snyder, 'What is Third-Wave Feminism? A New Directions Essay' (2008) 34 *Signs* 175, 178.

²²⁰ *ibid* 192.

²²¹ See: Kria Cochrane, 'The fourth wave of feminism: meet the rebel women' *The Guardian* (London, 10/2/2013) World News <<http://www.theguardian.com/world/2013/dec/10/fourth-wave-feminism-rebel-women>> accessed 12/2/2014.

²²² *ibid*.

rather than any distinct feature of fourth wave feminism. This suggestion is supported by the fact that in 1998, second wave feminist Ellen Messer-Davidow argued strongly for academic feminism to reconnect with national and local feminism through networking and technology.²²³ And, Hawthorn and Klein noted in 1999, that ‘Every campaign feminists ever thought of is present on the Internet.’²²⁴ One could conclude therefore that while technology has made feminist consciousness-raising and campaign efforts easier, faster, and cheaper, especially in the hands of a technology savvy generation; its use has not been the brainchild of the fourth wave. Nor has its use ended the divide within FLT, for as Cochran observes, within this fourth wave, ‘There are, of course, differences of opinion when it comes to which subjects feminism should be addressing.’²²⁵

e Feminist legal theory and pregnancy discrimination.

This overview of FLT has served to illustrate its complexities, and to highlight the fact that while there may be a ‘common cause’ for the improving the status and wellbeing of women, there is a clear divergence among feminists as to the measures necessary to achieve these goals. The evidence presented in this thesis will suggest that this divergence is strongest at the national level in the US, where the arguments of liberal feminists have historically held sway, directly affecting the antidiscrimination measures Congress has been willing to propose and or adopt. One possible reason for the strong role that liberal feminists play in the national discourse is an acute understanding that law can sometimes be a double-edged sword or ‘Trojan horse’ for women. Research has shown that much of feminist law reform has failed to achieve lasting change.²²⁶ It has also shown that:

²²³ Messer-Davidow, ‘Rearticulating Academic Feminist Studies: For Conference Session “Last Words! Teaching and Learning at the Century’s End”’ (Speaking Out: Women, Poverty, and Public Policy- Proceedings of the Twenty-Third Annual Women’s Studies Conference, Madison, Wisconsin, October 29-31, 1998).

²²⁴ Susan Hawthorne and Renata Klein, *Cyberfeminism: Connectivity, critique and creativity* (Spinifexpress 1999) 7.

²²⁵ Cochran (n 221).

²²⁶ MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (n 186) 2.

*Legal rights do not operate in a vacuum where only law rules. The enactment and impact of rights are dependent upon and influenced by the wider political, social, and cultural contexts.*²²⁷

Consequently, some feminists, including Carol Smart, argue *against* advancing law reform and legal rights as a means to improve the status of women, holding that such an approach has been a dangerous focus for feminism, because one ‘cannot predict the outcome of any individual law reform.’²²⁸ Smart argues that the problem with using rights as part of a feminist strategy is that, ‘Legal rights do not resolve problems. Rather they transpose the problem into one that is defined as having a legal solution.’²²⁹ Arguing that legal rights leave power relations intact, that individualized rights mean that few women benefit, and also observing that men can use rights as much as women, Smart concludes that the ‘use of law is hazardous.’ She also concludes that ‘feminist ‘legal theory’ is immobilized by the failure of feminism to affect law, and the failure of law to transform the quality of women’s lives.’²³⁰ In response, it is offered that while law may be hazardous and its results are not always predictable, these are poor reasons for not addressing the inequality that a lack of maternity leave or workplace accommodation cause. Indeed, a puzzling feature of US feminism as it relates to national equality measures for pregnant workers is its focus on theory, rather than on the adoption of practical measures for improving the daily lives of women, especially as ‘law is a place where theory and speculation end and action begins.’²³¹ The results of this research suggest that an adherence to the belief that US ‘feminist practice needs to be theorized and reflective, in order to ensure political interventions are well-targeted,’ has hurt pregnant workers and the families they support, rather than help.²³² This is to say that while US feminist theorizing could result in the adoption of national legislation uniquely positioned to advance substantive equality for pregnant workers, its role in the enactment of the FMLA serves to suggest otherwise. There, the role of liberal feminists

²²⁷ Renee Romkens, ‘Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women’ (2001) 13 *Yale J L & Feminism* 290.

²²⁸ Carol Smart, *Feminism and the Power of Law* (Taylor & Francis 1989) 164.

²²⁹ *ibid* 144.

²³⁰ *ibid*.

²³¹ Conaghan, ‘Following the Path to Equality Through Law: Reflections on Baker et al. Equality: From Theory to ‘Action’ (n 92)165.

²³² Davies (n 163).

in preventing the passage of maternity leave legislation helped delay the Act's passage by more than a decade.²³³

IV Comparative Method

As the hypothetical examples discussed in Part II served to indicate, the research method chosen for this study is comparative method. While intense debate surrounds the nature and value of comparative method, a review of the literature suggests that there are multiple reasons for researchers to use this approach in the study of law, including to:

- Inform policy;
- Identify common policy objectives;
- Evaluate solutions proposed to deal with common problems;
- Draw lessons about best practices;
- Assess the transferability of policies between societies.²³⁴

While all of these reasons are relevant to this research, an evaluation of EU solutions to pregnancy discrimination, and an assessment of their 'transferability' to the US are arguably the most important reasons to use comparative method in this study. I will address these two reasons in turn.

a Evaluate solutions.

Linda Hantrais writes that, 'it is not unusual for researchers to look to other countries, both for examples of how best to respond to the challenges they are facing and for ways of avoiding mistakes made elsewhere.'²³⁵ Curran adds that comparative method is valuable, because of its potential to identify solutions to what is a common problem, and for 'sharpening, deepening, and expanding the lens through which one

²³³ See the discussion in Elving (n 162).

²³⁴ L. Hantrais, *International Comparative Research: Theory, Methods and Practice* (Palgrave Macmillan 2009) 11.

²³⁵ *ibid* 135.

perceives law.’²³⁶Watson goes further, and argues that ‘borrowing from another system is the most common form of legal change.’²³⁷If these academics are correct, then utilizing a comparative approach in this research can help to identify other (not necessarily preferable) solutions to the problem of pregnancy discrimination. The results of a comparison of supranational, national, and local antidiscrimination laws can provide policy-makers with what Özücü refers to as ‘a pool of models from which to choose’ to tackle a seemingly intractable problem.²³⁸It can also provide ‘a new *perspective*’ and a better understanding of the EU and US approaches to pregnancy discrimination.²³⁹

However, for any of these results to occur, the solutions revealed from the comparison undertaken in this thesis must be closely evaluated, in order to determine their ability to help tackle the problem of pregnancy discrimination. In this evaluation, the concerns raised by feminist legal theorists outlined in Part III above, as to the role of law in either helping to end discrimination, or entrenching gender stereotypes are valuable. In particular, the critical lens of liberal feminists aids an assessment of whether the disadvantages that paid leave and workplace accommodation measures help to alleviate are outweighed by the negative stereotypes they reinforce, and to consider whether more gender-neutral measures that encourage men to share more equally in care giving can lessen these stereotypes.

Once EU solutions are evaluated, the question arises as to whether these solutions are transferable to the US. This question suggests a second important reason for using comparative method in this research, which is addressed below.

b Assess transferability.

A second important reason for using comparative method in this research is to assess the transferability of EU solutions to the US. That is, of course, if one believes

²³⁶ Vivian Grosswald Curran, ‘Dealing in Difference: Comparative Law’s Potential for Broadening Legal Perspectives’ (1998) 46 Am J Comp L 657, 658.

²³⁷ Alan Watson, ‘Legal Change: Sources of Law and Legal Culture’ (1982-1983) 131 U Pa L Rev 1121, 1125.

²³⁸ Esin Özücü, ‘Developing Comparative law,’ in Esin Özücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 55.

²³⁹ P Legrand, ‘Comparative Legal Studies and Commitment to Theory.’ (1995) 58 MLR 262, 264.

that there can be legal transfers, or, as Alan Watson calls them, ‘legal transplants.’ Alan Watson believes there can be, and defines legal transplants as the ‘moving of a rule or a system of law from one country to another or one people to another.’²⁴⁰ Legrand disagrees, and argues that ‘rules cannot travel.’²⁴¹ He asserts that ‘rules are the product of divergent and conflicting interests in societies’ and as a rule crosses boundaries, they undergo a change. In asking the question of what is transplanted, Legrand says that a rule does not retain the essential characteristics of the home institution, but becomes something different. Accordingly, he says ‘legal transplants are impossible.’²⁴²

However, as Nelken observes, Legrand’s thesis is correct only if ‘by “legal transplants,” we mean the attempt to use laws and legal institutions to reproduce identical meanings and effects in different cultures.’²⁴³ This is not the aim of this thesis, nor would it be possible, in light of the unique mandates set by the US Constitution.²⁴⁴ Nor is it supported by Watson, who agrees that ‘a rule once transplanted is different in its new home.’²⁴⁵ He suggests that often what is transplanted is an idea, rather than a rule.²⁴⁶ Rather than a transplant of EU antidiscrimination law to the US, the results of this thesis suggest the transplant of an ‘idea.’ The idea is of a more holistic substantive equality approach to ending pregnancy discrimination, as discussed in the Introduction to this thesis, which requires the adoption of practical measures and soft law strategies specifically designed to make the workplace more inclusive, while also addressing the needs of both women and men for a balance between work, private life, and caring responsibilities. Indeed, the results of this research suggest that such an approach is slowly taking root in the US.

Furthermore, it may also be that what the results of this research suggest is more properly termed a ‘legal convergence’ of the US approach with the EU holistic approach to discrimination and equality, rather than a ‘legal transplant.’ This convergence is in

²⁴⁰ Alan Watson, *Legal Transplants* (Scottish Academic Press 1974) 21.

²⁴¹ P Legrand, ‘The Impossibility of ‘Legal Transplants.’ (1997) 4 MJ 111, 112.

²⁴² *ibid*, 114

²⁴³ David Nelken, ‘Comparatists and Transferability’ in P. Legrand and R. Munday (eds), *Comparative Legal Studies: traditions and transitions* (OUP 2011) 442.

²⁴⁴ See Chapters 5- 7.

²⁴⁵ Alan Watson, ‘Ius Commune Lectures on European Private Law, 2: Legal Transplants and European Private Law’ (2000) 4 EJCL, Introduction.

²⁴⁶ Alan Watson, ‘Comparative Law and Legal Changes’ (1978) 37 CLJ 313, 315.

keeping with the research of David Clark, who suggests that ‘legal convergence’ can result from ‘similar social and cultural developments in Europe and America.’²⁴⁷ Certainly, similar developments were illustrated by the statistics outlined in the Introductory Chapter. They are also illustrated by President Obama’s remarks made the White House Summit on Working Families in 2014, concerning the need for Congress to pass laws supporting a balance between work and families. Noting that ‘there is only one developed country in the world that does not offer paid maternity leave, and that is us,’ President Obama stated that:

*Family leave, childcare, workplace flexibility, a decent wage—these are not frills, they are basic needs... They should be part of our bottom line as a society.*²⁴⁸

The assertion of similar developments does not ignore the different context against which EU and US antidiscrimination laws have been adopted, and against which an evaluation of transferability must be made. Distinct features exist in the US, which operate to render some legal solutions, even if preferable, not necessarily transferable.²⁴⁹ The EU antidiscrimination measures examined in this thesis cannot simply be borrowed by the US without ‘investigation into whether the rules are the best possible or even appropriate.’²⁵⁰ As Rose observes, ‘desirability does not guarantee practicality.’²⁵¹ Indeed, the results of this research suggest the legal provision of job protected, paid leave, and workplace accommodations are ‘desirable’ equality measures that the US could and should adopt nationally. In contrast, the supremacy of the US Constitution renders impractical the enactment of a mandatory maternity leave law, even if it were deemed desirable. Added to this, there is ‘always a risk of rejection.’²⁵² As Hantrais notes:

²⁴⁷ David S. Clark, ‘Development of Comparative Law in the US’ in Mathias Reimann and Reinhard Zimmermann (Eds), *The Oxford handbook of comparative law* (OUP 2006) 179.

²⁴⁸ OPS, ‘Remarks by President Obama at the White House Summit on Working Families | June 23, 2014’ (*Whitehouse*, 23/6/2014) <<http://www.whitehouse.gov/the-press-office/2014/06/23/remarks-president-obama-white-house-summit-working-families-june-23-2014>> accessed 24/6/2014.

²⁴⁹ See: O. Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 MLR 1, 27.

²⁵⁰ Watson, ‘Legal Change: Sources of Law and Legal Culture’ (n 236)1147.

²⁵¹ Richard Rose, ‘Ten Steps in Learning Lessons from Abroad’ (EUI) 5.

<http://cadmus.eui.eu/bitstream/handle/1814/1763/RSCAS_2002_05b.pdf?sequence=1> accessed 1/12/13

²⁵² Kahn-Freund (n 249) 27.

The transferability of policies between countries is largely dependent on the match between prevailing circumstances in the lesson-exporting and lesson-importing countries, and the interplay between policy environments and processes. ²⁵³

The reality is that ‘there are degrees of transferability,’ and as the discussion in subsequent chapters will illustrate, there are disparities that exist in the US, which operate to render impossible and/or difficult the adoption of some gender specific equality measures.²⁵⁴The importance of recognizing such disparities has been highlighted in the work of several scholars and writers, who emphasize the need to understand the complex socio-political context of the legal system under comparison. In particular, Mitchel De S.-O.L.’E. Lasser advises that ‘the comparatist must become acquainted with the foreign legal *culture*.’²⁵⁵Similarly, Roger Cotterrell suggests that comparison requires a study of the culture itself, of ‘appreciating (interpreting and understanding) difference, not merely of observing strangeness.’²⁵⁶In his seminal work, Kahn-Freund also makes clear, ‘The use of the comparative method requires not only knowledge of the foreign law, but also of its social and above all its political context.’²⁵⁷Ultimately, as Danneman observes, ‘there is no point in comparing what is identical, and little point in comparing what has nothing in common.’²⁵⁸With this understanding, these two jurisdictions have been chosen for comparison in this thesis as they share what De Cruz identifies as a baseline of similarity.²⁵⁹That is to say, the EU and the US are at a ‘similar stage in legal, economic, political, and social evolution,’²⁶⁰ and are ‘relatively similar rather than highly divergent societies.’²⁶¹Nevertheless, as similar as they are, they are also different. Most clearly, these differences are evident in the fact that the US is a national state with a federal government and a common law

²⁵³ Hantrais (n 234) 137.

²⁵⁴ Kahn-Freund (n 249) 6.

²⁵⁵ Mitchel De S.-O.-L.’E. Lasser, ‘The question of understanding’ in P. Legrand and R. Munday (eds), *Comparative legal studies: traditions and transitions* (OUP 2011) 200 (emphasis added).

²⁵⁶ Roger Cotterrell, ‘Is it so Bad to be Different? Comparative Law and the Appreciation of Diversity’ in Örüçü and Nelken (n 238)148.

²⁵⁷ Kahn-Freund (n 249) 6, 1-27L.

²⁵⁸ Danneman, ‘Comparative Law: Study of Similarities or Differences?’ in Reimann and Zimmermann (n 247) 384.

²⁵⁹ Peter De Cruz, *Comparative law in a changing world* (3rd edn, Routledge-Cavendish 2007) 227.

²⁶⁰ *ibid.*

²⁶¹ Fred DuBow and Amitai Etzioni, *Comparative Perspectives: theories and methods* (Boston: Little Brown 1970) 9.

system. In contrast, the EU is an international entity, with a civil law tradition. Furthermore, whereas market integration was the initial thrust behind EU anti-discrimination efforts, the impact of slavery and a rights-based approach to equality have been significant in the development of US antidiscrimination legislation.²⁶² Added to this, the US is considered a country of ‘laissez-faire’ capitalism, with an ideology that celebrates individualism and believes that important societal decisions should be left to the market.²⁶³ It is also said that ‘the most abiding and durable self-characterization of the United States is that of freedom. The concept of freedom lies at the heart of American identity.’²⁶⁴ It is against this freedom that the concept of equality for pregnant workers has to compete, and where equality often ‘suffers from an unfavourable comparison with liberty.’²⁶⁵

In comparison, the EU is defined by its ‘European Social Model,’ enshrined in the idea of a ‘highly competitive social market economy, aiming at full employment and social progress.’²⁶⁶ This model is grounded in the universal values of human dignity, freedom, equality, and solidarity, where EU citizens have ‘social rights’ in addition to legal and civil rights.²⁶⁷ Varying by Member State in the level of benefits and protection afforded, these social rights include, education, healthcare, pension, unemployment benefits, and family benefits. Consequently, it has been said that ‘the welfare state is a defining feature of Europe.’²⁶⁸

This overview of differences suggests that for an assessment of EU solutions to be truly meaningful, certain legal, historical, and contextual nuances cannot be ignored.

²⁶² See the discussion in Chapters 3 and 5.

²⁶³ For a sample of works, see: Michael Foley, *American Credo* (OUP 2007); Christopher L. Tomlins and Michael Grossberg, *The Cambridge history of law in America* (CUP 2008); J Zeitlin and DM Trubek, *Governing work and welfare in a new economy: European and American experiments* (OUP 2003)

²⁶⁴ Foley (n 263) 152.

²⁶⁵ *ibid.*

²⁶⁶ See: Articles 2 and 3 of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, OJ C 326 , 26/10/2012 P. 0001 - 0390; Europa, ‘The role of the European Social Model: European Commission-SPEECH/13/752 25/09/2013’ (*europa.eu*, 25/09/2013) <http://europa.eu/rapid/press-release_SPEECH-13-752_en.htm> accessed 4/2/2014.

²⁶⁷ See: Preamble to Charter of Fundamental Rights of the European Union [2010] OJ C83/02.

²⁶⁸ Wickham James, ‘Briefing paper for ‘Infowork’ Accompanying Measure’ 2. <<http://www.tcd.ie/ERC/pastprojects/infoworkdownloads/End%20of%20Social%20Model.pdf>> accessed 5/2/2014.

This is because there are political, social, economic, and cultural events that affect the EU and US legal systems, as ‘every legal system is a product of its history and ...political fortunes.’²⁶⁹ As DuBow and Elzion note, ‘comparative analysis, as a rule, deals with contextual explanations.’²⁷⁰ However, while the assessment undertaken in this thesis seeks to take account of these explanations, word constraints limit the extent to which context can be meaningfully explored. Therefore, the discussion will be limited to a consideration of historical, legal, and conceptual differences between the EU and the US, whereupon it is suggested that the legal and conceptual differences constitute the greatest barriers to the adoption by the US of measures comparable to those found in the EU Pregnant Workers Directive.²⁷¹

c The dangers of comparative method.

Finally, it is observed that as useful as the tool of comparative method is for this thesis, it also poses problems. The literature suggests that a meaningful comparison requires circumspection by the comparator, avoiding preconceptions pertaining to native legal systems. In Markensinis’ opinion, using comparative method offers the ‘ability to challenge entrenched categories and fundamental assumptions,’ but it can also serve to entrench pre-existing prejudices.²⁷² Which is why De Cruz warns that there are ‘major pitfalls and perils that lie in wait for any comparative lawyer,’ including a ‘tendency to impose one’s own (native) legal conceptions and expectations on the system being compared.’²⁷³ While this danger is likely greater when comparing Western with non-Western legal systems, it highlights the need for the author to engage in distancing, differencing, and self-reflection. All of which requires an understanding of the law in one’s own terms, while also seeking to have one’s perspective challenged.²⁷⁴ In this regard, Frankenberg’s description of comparative law is compelling. He compares it to travelling, wherein the ‘traveller and the comparatist are invited to break away from

²⁶⁹ De Cruz (n 259) 223.

²⁷⁰ DuBow and Etzioni (n 261) 11.

²⁷¹ See Chapter 6.

²⁷² B.S. Markensinis, *Foreign law and comparative methodology: A subject and a thesis* (Oxford: Hart Pub 1997) 1.

²⁷³ De Cruz (n 259) 229.

²⁷⁴ Mitchell De S.-OL. E. Lasser, ‘The Question of Understanding’ in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2011) 213.

daily routines, to meet the unexpected and, perhaps, to get to know the unknown.²⁷⁵ This requires the legal comparator recognize their role as a participant-observer and their need to break away from firmly held beliefs and prejudices, and to avoid being ethnocentric.²⁷⁶ This suggests that ‘Reflection on our own (contrasting) cultural ‘starting-point’ is always of crucial importance in any comparison, and should be taken very seriously when planning legal transfers.’²⁷⁷

Heading this advice, this comparative research has been conducted with an eye to recognizing and challenging personal bias and prejudice.

V Conclusion.

This Chapter has done two things. First, by contrasting and comparing the legal rights of employees at a US company with the legal rights provided to employees in the EU, the inadequacy of a formal equality/equal rights based approach to addressing the problem of pregnancy discrimination was highlighted and the foundation was laid for a deeper examination of the EU and US models of equality.

Secondly, this Chapter laid the groundwork for responding to the overall research questions for this thesis, presenting the comparative and feminist framework used to consider a specific issue of discrimination and examining the role of ‘special treatment’ legislation in addressing it.

²⁷⁵ Gunter Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’ (1985) 26 Harv Int’l LJ 411, 411.

²⁷⁶ *ibid* 415, 444, 455.

²⁷⁷ Nelken (n 243) 442.

Chapter 3: The European Union model of equality

*A European approach to equality which is both pluralistic and Humanistic and which constitutes the basis for action both in the Community and in the rest of the world.*²⁷⁸

I Introduction

The purpose of these next two Chapters is to explore the EU model of equality in depth, critically evaluating its solutions to pregnancy discrimination and considering its future initiatives. Part II begins this task with a discussion of the historical background to EU gender discrimination law. An examination of the origins of the EU approach to resolving gender discrimination is important for understanding the context in which equality measures for pregnant workers are adopted. The classical view, which is discussed in the important work of Mark Bell, suggests that EU social policy is located between two theoretical frameworks. They are, a ‘market integration’ model, which is primarily concerned with the functioning of the internal market, and a ‘social citizenship’ model, which is concerned with the protection of fundamental rights.²⁷⁹ In the following discussion, it will be seen that because the Treaties maintain an economic focus for the Union, EU gender equality policy has historically emphasized the labour market participation of pregnant women and the idea of economic maximization, rather than equality per se.

Part III offers an overview of the different forms of EU law and the powers of the EU institutions to adopt measures designed to address pregnancy discrimination. An initial comparison is undertaken with the laws and powers of the US Congress and the state legislatures, which will provide a foundation for the in-depth comparative discussion undertaken in subsequent Chapters.

Against this background, Part IV begins the exploration of the EU model of equality, with a discussion of the right to equal treatment between women and men, and an initial comparison between EU and US measures intended to end both ‘direct’ and

²⁷⁸ Commission, *Communication from the Commission—Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities*. Brussels, 21.02.1996 COM (96) 67 final. (1996) 2

²⁷⁹ See: Mark Bell, *Anti-discrimination law and the European Union* (OUP 2002) 2.

‘indirect’ discrimination.²⁸⁰ Parts V and VI examine two derogations in EU antidiscrimination law. Derogations may be understood as the exemption from, or relaxation of the mandate of equal treatment. In Part V, the key derogation requiring protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding is explored through a discussion of EU secondary law and the laws of the member states. Part VI explores the derogation permitting positive action, which Collins prefers to term ‘a duty of reasonable adjustment.’²⁸¹ From an initial comparison with US ‘affirmative action’ measures, it will be seen that there is greater flexibility in application and acceptance of gender balancing measures in the EU. From the discussion of these two EU derogations, three things will also become evident. First, derogations play a pivotal role in addressing discrimination in the EU. Secondly, they have unintended negative consequences for the wider canvas of gender equality. Thirdly, they tell us much about the value placed on gender equality by the EU.

This Chapter concludes with a discussion of the strategy of gender mainstreaming as it has been enacted at the supranational *and* national levels of the EU. Evidence will be presented in Part VII to show that the EU is fully committed to this transformative strategy and is at the forefront of utilizing it in governance. This discussion is intended to set the stage for the exploration in Chapter 7 of the debate surrounding the strengths, weaknesses, and limitations of the strategy in the EU and the specific lessons EU experience offers US nascent efforts.

II The historical basis.

A review of the literature examining EU social policy reveals an economic and social basis to EU measures designed to address gender discrimination. Before undertaking a close review of EU pregnancy discrimination law, it will be helpful first to explore these dual bases.

²⁸⁰ See also the discussion in Chapters 1 and 5.

²⁸¹ See: Collins, ‘Discrimination, equality and social ‘inclusion’ (n 43) 37.

a An economic basis.

In their Gender Equality Report to the Commission, Burri, and Prechal outline the inauspicious start to the first Treaty measure addressing equality between women and men, noting that:

*The background to [Article 119] was purely economic; the member states, in particular France, wanted to eliminate distortions in competition between undertakings established in different member states. France had adopted provisions on equal pay for men and women much earlier and it feared that cheap female labour in other member states would put French undertakings and the economy at a disadvantage.*²⁸²

Indeed, it is generally acknowledged that EU gender equality measures initially arose out of a desire by several European countries to create an economic and political union.²⁸³ By entering into this union, and in an effort to achieve their goals, the member states ceded part of their sovereignty, via Treaty, to the EU institutions, to make and adopt laws. As the CJEU observed in the landmark case of *Costa v E.N.E.L.*:

*The member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law, which binds both their nationals and themselves.*²⁸⁴

With this economic goal of competitiveness, gender discrimination became a focus for the member states of this European Economic Community (EEC, now the European Union (EU)), because it was understood to create market inefficiency. As Hugh Collins observes, discrimination was seen to damage both profits and productivity. Consequently, action was taken not only because ‘unequal treatment is wrong in principle,’ but also because ‘it is inefficient in practice.’²⁸⁵ Simply stated, the problem was that a member state that paid women less than men could have an economic advantage against a member state that statutorily provided for equal pay between the sexes. The resolution to this problem was the adoption of Article 119 in the original constitutional treaty establishing the EEC in 1957, which was concerned with

²⁸² Susan Burri and Sacha Prechal, *EU Gender Equality Update 2010* (EU Commission, 2010) 2.

²⁸³ There are currently 28 Member states: Europa, ‘European Union: Countries’ <http://europa.eu/about-eu/countries/index_en.htm> accessed 20/11/2014.

²⁸⁴ Case 6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 1141, para 3.

²⁸⁵ Collins, *Employment law* (n 30) 55.

the principle of equal pay between men and women for equal work.²⁸⁶Notwithstanding its economic foundation, Article 119 is generally acknowledged to have provided a springboard to the social basis for equality, and the means by which other areas of gender discrimination could be addressed by the EU institutions. Much has been written about the social basis of EU antidiscrimination law, and the EU's move 'from market integration to the rights of individuals,' and from a narrow focus on market efficiency to a 'broader focus on human dignity, diversity and social inclusion.'²⁸⁷However, as the discussion below reveals, this move has been slow and measured.

b A social basis.

The fact is, as Fredman writes, Article 119 effectively lay 'dormant' for 20 years,²⁸⁸before being resurrected by the European Court of Justice (ECJ, now Court of Justice of the EU (CJEU)), in the case of *Defrenne v Sabena*.²⁸⁹In that case, the court acknowledged that the aim of Article 119 was to avoid 'competitive disadvantage in intra-community competition.'²⁹⁰It also emphasized that the union was *not* merely an economic one, but one that ensured social progress. This is to say that Article 119 had a double aim, 'which is at once economic and social.'²⁹¹This assertion had as its background the Council Resolution of 21 January 1974, concerning a Social Action Programme, the preamble to which stated that such a programme:

*Involves actions designed to achieve full and better employment, the improvement of living and working conditions and increased involvement of management and labour in the economic and social decisions of the Community, and of workers in the life of undertakings.*²⁹²

The Resolution also set forth a priority of undertaking:

²⁸⁶ Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (Euratom) (now Article 157 TFEU).

²⁸⁷ Sargeant (n 14) 43.

²⁸⁸ S Fredman, *Discrimination law* (2nd edn, OUP 2011) 42.

²⁸⁹ Case 43/75 *Defrenne II* [1976] ECR 455

²⁹⁰ *ibid*, paras 10-12.

²⁹¹ *ibid*.

²⁹² Council 'Resolution of 21 January 1974 concerning a social action programme' OJ C 13/2.2/1972.

*Action to achieve equality between men and women as regards access to employment and vocational training and advancement and as regards working conditions, including pay.*²⁹³

The actions undertaken were the adoption of three Council Directives. Directive 75/117/EEC, relating to the application of the principle of equal pay for men and women (EPD).²⁹⁴ Directive 76/207/EEC, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions (ETD),²⁹⁵ and Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, as discussed further below, and throughout this thesis.²⁹⁶

This notion that there is a ‘double aim’ in the EU, that it is at once both economic and social in its aims, has since been solidified by the provisions of the amending Treaties adopted since 1974. Most notably, the Treaty of Amsterdam expanded the competence of the community to adopt legislation on the issues of discrimination and equality. Article 2 was extended to task the Commission with promoting equality between women and men and Article 3 was extended to specifically endorse the strategy of gender mainstreaming by providing that, ‘In all other activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.’ Additionally, Article 13 was added, which authorized action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Treaty of Amsterdam also expressly replaced Article B in the Treaty on EU (Maastricht Treaty) with the specific objective ‘to promote economic and social progress and a high level of employment.’²⁹⁷

It is generally observed that approval of the EU social agenda (ESA) was intended to end the asymmetry of the social and economic dimension, which Edoardo Ales argues, signifies the EU’s move towards a ‘social market economy versus a purely neoliberal one.’²⁹⁸ Sonia Mazey’s description is informative in this regard, noting that

²⁹³ *ibid*, para 4.

²⁹⁴ Equal Pay Directive (n 172).

²⁹⁵ Equal Treatment Directive (n 122).

²⁹⁶ Equal Treatment in matters of social security (n 174).

²⁹⁷ See, Article 1(5) of the Treaty of Amsterdam (n 93).

²⁹⁸ E. Ales and others (eds), *Fundamental Social Rights in Europe: Challenges and Opportunities* (Intersentia 2009) 46.

the Treaty of Amsterdam marked ‘the constitutional coming of age for EU gender equality policy and the birth of EU gender mainstreaming.’²⁹⁹This coming of age was notably expanded in 2000, when the European Council set forth ‘the indissoluble link between economic performance and social progress,’ with its approval of the ESA and the Charter of Fundamental Rights (CFR), which, in light of its provisions, Diamond Ashiagbor calls an ‘enormously important supporting beam to the edifice of European social rights.’³⁰⁰Ashiagbor is correct to highlight the central role played by the CFR in cementing EU social rights, because, in addition to its declaration of specific ‘fundamental rights’ for EU citizens, there is a Preamble, which includes the statement that, ‘the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.’³⁰¹Indeed, any lingering misunderstanding as to the importance of the CFR is removed by the Lisbon Treaty, which amended the Treaty of Maastricht (TEU), now known as the Treaty on the Functioning of the EU (TFEU), and made the CFR *legally* binding, with the same status as the Treaties. Article 2 of the Lisbon Treaty also reaffirmed the declaration in the CFR, providing that:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

In light of such developments, academics have emphasized the social commitment of the EU.³⁰²Arguably, this commitment is supported by the judgement of the CJEU in the case of *Deutsche Telekom AG v. Lilli Schroeder*, which had the effect of elevating the social objective dramatically. In that case, the Court held that:

²⁹⁹ Sonia Mazey, ‘Policy Entrepreneurship, Group Mobilisation and the Creation of a New Policy Domain: Women’s Rights and the European Union’ in Jeremy Richardson (ed) *Constructing a Policy-Making State? Policy Dynamics in the EU* (OUP 2012) 19.

³⁰⁰ Europa, *Presidency Conclusions: Nice European Council Meeting—Nice 7, 8 and 9, December 2000* IV; Diamond Ashiagbor, *The European employment strategy: labour market regulation and new governance* (OUP 2005) 177.

³⁰¹ Treaty of Lisbon (n 266).

³⁰² E.F. Defeis, ‘The Treaty of Amsterdam: The Next Step towards Gender Equality.’ (1999) 23 BC Int’l & Comp L Rev 1.

*The economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different member states, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.*³⁰³

Notwithstanding this judgment, the results of this study suggest that the original market approach to ending discrimination has not, and likely will never disappear in the EU. Instead, as the subsequent discussion will show, economic considerations remain at the forefront in the provision of pregnancy and maternity pay and maternity leave. As Tomas-Bianov astutely observes, the economic perspective is the ‘red thread in the [equality] strategy.’³⁰⁴

c Criticisms of the economic basis.

There has been a significant amount of commentary regarding the economic basis of EU social policy, including from Sandra Fredman, who observes that

*From its inception as an economic union, the EU granted the status of fundamental rights, not to civil and political rights or even socio-economic rights, but to basic market freedoms: freedom of movement of goods, services, and labour. Any social rights have, until recently, had to be justified in market-creating terms.*³⁰⁵

Likewise, Joanna Kantola notes in her book, *Gender and the European Union*, that gender equality law in Europe was initially adopted not out of concern with women’s interests, but out of a concern with economic principles.³⁰⁶ The reality is, as the academics highlight, the EU did not initially seek to address gender discrimination from a moral or ethical standpoint. Rather, its drive to adopt antidiscrimination law was based upon a need to remove existing barriers prohibiting the achievement of a single economic market. This need, as Mark Bell observes, meant that EU gender equality law was initially an ‘economic expedient’ and was only later recast as a fundamental

³⁰³ Case C-50/96 *Deutsche Telekom AG v Schröder* [2000] ECR I-743, para 57.

³⁰⁴ Anamaria Tomas-Bianov, ‘Transforming Europe: EU’s Gender Policy’ (2011) 4 (53) *Bulletin of the Transilvania University of Brasov* 139, 142.

³⁰⁵ Fredman, ‘Transformation or Dilution: Fundamental Rights in the EU Social Space’ (n 72) 42.

³⁰⁶ See the discussion in Johanna Kantola, *Gender and the European Union* (Palgrave Macmillan 2010)18.

right.³⁰⁷Notwithstanding this recasting, as Catherine Barnard notes, EU social policy remains an eclectic body of ‘employment-related social policy.’³⁰⁸This suggests that sex discrimination law is at best inextricably intertwined with economic integration, or at worst, is secondary to it. Any secondary role has been severely criticised by some academics, including Maria Stratigaki, who argues that the economic basis of EU social policy is ‘a limitation upon the reach of policy outcomes.’ While her observations are not without basis, her assessment of European politicians as playing only, ‘lip service’ to equality as a fundamental principle of democracy and social justice is somewhat excessive. While it is undeniable that EU gender equality policy has an, ‘inherent double identity as both economic and social policy,’ the equality provisions found in EU primary and secondary legislation cannot justly be described as insincere.³⁰⁹ Furthermore, with regard to pregnancy discrimination, it will likely always be at the intersection of employment and social welfare, as women are fuel for the EU economic engine. For instance, even under the terms of the Commission’s ‘Strategy for Equality Between Women and Men 2010-2015,’ the focus is to get more women into employment in order to effectuate, ‘widening the human capital base, and raising competitiveness.’ Indeed, the EU Commission is unabashed in declaring that ‘In order to achieve smart, sustainable, and inclusive growth, the potential, and the talent pool of women needs to be used more extensively and more efficiently.’³¹⁰This achievement is to be secured through a variety of initiatives discussed in Chapter 4, including an increased commitment to gender mainstreaming, specific actions to close the gender pay

³⁰⁷ Mark Bell ‘The Principle of Equal Treatment: Widening and Deepening’ in P. Craig P and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 615.

³⁰⁸ Catherine Barnard, ‘“EU” Social Policy: From Employment Law to Labour Market Reform’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 660.

³⁰⁹ M. Stratigaki, ‘The Cooptation of Gender Concepts in EU Policies: The Case of “Reconciliation of Work and Family”’ (2004) 11 *Social Politics: International Studies in Gender, State & Society* 30, 37

³¹⁰ Commission, *Strategy for equality between women and men* (2010) 12. See also: Europa, ‘Press Release: Gender Equality: eradicating poverty and spurring economic growth (Women’s Rights and Gender Equality Committee)’ (28/01/11).
<<http://www.europarl.europa.eu/en/pressroom/content/20110124IPR12364/html/Gender-equality-eradicating-poverty-and-spurring-economic-growth>> accessed 20/08/2011. Declaring that GDP would increase 30% if women’s employment and productivity rates were similar to men’s.

gap, and the increased provision of childcare facilities and other work/life reconciliation measures for women and men.³¹¹

It is offered that in light of the concrete and positive developments in equal opportunity that can be secured through practical measures, it should matter little that the basis for their promotion is economic rather than social. Nor should it be surprising that their basis is primarily economic. After all, while the Treaty of Lisbon makes explicit reference to goals beyond the establishment of an internal market, to include combating social exclusion and discrimination, and the promotion of the economic, social and territorial cohesion of the member states, the founding economic goal of the Union remains at the forefront of EU social policy.³¹² This suggests EU anti-discrimination law will always be shaped by a market focused on the movement of goods, capital, services, and labour, and the need to prohibit market distortion. To think otherwise, would be to fail to understand the purpose of what has been an economic union first, and foremost. Notwithstanding this focus, the results of this research suggest that the correlative social commitment of the EU has historically translated into the net being thrown much wider than in the US, in terms of the practical measures adopted to tackle discrimination and achieve equality for pregnant workers.

III The *acquis communautaire* and legislative authority.³¹³

This Part explores the types of laws that can be adopted to address pregnancy discrimination at the supranational level and the role played in their adoption by the EU institutions. Due to word constraints, what is provided here can only be an overview, which is intended to aid the understanding of the substantive provisions of the EU model

³¹¹ The gender pay gap is defined as the difference between male and female median earnings divided by male median earnings. Maternity leave is offered as one among other reasons for the pay gap in Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategy for equality between women and men 2010-2015, COM (2010) 491 final* (2010).

³¹² Treaty of Lisbon (n 266), Article 2.

³¹³ A French term referring to the cumulative body of EU law.

of equality, and provide a basis for the comparative examination with the US, which is undertaken in subsequent Chapters.³¹⁴

a Legislative form.

As stated previously, the EU model of equality uses a dual track approach to tackling pregnancy discrimination, which combines equal treatment with special treatment measures, complemented by the transformative strategy of gender mainstreaming. This means that EU gender equality legislation is made up of both ‘hard’ and ‘soft’ laws, as those terms were defined in Chapter 1. More specifically, ‘hard’ laws in the EU are the primary legislation of the Treaties and secondary legislation in the form of Regulations, Directives, and Decisions. In contrast, EU soft law, as an ‘umbrella concept,’ generally includes communications, notices, guidelines, recommendations, strategies, and the opinions of the EU Commission and Parliament.³¹⁵ Added to this, it can be said that EU laws are either ‘hard’ or ‘soft’ in the sense that only some laws are legally binding upon the member states and, or provide for legal sanction for lack of compliance. In this regard, Regulations, Directives, and Decisions take precedence over national law, and whereas Regulations are binding legislative acts that are applicable across the entire EU, Directives only set forth the goal that one, more, or all member states are required to achieve. This is to say that each sovereign member state is required to *adapt* their laws to meet the goals of a Directive, but is free to decide how to do so. In contrast, a Decision is binding only upon those to whom it is addressed.

In Chapter 1, it was also observed that there are significant differences of detail in the EU and US models of equality. One significant difference noted here is that the types of legislative measures available to the EU institutions do not exist in the US. In the US, Congress and the state legislatures may pass only Bills and Resolutions, and the

³¹⁴ For an introduction to EU law, see: Paul Craig, Grainne de Búrca, *EU Law, Text, Cases and Materials* (5th edn, OUP 2011); Trevor C. Hartley, *The foundations of European Community law: an introduction to the constitutional and administrative law of the European Community* (6th edn, OUP 2007); Anthony Arnall, *The European Union and its Court of Justice* (2nd edn, OUP 2006); Anand Menon, Stephen Weatherill and Erik Jones, *The Oxford handbook of the European Union* (OUP 2012).

³¹⁵ Korkea-Aho (n 86) 274.

President can issue Executive Orders.³¹⁶ Admittedly, while a difference in legislative form affects only the type, rather than the substantive provisions of antidiscrimination laws, this difference is still important to highlight because it provides one very good reason why there can never be a complete convergence of EU and US pregnancy discrimination law, even if it were desired.³¹⁷

b Legislative authority.

A more important difference between the EU and US models of equality is in the conferral of legislative authority. In the EU, it is generally understood that the bulk of supranational legislative authority resides in the Commission, whose members are appointed by the member states.³¹⁸ As a hybrid institution, with a dual function as the policy making arm of the EU, the Commission has an institutional structure that combines executive, legislative, and judicial functions. Indeed, traditionally, the Commission has three core competencies—proposing, monitoring, and enforcing EU legislation. More specifically, it has the power to initiate legislation and develop policy. It also has power to enforce EU law via infringement proceedings against member states, under Article 258 of the Treaty on the Functioning of the European Union (TFEU). These combinational roles have led Laffan to describe the Commission as a ‘policy entrepreneur’ and ‘policy manager,’³¹⁹ Linarelli also observes that in terms of gender equality, the Commission has emerged to become an, ‘especially vibrant law-making institution.’³²⁰ These are fair descriptions. In light of the significant powers conferred upon it, the Commission has historically had a central role in directing the EU agenda and shaping the content of its policy and norms.³²¹ However, it is fair to say that recent Treaty amendment and member state policy changes have reduced the vibrancy of the Commission to some degree. Notably, Article 289 (2) TFEU requires that in

³¹⁶ See the discussion in Chapters 5-7.

³¹⁷ See Chapter 2 for a discussion of legal convergence. See Chapter 5 for a discussion of US legislative authority and legislative form.

³¹⁸ See generally, Paul Craig, Grainne de Búrca, (n 316)

³¹⁹ B. Laffan, ‘From policy entrepreneur to policy manager: the challenge facing the European Commission’ (1997) 4 JEPP 422.

³²⁰ J. Linarelli, ‘The Economics of Uniform Laws and Uniform Lawmaking, The’ (2002) 48 Wayne L Rev 1387, 1443.

³²¹ See generally, JHH Weiler, ‘The Transformation of Europe’ (1990-1) 100 Yale LJ 2403.

proposing legislation, which is usually adopted by the Council of Ministers, the EU Parliament is to give its consent, as a special legislative procedure, whenever new legislation on combating discrimination is being adopted. In this procedure, Parliament has the right of veto, which the EU Council cannot overrule. Added to this, there are the effects of member state austerity policies arising from the global economic recession dating back to 2008, which are clearly revealed in the inability of the Commission to secure agreement on its Proposal for a new Pregnant Workers Directive, as discussed in Part V, subsection c, below.³²²

Notwithstanding the foregoing, it is suggested that the Commission remains essential to achieving progress in tackling pregnancy discrimination in the EU, and as the evidence presented in Chapter 5 will reveal, in comparison to the US Congress, the Commission remains far more vibrant in terms of advancing gender equality law. Indeed, the academic research considering the legislative role of the Commission, suggests there are two key reasons for the Commission's continued vibrancy. First, the somewhat vague, general, and incomplete Treaty language, in terms of its aspirations and goals has aided the Commission and promoted flexibility in the measures it has proposed.³²³ Added to this, there are 24 official languages in the EU as of 2015, which make the drafting of legislation difficult. In this context, as Voermans writes, 'constructive ambiguity greases the wheels of political cooperation.'³²⁴ It also strengthens the legislative role of the Commission. This is to say that the use of terms sufficiently infused with optimism, yet vague enough to attain the political support of the twenty-eight signatories to a Treaty, enable the Commission to stretch its legislative authority to the maximum limit. An outline of Treaty provisions conferring authority upon the Commission to legislate on gender equality issues beyond equal pay will serve to explain this last point more clearly.

³²² For a discussion of the effects of austerity, see: Jill Rubery, 'Austerity and the Future for Gender Equality in Europe' (2015) 68 (4) ILR 715.

³²³ See: Laffan (n 321). Also, Mariagrazia Rossilli (ed) *Gender policies in the European Union* (P. Lang 1999); Chris Shore, 'European 'Governance' or Governmentality? The European Commission and the Future of Democratic Government' (2011) 17 Eur LJ 287; Catherine Hoskyns, 'Women's Equality and the European Community' (1985) 20 Feminist Rev 70; Mazey (n 11).

³²⁴ W. Voermans, 'Styles of Legislation and Their Effects' (2011) 32 Stat LR 38, 44.

As observed in Part II above, the Treaty of Amsterdam first expanded the authority of the Commission, whereby Article 141(ex 119) extended the equality principle beyond the workplace, and imposed a general obligation on the EU in *all* of its actions to eliminate inequality and to advocate equality. This expansion was confirmed by Article 1(a) of the Treaty of Lisbon, and Article 23 of the CFR, which enshrine equality as a common value and fundamental right in the EU. Article 2(3) of the Treaty of Lisbon further mandates combating discrimination and social exclusion and the promotion of equality between women and men. While providing the Commission with a Treaty basis for legislative measures, these provisions, along with Article 10, also provide for ‘enhanced cooperation’ between the EU member states in matters involving the non-exclusive competencies of the Union, in areas such a social policy, economic policy, health, and education. Moreover, Article 23 of the CFR states that equality between men and women must be ensured in *all areas*, including employment, work, and pay.

A second and key reason for the legislative vibrancy of the EU Commission is the adoption of the Qualified Majority Voting (QMV) decision-making procedure of the Council in the field of health and safety. Prior to the adoption of QMV, under Article 118a of the EC Treaty (now Article 137), a single member state of the EU could, and often did seek to veto equality measures. Instead, with the adoption of QMV, the adoption of equality Directives, including the Pregnant Workers Directive (PWD) was ensured. Some discussion of UK government objections surrounding the enactment of the PWD is appropriate here.

When the Directive was proposed, the UK observed the availability of Article 100 of the EC Treaty as an alternative, and it argued, sounder legislative basis for the proposal. While this argument was not without reason, it had more to do with procedure than with substance. This is to say, UK objections were grounded not so much in a desire for legislative accuracy as they were in a desire to thwart the Directive in its entirety.³²⁵ Article 100 required that the Council act unanimously on a proposal of the Commission, in contrast to Article 118a, which provided for QMV. Now, QMV under

³²⁵ See: Evelyn Ellis, ‘Protection of Pregnancy and Maternity’ (1993) 22 ILJ 63, 65

the TFEU, Article 153(1) enables legislation in the area of equality and combating social exclusion to be more easily adopted at the EU level.

As Table 1 below illustrates, within the milieu of its delegated authority, the Commission has been able to propose a broad array of equality measures.

Table 1: EU Equality Directives

Directive	Number	Amended	OJ Reference
Equal pay for Men and Women	75/117		OJL 45, 19/2/1975
Equal Treatment for Men and Women in Employment	76/207	2002/73	OJL269,5/10/2002
Equal Treatment of Men and Women in Statutory Schemes of Social Security	79/7		OJL 6,10/1/1979
Equal Treatment of Men and Women in Occupational Social Security Schemes	86/378	96/97	OJL 46, 17/2/1997
Equal Treatment of Men and Women engaged in an activity, including Agriculture, & self-employed.	86/613	2010/41	OJ 180, 15/07/2010
The Pregnant Workers Directive	92/85	2007/30	OJL165,27/6/2007
The Parental Leave Directive	96/34	2010/18	OJL 68/13, 18/3/2010
Directive on Fixed-term work	99/70		OJL 175,10/7/1999
Equal treatment of men and women in access to and supply of goods and services.	2004/113		OJL373,21/12/2004
Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. (RECAST)	2006/54		OJL204,26/07/2006
Proposal for a Directive amending Council Directive 92/85/EEC COM(2008) 637 final			
Proposal for a Directive for improving the gender Balance among non-executive Directors of companies listed on stock exchanges COM(2012) 614 final			

Source: Author's analysis of EU legislation

IV The EU dual track approach to equality.

Having provided the historical and legal background to the EU model of equality, the remainder of this Chapter explores its ‘dual track’ approach, which seeks substantive equality by combining equal treatment with special treatment measures, complemented by the transformative strategy of gender mainstreaming. This Part begins with an examination of the EU provision of equal treatment between women and men. It then explores the differences in application of the concept of indirect discrimination between the EU and the US, providing initial evidence for the conclusion that the concept has potential to be far more transformative for gender equality in the EU than in the US.³²⁶

a Direct discrimination.

To restate, equal treatment (formal equality) is the centre-point of EU and US antidiscrimination law. As stated above, in the EU equal treatment was originally enshrined in Treaty as an isolated provision with regard to equal pay. It was expanded during the 1970s by three Directives regarding equal pay, equal treatment as regards access to employment, and equal treatment in matters of social security.³²⁷ The purpose of these Directives was to put into effect in the member states the principle of equal treatment for men and women in an employment context. Accordingly, each Directive contained the negative prohibition of discrimination on grounds of sex, providing in virtually identical terms ‘that there shall be no discrimination whatsoever on ‘grounds of sex, either directly or indirectly by reference in particular to marital or family status.’³²⁸ This mandate of formal equality was intended to end both direct and indirect discrimination in the EU and was restated in Article 14(1) of the Directive 2006/54/EC (Recast Directive). The Recast Directive repealed and recast 76/207/EEC (as amended by 2002/73/EC) and several other Directives, providing that there shall be no direct or indirect discrimination ‘on grounds of sex’ in the public or private sectors, including

³²⁶ For a discussion of the application of the concept in the US, see Chapter 5.

³²⁷ Equal Pay Directive (n 172); Equal Treatment Directive (n 122); Equal Treatment in matters of social security (n 174)

³²⁸ Equal Treatment Directive (n 122) Article 5(1).

public bodies, in relation to employment, working conditions; including dismissals as well as pay.³²⁹

According to settled EU case law, direct, or overt discrimination involves ‘less favourable’ treatment ‘on grounds of sex,’ as in the use of masculine and feminine gender in job advertisements, job descriptions, and collective agreements; discrimination against married women, pregnant women and women on maternity leave; differences in pay and, or working conditions according to sex, including social benefits and retirement ages; and by virtue of Directive 2004/113/EC, where sex is a factor in the assessment of insurance risks.³³⁰

As observed in Chapter 1, the requirement of ‘less favourable treatment’ requires a point of comparison. A comparison must be made between cases of persons of different sex, such that the circumstances in the one case are the same, in the sense of being substantially similar, or not materially different. A problem arises therefore where inequality stems from gender difference, as in the case of pregnancy. Pregnancy, as Fredman observes, involves ‘a difference with distinction.’³³¹ Initially, in resolving this problem, the national courts of the EU member states were ‘the first to wrestle with the question,’ as there was no express prohibition against pregnancy discrimination in the original Treaty.³³² At the outset, as no point of comparison could be found between a

³²⁹ *ibid*, Article 2(1). Now Article 2(1) (a) and (b) of the Recast Directive (n 15), the EPD 75/117/EEC (n 171), ETD 76/207/EEC; Directive 86/378/EEC on equal treatment in occupational social security schemes and Directive 97/80/EC on burden of proof in cases of discrimination based on sex were repealed and recast.

³³⁰ See: Case 129/79 *Macarthy's Ltd v Wendy Smith* [1980] ECR 1275, where a female manager was paid less than male predecessor. Also, Case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 0723, involving a different pensionable age for men and women; Case C-177/88 *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941, refusal to appoint a pregnant woman; *Hertz* (n 126), dismissal by reason of pregnancy; Case C-187/98 *Commission of the European Communities v. Hellenic Republic* [1999] ECR I-07713, where regulations imposed conditions on married female workers that were not imposed on married male workers; Case C-595/12 *Loredana Napoli. v. Ministero della Giustizia-Dipartimento dell'Amministrazione penitenziaria*. [2014] ECR 0, concerning the automatic exclusion of a female worker from a training course because she has taken compulsory maternity leave. See: Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. {2004} OJL 373/37, and the decision of the CJEU in Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL and others v Conseil des ministres* [2011] ECR 00.

³³¹ Fredman, ‘A difference with distinction: pregnancy and parenthood reassessed’ (n 138) 106.

³³² It was also not expressly prohibited in US civil rights legislation prohibiting sex discrimination. See the discussion in Chapters 5 and 6.

pregnant woman and a man, it was determined that there could be no discrimination on grounds of sex.³³³ Subsequently, the problem was resolved through comparison with ‘analogous circumstances,’ as in the UK case of *Hayes v Malleable Working Men’s Club and Institute*, where the Employment Appeal Tribunal determined that the correct comparator for a pregnant female employee was a *sick* male employee.³³⁴

When faced with this problem at the supranational level, the CJEU properly ruled that discrimination based on pregnancy is discrimination based on sex. It also cemented into the *acquis communautaire* the concept that pregnancy is *sui generis*. This is to say that in relation to pregnancy, it is impossible to find a person of the opposite sex who is in a directly comparable situation. Not even the hypothetical ‘sick man’ is comparable, for, as the court held in *Webb v. EMO Cargo*, ‘pregnancy is not in any way comparable with a pathological condition.’³³⁵ Initially, to solve the riddle that pregnancy creates, the CJEU relied upon Article 119 EEC (now Article 141 EC), and Articles 2(1) and 5(1) of Directive 76/207/EEC (now 2006/54/EC). Beginning with *Dekker*, the CJEU held that refusal to appoint a pregnant woman was direct sex discrimination.³³⁶ In the cases of *Handels-og Kontorfunktionaerernes Forbund (Hertz)*, *Habermann-Beltermann*, and *Webb v. EMO Cargo*, the Court also held that the dismissal of a pregnant worker on account of pregnancy, or essentially on account of pregnancy, can affect only women and therefore constitutes direct discrimination on grounds of sex.³³⁷ This is so regardless of whether a pregnant worker has been engaged under a fixed term (temporary), or indefinite contract.³³⁸ These judgments have since been codified by the PWD, and have been affirmed by the CJEU in all subsequent cases alleging pregnancy discrimination in

³³³ For an EU case on point, see: *Turley* (n 37) 70. Tribunal held that to dismiss a woman because she was pregnant was not to dismiss her because she was a woman. For a US case on point, see: *Gilbert* (n 37) 676. US Supreme Court held that differential treatment of pregnancy is not gender-based discrimination, because only women can become pregnant.

³³⁴ *Hayes v Malleable* (n 39) and the US case of *Stout v. Baxter Healthcare Corp.* 282 F3d 856 (5th Cir 2002).

³³⁵ *Webb* (n 125), para 25. For most recent restatement see: Case C 507/12 *Saint Prix v Secretary of State for Work and Pensions* [2014] ECR 0, para 29.

³³⁶ *Dekker* (n 333), para 12.

³³⁷ *Hertz* (n 126), para 13; Case C-421/92 *Gabriele Habermann-Beltermann v. Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. e.V.* [1994] ECR I-1657, para 15; *Webb* (n 125), para 19.

³³⁸ See: *Webb* (n 125), para 29; Case C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECR I-9383, para 34; C-191/03 *Northwestern Health Board v Margaret McKenna* [2005] ECR I-7631, para 47; Case C-320/01 *Wiebke Busch v Klinikum Neustadt GmbH & Co. Betriebs-KG* [2003] ECR I-2041.

the EU, including in the case of *Silke-Karin Mahlburg*, where a statutory prohibition preventing a woman's employment from the outset and duration of her pregnancy served as the basis for a refusal to hire.³³⁹

These EU cases are path breaking, as they exemplify the idea that 'to disregard relevant differences is as unjust as it is to regard irrelevant differences.'³⁴⁰ They also exemplify a profound difference between the EU and US models of equality. That being how each jurisdiction treats the difference that pregnancy makes. As the discussion of US antidiscrimination law in Chapter 5 will reveal, while the US also prohibits discrimination against pregnant workers, it stops short of treating pregnancy as *sui generis*. Instead, US adherence to formal equality underpins a national preference for 'pregnancy blindness' in the workplace.

b Indirect discrimination.

The concept of indirect discrimination was also initially discussed in Chapter 1, where it was noted that the concept was judicially created in the US, and as Nancy Travis observes, it was originally 'intended to displace established social norms.'³⁴¹ EU antidiscrimination law also addresses this more subtle form of discrimination, which occurs:

*Where an apparently neutral provision, criterion, or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex unless that provision, criterion, or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*³⁴²

Despite a substantive similarity, the results of this close review of case law reveals the application of the concept to pregnancy and maternity differs considerably between the EU and the US. This difference in application is directly related to the rights and protections afforded to EU women by the PWD and the Recast Directive.

³³⁹ Case C-207/98 *Silke-Karin Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549, para 27.

³⁴⁰ J. Stone, 'Justice in the Slough of Equality' (1977) 29 *Hastings LJ* 995, 1003.

³⁴¹ M.A. Travis, 'Recapturing the Transformative Potential of Employment Discrimination Law' (2005) 62 *Wash & Lee L Rev* 3, 5.

³⁴² Case C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECR I-7643, para 3, referencing Article 2(2) ETD.

This is to say that the express provision of rights to pregnant workers pertaining to hiring, dismissal, leave, pay, and workplace accommodations create less need to rely on the concept to secure gender equality in the EU than exists in the US. Instead, in the US, as the discussion in Chapter 5 will reveal, in the absence of a right to paid leave or workplace accommodations, the concept has been relied upon, albeit largely unsuccessfully, to claim workplace policies disproportionately affecting pregnant employees amount to discrimination. These workplace policies generally pertain to the provision of sick leave, light duty assignments, flexible work, and part-time work.

Juxtaposed to this, the EU variant of the US paradigm of disparate impact discrimination is focused on invalidating *other* workplace policies based upon unexamined assumptions and stereotypes disproportionately affecting women, especially atypical workers. The following exploration of the application of the concept in the EU will show that using indirect discrimination to dismantle policies that disproportionately affect women is vitally important for advancing substantive equality for pregnant workers, because upon return work and, as ‘women with children,’ they comprise the largest segment of atypical workers in the EU.³⁴³

c Atypical workers.

The author’s review of EU case law found that cases alleging indirect sex discrimination mostly concern the pay and conditions of part-time workers, and that the CJEU has been willing to take on the task of eliminating what one Advocate General refers to as ‘the frequent discrimination that still remains.’³⁴⁴ This willingness is illustrated by the fact that the Court has found indirect discrimination in an array of situations, including where an apparently neutral provision results in the hourly rate of pay for part-time work to be lower than for full-time work,³⁴⁵ and where part-time employees are excluded from an occupational pension scheme.³⁴⁶ It has also been found to occur where a part-time worker converting to full-time work is placed on a lower pay

³⁴³ See further, the statistics and discussion in Chapter 4.

³⁴⁴ Case C-300/06 *Ursula Voß v Land Berlin* [2007] ECR I-10573, Opinion of AG Ruiz- Jarabo Colomer, para 27.

³⁴⁵ See: Case 96/80 *Jenkins v. Kingsgate (Clothing Productions) Ltd.* [1981] ECR 911, paras 14-15.

³⁴⁶ See: Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607.

scale than previously occupied while job-sharing;³⁴⁷ when calculating length of service for appointment as established staff,³⁴⁸ and where to gain exemption from a qualifying exam, part-time employees must work several years longer than full-time employees.³⁴⁹ Finally, it has been found where a part-time worker is required to pay pension contributions for a longer period than a full-time worker, in order to obtain a proportionately lower pension,³⁵⁰ and where the voluntarily payment of a Christmas bonus excluding part-time workers adversely affects women.³⁵¹

One commonality that emerges from these cases is judicial flexibility towards burden of proof requirements. This is to say that statistical percentages for establishing a ‘difference in treatment which is material’ are not rigidly applied by the EU courts. Rather, the use of set percentages has been categorically rejected, with the CJEU stating in *Brachner* that:

*As a general rule, it will hardly ever be possible to lay down fixed percentages as; in addition, the absolute figures and the intensity of the effects in each case may also be relevant.*³⁵²

Flexibility is further illustrated by the Court’s refusal in the case of *Seymour-Smith* to temporally limit statistical proof, ruling that:

*With regard, in particular, to statistics, it may be appropriate to take into account not only the statistics available at the point in time at which the act was adopted, but also statistics compiled subsequently which are likely to provide an indication of its impact on men and on women.*³⁵³

This case was referred to in *Edwards (2)*, wherein the UK Court of Appeal held that when considering the statistics proffered, a tribunal ‘was entitled to take into account its own knowledge and experience’ of social factors, which in this case was,

³⁴⁷ See: C-243/95 *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance* [1998] ECR I-3739.

³⁴⁸ See: Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE* [2005] ECR I-1789.

³⁴⁹ See: Case C-100/95 *Brigitte Kording v Senator für Finanzen* [1997] ERC I-05289.

³⁵⁰ Case C-385/11 *Isabel Elbal Moreno v. Insituto Nacional d la Seguridad Social (INSS)* [2012] ECR O.

³⁵¹ NB: An employer is permitted to reduce a Christmas bonus pro temporis, to reflect periods of parental leave taken. C-333/97 *Susanne Lewen v Lothar Denda* [1999] ECR I-7243, para 50.

³⁵² Case C-123/10 *Waltraud Brachner v Pensionsversicherungsanstalt* [2011] ECR I-00000. Opinion of AG Trstenjak, para 70.

³⁵³ Case C-167/97 *R. v Secretary of State for Employment, ex parte Nicole Seymour- Smith and Laura Perez* [1999] ECR I-00623, para 49.

‘that the burden of child care falls upon many more women than men and that a far greater proportion of single parents with the care of children are women rather than men.’³⁵⁴

It is undeniable that EU judicial flexibility has been boosted by the changes wrought to the test of indirect discrimination by Directive 2006/54/EU, which recast several Directives, including Council Directive 97/80/EC of 15 December 1997, on the burden of proof in cases of discrimination based on sex. Article 2(2) of Directive 97/80/EC had provided that indirect discrimination exists where the apparently neutral provision, criterion, or practice disadvantages a substantially higher proportion of the members of one sex. This wording has been changed to require only that persons of one sex are placed at a *particular disadvantage*. This change directly impacts the type and amount of proof required to show indirect sex discrimination in the EU. As noted by Catherine Barnard:

*This shift from actual to potential disparate impact recognizes that in some areas common sense would dictate that there may well be disparate impact, but it is difficult to obtain statistical proof.*³⁵⁵

By way of contrast, and as the discussion in Chapter 5 will show, burden of proof requirements in the US hold that for there to be indirect discrimination/disparate impact, there must be ‘statistically sufficient’ disparities in the hiring, promotion, and other selection rates for any protected group, which meet the ‘four-fifths or 80% administrative rule.’³⁵⁶ Added to this, it will be seen that evidence is temporally limited and cannot serve as a basis for proving discrimination beyond the time period analysed.

From the foregoing discussion, it should begin to be evident that the EU and US approaches to indirect discrimination represent points at the opposite ends of a road to achieving greater substantive equality. At one end, judicial acknowledgement of the burden that care giving imposes upon women’s careers illustrates the breadth of the EU position on indirect discrimination, which could ultimately transform the workplace from a male-defined organizational norm, towards one that supports all workers in their

³⁵⁴ *London Underground Ltd v Edwards (No.2)* [1999] ICR 494 [20(ii)] (Potter L.J.) See also *Chief Constable of Avon & Somerset Constabulary v Ms A Chew* [2002] Emp LR 370 [52].

³⁵⁵ Catherine Barnard, *EU Employment Law* (4th edn, OUP 2012) 280.

³⁵⁶ Uniform Guidelines on Employee Selection Procedures (1978) 29 C.F.R. 1 § 1607.4(D).

roles as caregivers. At the other end, as the discussion in Chapter 5 will reveal, the judicial balancing of economic interests and a statutory defence, enable US employer's discriminatory policies towards pregnant workers to continue, under the guise of gender neutrality. While it is acknowledged that Article 2(1) (b) of the Recast Directive also provides a defence to an employer where the discrimination is 'objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,' the CJEU has unequivocally rejected 'economic justifications' for discriminatory policies, including any argument that avoidance of discrimination will involve increased costs for the employer.³⁵⁷ Thus, the picture that emerges is one in which the concept of indirect discrimination is being used in the EU to advance equality in new areas. Arguably, the CJEU is supported in its efforts by the Council's adoption of Directives specific to atypical workers, including the Agreement on Part-Time Work, the Agreement on Fixed-Time Work, and the Directive on Temporary Agency Work.³⁵⁸ In contrast, in the US, the concept is being used, albeit rather unsuccessfully, to address the ongoing lack of workplace accommodations for pregnant workers.

V Special protection of pregnancy and maternity—a derogation from equal treatment.

Sandra Fredman, in her book called *Women and the Law*, observes that 'the equal treatment principle is a complex and often clumsy medium for the protection of pregnancy and parenthood.'³⁵⁹ It is for this very reason that EU law provides a derogation from equal treatment from the beginning of pregnancy until the end of maternity leave. This derogation is contained in Directive 92/85/EEC (PWD), and is expressly referenced in Article 2(c) of Directive 2006/54/EU, which provides that

³⁵⁷ *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance* (n 348), para 40.

³⁵⁸ Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] OJ L 14/9, as amended by Council Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland, OJ L131, 05/05/1998; Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10/07/1999, p. 43–48; Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 05/12/2008, p. 9–14.

³⁵⁹ S Fredman, *Women and the Law* (OUP 1997) 191.

discrimination includes ‘any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.’³⁶⁰This Part explores the EU derogation through a discussion of the general features of the PWD, the member state laws that transpose its protective provisions into national law, and the EU Commission’s proposal for a new Directive.

This exploration recognizes that there are valid questions about whether the PWD and the broader protections afforded by national law are substantive equality measures. Indeed, as the discussion in Chapter 2 revealed, there is a clear difference of opinion among feminist legal theorists as to the equality value of ‘special treatment’ measures. That discussion is further addressed in Chapter 4, where evidence will be presented that is intended to suggest the EU institutions are fully cognizant of the role that their equality measures play in achieving true equality, or continuing harmful stereotypes, and earnestly seek to reconcile the two. Here, the focus is on exploring the different levels of protection afforded within the EU.

a Supranational protection

The derogation from equal treatment afforded to pregnant workers by EU antidiscrimination law is contained in Directive 92/85/EEC, concerning the implementation of measures to encourage improvements in the safety and health of pregnant workers, workers who have recently given birth and women who are breastfeeding (PWD). The PWD supplements existing EU antidiscrimination law. This means that not only is unfavourable treatment of a woman in relation to pregnancy or maternity direct discrimination on grounds of sex, but *special* protection is afforded against dismissal from the beginning of pregnancy until the end of maternity leave, save in exceptional circumstances. Added to this, there is a right to take maternity leave, a right to workplace accommodation, and within certain limits, a protection of income for the worker who is pregnant, or has recently given birth.³⁶¹The most remarkable aspect of the PWD is that in return for this special employment position, before, during, and after birth, there is a restrictive effect upon occupational activity. EU pregnant and

³⁶⁰ See further, the discussion on pp149ff.

³⁶¹ See: Recast Directive (n 15); Pregnant Workers Directive (n 112), and the discussion in Chapter 4.

breastfeeding workers are *not* permitted to work in activities which have been assessed as revealing a risk of exposure, jeopardizing safety and health, to certain particularly dangerous agents or working conditions.³⁶² Nor are they required to work at night, if it would be contrary to their health and safety.³⁶³ Additionally, a two-week portion of the fourteen continuous weeks of maternity leave required by the PWD is mandatory.³⁶⁴ As the discussion in Chapter 5 will reveal, such restrictions upon a woman's employment are not constitutionally permissible in the US, nor are they acceptable to liberal feminists.³⁶⁵

The reason for this restrictive effect is that health and safety concerns underpin the protections the Directive affords:

*In view of the harmful effects which the risks of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particular risk that pregnant women may be prompted voluntarily to terminate their pregnancy.*³⁶⁶

These concerns are expressly restated in the Recast Directive (2006/54/EC). Recital 24 in the preamble refers to the fact that the CJEU has recognized the legitimacy of 'protecting a women's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality.' Recital 25 also clarifies that 'protection' for maternity leave includes the right to return to the same or an equivalent post, to suffer no detriment in terms and conditions as a result of taking such leave, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.³⁶⁷

In light of its mandates, the question arises as to whether the PWD is an example of excessive legal paternalism, or a praiseworthy measure for overcoming the injustice that formal equality creates.³⁶⁸ While the discursive analysis surrounding this question is

³⁶² *ibid*, see Annex II for a definition of agents and working conditions.

³⁶³ Pregnant Workers Directive (n 112), Article 7.

³⁶⁴ *ibid*, Article 8(2).

³⁶⁵ See the discussion of feminist legal theory in Chapter 2.

³⁶⁶ *Mayr* (n 144), para 34; *Hertz* (n 126), para 13. As confirmed in para 15 of *Habermann-Beltermann* (n 340).

³⁶⁷ Recast Directive (n 15).

³⁶⁸ Legal paternalism is defined here as state interference with personal choice.

addressed in Chapters 4 and 6, a preliminary observation is appropriate here. As the PWD remains at the crux of EU antidiscrimination law, it suggests that some restriction on individual autonomy has generally been accepted as necessary to prevent the exploitation of pregnant women. The fact that the restrictive effect upon occupational activity and the benefits accorded a pregnant worker may in fact be greater under national laws than is mandated by the PWD, suggests, as Julie Suk claims, that in the EU ‘the special protection of maternity and pregnancy is hardly ever questioned.’³⁶⁹The following discussion of the varied member state protections will serve to emphasise this last point.

b National protection.

In their implementation of EU law, member states are under a duty to transpose Directives in a manner that is effective, timely, and proportionate, and must notify the Commission of the measures they have undertaken. Failure to transpose properly or to do so inadequately can result in an infringement action by the Commission, pursuant to TFEU, Article 258 (ex Article 226.) In light of the vast amount of EU law, it should not be surprising therefore, that transposition is a source of a significant amount of ongoing research and debate, with some observers arguing that there is a ‘transposition deficit’ in terms of member state implementation of EU law.³⁷⁰A common riposte to such an argument is that as the Commission has limited resources and can only monitor a fraction of infringements, claims of non-compliance are questionable.³⁷¹Another response holds that some of the deficit is due to the complexity of the policy to be transposed, rather than merely a deliberate effort to avoid the application of EU law.³⁷²While the issue of transposition is generally beyond the scope of this thesis, the

³⁶⁹ Julie C. Suk, ‘Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict’, 40 <http://works.bepress.com/julie_suk/2/> accessed 26/2/2014.

³⁷⁰ M. Hall, ‘EU regulation and the UK employee consultation ‘framework’ (2010) 31 *Economic and Industrial Democracy* 55, 56.

³⁷¹ See: Tanja A. Borzel, ‘Non-compliance in the European Union: pathology or statistical artefact?’ (2001) 8 *JEPP* 803.

³⁷² See, for example: Robert Thomas and Gary Lynch-Wood, ‘Transposing European Union Law in the United Kingdom: Administrative Rule-Making, Scrutiny and Better Regulation’ (2008) [14] *EPL* 177, and Markus Haverland and Marleen Romeijn, ‘Do member states make European policies work? Analysing the EU transposition deficit’ (2007) 85 *Pub Adm* 757, 775, while concluding that the ‘transposition deficit

concept of ‘gold plating’ in transposition is relevant to this discussion of the national measures adopted under the mandate of the PWD. This is because the other side of a transposition deficit is ‘gold plating.’ This is to say that when transposing an EU Directive into law, a member state may ‘go beyond what is required...while staying within legality.’³⁷³ Indeed, the results of this in depth study of member state measures reveals that in transposing the PWD, the majority of the twenty-eight member states have in fact elected to adopt measures that go *beyond* the minimum protections mandated, as interpreted by the CJEU. This ‘gold plating’ of the PWD is illustrated by the fact that although the payment of an ‘adequate allowance’ has been interpreted by the CJEU to mean that member states may provide less than full pay, eleven member states have elected to provide full pay, for at least part of the maternity leave they provide.³⁷⁴ It is also illustrated by the fact that while the mandates of the PWD do not preclude the dismissal of a woman who is suffering from a pregnancy-related illness, which continues *after* the expiration of maternity leave, several member states have legislatively extended the period of protection.³⁷⁵ This is the case in the Netherlands, which provides up to two years of pay to any worker who is unable to work due to sickness during pregnancy, and in Malta, which prohibits dismissal of a female worker during the five months *after* her return from maternity leave.³⁷⁶ The duration of maternity leave provided by many member states is also longer than the minimum fourteen weeks required by the PWD. Member state provision varies, from the minimum of 14 weeks in a small number of member states, to 28 weeks in others, and in certain circumstances to up to 52 weeks, although not all of which is paid.³⁷⁷

is substantial,’ the authors also determined that of the 5 member states reviewed, the UK was the best at transposing 60% of cases on time.

³⁷³ European Commission, ‘Better Regulation’ (*Europa*, 12/03/2012).

<http://ec.europa.eu/governance/better_regulation/glossary_en.htm> accessed 03/12/2012

³⁷⁴ The eleven member states are as follows: Croatia, Cyprus, Estonia, France, Germany, Greece, Luxembourg, Malta, Netherlands, Poland, and the UK. See Appendix 1 to this thesis: EU Member State Pregnancy and Maternity Measures.

³⁷⁵ See: Case C-400/95 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S* [1997] ECR I-2757.

³⁷⁶ Commission, *Your social security rights in the Netherlands* (July 2013); Commission, *Your social security rights in Malta* (July 2013).

³⁷⁷ See also: EU Parliament, *Costs and Benefits of Maternity and Paternity Leave* (2010) 8.

Because member states have broad discretion in carrying out the health and safety mandates of the PWD, the actual provisions of their national laws differ greatly. These differences extend to the amount that employees and employers are required to contribute to the social security system that funds the allowance, as well as differences in eligibility requirements, differences in mandatory leave lengths, differences in work restrictions, and a differential impact of childbirth complications, and multiple births upon overall maternity leave length. These differences are seen in Lithuania, where to be eligible for statutory benefits, women are required to have twelve months work experience for the past two years.³⁷⁸ Whereas, in Latvia the requirement is six months, and in Estonia it is three months.³⁷⁹ This difference is also seen in the adoption of a lengthy leave mandate, as found in Austria, where, for eight weeks before delivery and eight weeks after delivery [Schutzfrist], women are not allowed to be employed, even though they may want to be.³⁸⁰

Member state laws also distinguish between the leave and pay provisions available to full-time employees and to women in *other* work capacities. For instance, while many member states modify, or exclude coverage for unemployed and marginally employed women, France extends leave and pay to students and people in vocational training.³⁸¹ In point of fact, until passage of Directive 2010/41/EU (the self-employed directive), the self-employed were also excluded from maternity benefits mandated by the PWD.³⁸² Now, under Article 8 of 2010/41/EU, women assisting a self-employed partner will be eligible for benefits if they become partners in, or employees of, the business. Notably, the UK, in its transposition of Directive 2010/41/EU, through SI2014/606, has elected to go further, and provides an entitlement to a maternity allowance for spouses of self-employed workers who ‘habitually participate in the

³⁷⁸ Commission, *Your social Security rights in Lithuania* (2013).

³⁷⁹ VSAA, ‘Maternity Benefit’ (27/12/2013) <<http://www.vsaa.lv/en/services/parents/maternity-benefit>> accessed 8/8/2014.

³⁸⁰ EC Austrian Gov., ‘Before Giving Birth’ (2.4.2014) <<https://www.help.gv.at/Portal.Node/hlpd/public/content/143/Seite.1430100.html>> accessed 13/5/2014.

³⁸¹ Commission, *Your social security rights in France* (2013).

³⁸² Case C-5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)* [2013] ECR O, para 64.

activities of the self-employed worker and perform the same tasks and ancillary tasks.³⁸³

One feature that immediately emerges from this review of EU national laws is the strong workplace protection for pregnancy and maternity, aiming to accommodate the main biological difference between men and women. These protections stand in contrast to US laws discussed in Chapters 5. It is also notable that if the EU Commission's proposal for an amendment to the Pregnant Worker's Directive is adopted, these protections will be expanded even further. A review of the Proposal below will serve to highlight the expanded provisions, the intense debate surrounding the relationship between equality and protection, and the limitations of the Proposal.

c A new Pregnant Workers Directive?

It is generally acknowledged that negotiations surrounding the passage of the original PWD had the effect of limiting the Directive's reach. Specific objections raised by the UK government succeeded in securing a final Directive that provided for fourteen rather than sixteen weeks of leave and payment of an 'adequate allowance' rather than full pay, as was originally proposed.³⁸⁴ Today, a proposal for a new PWD seeks to reinstate the requirement of full pay and extend maternity leave to twenty weeks. Proposed more than six years ago by the European Commission (October 2008) and amended by the European Parliament in October 2010,³⁸⁵ this legislative amendment forms the basis of what the European Commission views as part of a package for better reconciliation of professional, private and family life.³⁸⁶ In addition to fully paid and longer maternity leave, the proposal extends protection against dismissal, to include the first six months after a return to work. Further amendments to the proposal would

³⁸³ The Social Security (Maternity Allowance) (Participating Wife or Civil Partner of Self-employed Earner) Regulations 2014, No. 606.

³⁸⁴ Ellis (n 328) 63.

³⁸⁵ See: Commission, *Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding* ((COM (2008) 600/4) {SEC(2008)2526};{SEC(2008)2527}, 2008). Note: The European Parliament extended the provision to 20 weeks of maternity leave and 2 weeks of full paid paternity leave. (MEMO 10/509).

³⁸⁶ Council, *Progress Reports* (10541/11, 31 May 2011).

oblige member states to grant additional maternity leave in cases of multiple births, and/or a child born with disabilities.³⁸⁷ Furthermore, a new Article 11a would be inserted, expressly mandating at least two hours time off for breastfeeding, with no limitation of breastfeeding to within one year of birth.³⁸⁸

(See, Table 2 below for a comparison of several of the provisions of the ‘old’ and ‘new’ PWD)

Table 2: Old v. New Pregnant Workers Directive

PWD	Maternity Leave	Maternity Pay	Paternity Leave	Paternity Pay	Breastfeeding Leave	Adoption Pay/Leave	Flexible Work	Treaty Basis
Current 92/85/EEC	Length varies by State 14-52 weeks.	Amount Varies by State. 69-100%	None	None	By Request, no general entitlement.	Same leave as for natural parents. Pay varies by State	By Request only.	Health & Safety Basis Art .153 TFEU
Proposed COM(2008) 637final	20 week Minimum	100% salary	2 weeks	100% pay x 2 weeks	Right, not limited by age of child. 2x 1 hour per day	Same leave as for natural parents Same rate as natural parents	Right to PTwork x 1 year after birth.	Adding Equality Basis— Art 157 TFEU. Dual Basis

Source: Author’s analysis of Commission MEMO/08/603

In light of its provisions, supporters of the Proposal declare that it ‘corresponds to our common sense belief that such a moment marks the appearance of difference between women and men.’³⁸⁹ On the surface, the Proposal does seem well designed to achieve progress in tackling pregnancy discrimination and several observations can be offered to support the argument in favour of its passage, including that it dovetails with EU efforts to increase the economic participation of women and the Europe 2020 strategy for growth, jobs, and substantive equality at work.³⁹⁰ Its leave mandate is also in

³⁸⁷ See the answer given by Ms Reding on behalf of the Commission (21 August 2013), Commission, *Written questions by Members of the European Parliament and their answers given by a European Union institution*, OJ C65E/ 1 (2013).

³⁸⁸ See Article 11(a) of the European Parliament legislative resolution of 20 October 2010 on the proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (COM (2008)0637– C6-0340/2008 – 2008/0193(COD)).

³⁸⁹ Kathryn Culek, ‘Sex Equality’ (2009) 2 Ankara B Rev 64, 75.

³⁹⁰ See: Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategy for equality*

keeping with international recommendations suggesting that maternity leave of at least eighteen weeks has a positive impact upon the health of women and children.³⁹¹ There is also ample evidence to suggest the current Directive is no longer up to the task of advancing substantive equality. Indeed, the statistics presented in Chapter 1, and the case law discussed in Chapter 4, reveal the EU objective of ‘special treatment’ needs amendment, in light of the fact that over time it has been defined by the CJEU to mean less than full pay and because, women undergoing ‘in vitro fertilization’ (IVF), surrogate mothers, and most men are excluded from its provisions.³⁹² As the discussion in Chapter 4 will also reveal, the limitations of the Directive are not resolved by national measures, which, while being generally more expansive, are focused solely on women, and vary widely in the protections they afford.³⁹³

These observations do not ignore the criticisms of feminists, academics and others, or the concerns of some member states, including the UK, that expanded maternity leave is economically burdensome and could ‘adversely impact young women’s employment rates.’³⁹⁴ There is a significant amount of important academic research indicating that ‘special treatment’ in the form of short-term, job-protected paid leave serves to alleviate the disadvantage to women’s careers that pregnancy and childbirth can create, but the provision of longer leave than is medically necessary to recover from childbirth can endanger women’s position in the labour market, as it

between women and men 2010-2015, COM (2010) 491 final; Commission, *Boosting equality between women and men in the EU: Key actions and figures* (2014); Commission, ‘European Commission: Europe 2020’ (*Europa*, 2002) <http://ec.europa.eu/europe2020/index_en.htm> accessed 17/09/2012.

³⁹¹ C183- Maternity Protection Convention, 2000 (No.183), Geneva, 88th ILC session (15 Jun 2000). In addition, accompanying Recommendation (No. 191).

³⁹² See also: Annick Masselot and Eugenia Caracciolo di Torella, ‘Pregnancy, maternity and the organisation of family life: an attempt to classify the case law of the Court of Justice’ [2001] ELR 239; *Montull* (n 385); Case C-167/12 *C.D. v S.T.* [2014] ECR 0, where the CJEU stated neither the PWD nor the ETD (Recast n 15) require a member state to provide maternity leave to a surrogate mother. See also: Case C-363/12 *Z v A Government department* [2014] ERC 0, where the CJEU held refusal to grant maternity leave to a surrogate mother does not constitute discrimination on grounds of disability within the meaning of 2000/78/EC.

³⁹³ See: Commission, *Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding*, 6

³⁹⁴ BIS, *Summary of responses to consultation on European Commission proposals to amend the Pregnant Workers Directive* (Crown Copyright, 2010) 11, para 49.

reinforces traditional roles of child bearers and childcare givers.³⁹⁵ These concerns appear to have held sway with the member states, for when the proposed Directive was debated at the 3131st Council Meeting on December 2011, it was concluded that twenty weeks of maternity leave with full pay were ‘unacceptable to the Council’ and that ‘such a solution could have counterproductive effects [for women].’³⁹⁶

As there has been no further progress on the Proposal since a failure to obtain the requisite qualified majority in 2011, the Commission recently announced its intent to withdraw it and replace it if it is not adopted within the next six months. The results of this research suggest that in the interests of substantive equality, the Proposal should not be adopted. The basis for this suggestion is that the decisions of the CJEU in the cases that have come before it since the Proposal was first submitted reveal that pregnancy discrimination is far more nuanced than originally thought.³⁹⁷ They also suggest that the Proposal is a helpful, but largely inadequate tool for advancing substantive equality, as it does not provide maternity rights to surrogate mothers or men.³⁹⁸ Nor does it adequately resolve the conflict that arises between special protection and equality under PWD, Article 141 EC, the Equal Pay Directive, and the Equal Treatment Directive, as revealed from the discussion of CJEU case law in Chapter 4. Consequently, faced with what is damning evidence of the limitations of its failed Proposal, the question arises as to what a new Proposal should look like. While I do not profess to have all, or even the best answer to what this new Proposed Directive should look like, it is appropriate to offer some suggestions. These suggestions form part of the discussion of the ‘EU model of equality redirected,’ which is undertaken in Chapter 4, part IV (b).

³⁹⁵ See the discussion in Chapter 4, and Petra Foubert, ‘Does EC Pregnancy and Maternity Legislation Create Equal Opportunities for Women in the EC Labor Market—The European Court of Justice’s Interpretation of the EC Pregnancy Directive in Boyle and Lewen’ (2001-2002) 8 Mich J Gender & L 226.

³⁹⁶ Council, *Press Release: 3131st Council Meeting: Employment, Social Policy, Health & Consumer Affairs, 1 & 2 December 2011 17943/1/11 REV1 Presse 471 PR CO 75* (2011) p 10. See also: See: BIS; Anna-Lena Kurch, “Safety First: the European Parliament and the reform of maternity leave,” in SWP Working Paper and Nicolai von Ondarza (eds.) Daniela Kietz *Strengthened, sidelined, and caught in compromise: the 7th European Parliament from a German perspective* (Ludwigkirchplatz 3-4, 2014)13-16.

³⁹⁷ See the discussion in Chapter 4.

³⁹⁸ See: *C.D.* (n 395); *Z v A Government department* (n 395); *Montull* (n 385). See also Part II, above.

VI Positive action—a derogation from equal treatment.

a A shared derogation.

In addition to adopting ‘special treatment measures’ for pregnancy and maternity, EU antidiscrimination law permits positive action measures, which:

*Aim at eliminating or counteracting the detrimental effects on the underrepresented sex (mostly women) in employment or in seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women.*³⁹⁹

The discussion in Chapter 5 will reveal that while positive action is also permissible under US antidiscrimination law, a clear distinction lies in its history, name, and use. The US initially mandated what is termed ‘affirmative action,’ in order to address racial discrimination, and only later considered the parameters of measures intended to address gender inequality in private employment. In contrast, positive action in the EU is a more recent voluntary policy for addressing gender inequality, and is yet to be mandated. Added to this, member state measures suggest positive action is more generally accepted in the EU as necessary to ensure full equality in practice between men and women in working life. As Advocate General Tesauro observed in *Kalanke v. Freie Hansestadt Bremen*, the idea of positive action ‘marks a transition from the individual vision to the collective vision of equality.’⁴⁰⁰

In contrast, in the US, affirmative action measures are extremely controversial and are the subject of ongoing litigation seeking to curb their use. As the First Circuit Court of Appeal in the case of *Cotter v. City of Boston* euphemistically observed, ‘There is rich public debate about the issue of affirmative action.’⁴⁰¹ This debate forms part of the comparison undertaken in Chapter 5. The results of that comparison suggest that while there are similarities in these derogations, there are also differences in approach that serve to prevent any significant convergence between EU and US antidiscrimination

³⁹⁹ Sacha Prechal and Susan Burri, *EU Rules on Gender Equality: How are they transposed into national law?* (2010) 5.

⁴⁰⁰ *Kalanke v. Freie Hansestadt Bremen* (n 98), para 8.

⁴⁰¹ *Cotter v. City of Boston* 323 F3d 160 (1st Cir 2003) 168.

law in this area. As an aid to that comparison, this Part explores the EU derogation permitting positive action. Evidence is presented that is intended to show that while positive action is an important tool for addressing the barriers faced by women in the workplace, especially because of its potential to counteract the gender negative effects that protective measures create, the confusion surrounding its permissible boundaries has rendered it less effective than it might otherwise be. A historical review of the evolution of positive action in the EU will serve to make this point clearer.

b Legislative confusion

While the term ‘positive action’ was not expressly used in the Equal Treatment Directive of 1976, Article 2(4) provided that the Directive, ‘shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities.’ In light of this provision and with the express encouragement of the EU institutions, all EU member states adopted some form of positive action by 1995.⁴⁰² Notwithstanding broad acceptance of the concept, the lack of any clear mandate or definition, and the elasticity of Article 2(4), has resulted in what the Commission recognizes as a ‘degree of confusion surrounding the definition of positive action’ in the member states.⁴⁰³ It was this confusion that rendered national measures vulnerable to legal challenge, and in the initial cases interpreting Article 2(4), the CJEU stated that the Article was:

*Specifically and exclusively designed to allow measures, which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality, which may exist in the reality of social life.*⁴⁰⁴

Notwithstanding this, the Court declared that any ‘generalized preservation of special rights for women’ by a member state was incompatible with equal treatment. It also declared that as positive action was a derogation from the principle of equal

⁴⁰² Commission, *Report from the Commission on the Implementation of the Council Recommendation of 13 December 1984 on the Promotion of Positive Action for Women (84/635/EEC)* (COM(95) 247 Final, 1995) 3

⁴⁰³ *ibid* 14.

⁴⁰⁴ Case 312/86 *Commission v France* 1988 ECR 6315, para 15.

treatment, it would interpret member state measures strictly.⁴⁰⁵ This strictness was evident in the subsequent case of *Kalanke v. Freie Hansestadt Bremen*. There, the court held that despite there being an under representation of women in a particular employment position, and that the applicants were in possession of equal qualifications with male candidates, Germany could not adopt a positive action measure that gave women ‘automatic priority.’⁴⁰⁶

It is generally acknowledged that the immediate impact of the *Kalanke* decision was a chilling effect on the adoption of positive action measures by member states.⁴⁰⁷ In response, the EU Commission and the EU Parliament felt compelled to issue guidance as to the interpretation to be given to the ruling. They also voiced support for a proposal to amend Article 2(4), in order to expressly permit positive action in favour of the underrepresented sex ‘on condition that the employer always has the possibility of taking account of the particular circumstances of a given case.’⁴⁰⁸ With the prescient observation that, ‘the anti-discrimination laws which were adopted twenty years ago are not now sufficient to achieve equality for women as regards their access to employment and promotion,’ the Commission and Parliament concluded that only a positive action measure requiring automatic quotas violated Article 2(4).⁴⁰⁹

The use of positive action has since become institutionalized in the primary and secondary legislation of the EU, with Article 141(4) (ex Article 119(4), and now Article 157 (TFEU)) providing that:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any member state from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

⁴⁰⁵ Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 36

⁴⁰⁶ *Kalanke v. Freie Hansestadt Bremen* (n 98), para 24.

⁴⁰⁷ O’Cinneide (n 55) 356.

⁴⁰⁸ Commission, *Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v Freie Hansestadt Bremen COM (96) 88 final.*

⁴⁰⁹ *ibid.*

Declaration No. 28 on the Article provides that ‘member states should in the first instance aim at improving the situation of women in working life.’ Added to this, there is the most recent legislative provision authorizing gender based positive action measures. Article 3 of the Recast Directive 2006/54/EC, which provides that:

Member states may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

Notwithstanding this permissibility, a lack of legislative clarity as to the types of measures that are envisaged has served to ensure that the use of this derogation remains constrained by case law. While this may change in the near future, as the CJEU has yet to rule on member state measures enacted pursuant to Directive 2006/54/EC, it is questionable whether any change will be far sweeping, for as Mark Bell has observed:

*The Court has baulked at measures conferring automatic and unconditional preferential treatment for women, at least at the point of selection for employment.*⁴¹⁰

Instead, in interpreting EU law, the CJEU has enumerated three categories of positive action measures, and a threefold test to be satisfied if member state measures are to be considered valid. The three categories outlined by Advocate General Maduro in *Serge Briheche v Ministre de l’Intérieur*, are as follows:

1. A first category includes measures, which are not directly discriminatory in nature but aim simply at improving the training and qualifications of women (for instance the allocation of training places to women).
2. A second category contains measures, which aim at enabling women to better reconcile their role as parent and their professional activity (such as the possibility to benefit from nursery places offered by the employer).
3. The third category includes measures, which also aim at achieving equality between men and women in the labour market, but are

⁴¹⁰ Mark Bell, *Racism and Equality in the European Union* (OUP 2008) 35.

discriminatory in nature in that they favour women in order to reduce their under-representation in professional life. The third category includes measures having a direct impact on employment, which give preference to women in selection processes or set targets or quotas to be achieved.⁴¹¹

The three-fold test requires an ‘existing imbalance’ between men and women in a specific sector, or career grade, and that the positive action measure, which must be ‘interpreted strictly,’ is able to ‘remove the discrimination.’⁴¹²This test ensures that gender specific measures in appointment and promotion are only valid where gender does not automatically and unconditionally give priority to women, when women and men are equally qualified, and where the candidates are the subject of an objective assessment, which takes account of the specific personal situations of all candidates.⁴¹³This means that selection of a female candidate cannot be ‘based on the mere fact of belonging to the under-represented sex.’⁴¹⁴It also means that in the EU, ‘positive discrimination’ is prohibited, and gender can only be a ‘plus’ factor, considered in addition to other qualifications.⁴¹⁵To fall within the equal treatment derogation a positive action measure may not amount to the total exclusion of men. This means that earmarking posts for women contravenes EU law, as does a national provision, which reserves an exemption from the age limit for obtaining access to public-sector employment to women, but not men.⁴¹⁶It also means that measures permitting time-off for employed women to feed their child, but not for employed men, unless the child’s mother is also employed are prohibited.⁴¹⁷

Notwithstanding that EU legislation expressly permits measures providing ‘specific advantages’ to the ‘underrepresented sex,’ this study also found the CJEU

⁴¹¹ C-319/03 *Serge Briheche v Ministre de l’Intérieur, Ministre de l’Éducation nationale and Ministre de la Justice* [2004] ECR I-8807, Opinion of AG Poiares Madura, paras 30-33.

⁴¹² See the discussion in *Kalanke v. Freie Hansestadt Bremen* (n 98).

⁴¹³ Case C-158/97 *Badeck and Others* [2000] ECR I-1875, para 23; *Kalanke v. Freie Hansestadt Bremen* (n 98), para 22.

⁴¹⁴ C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*. [2000] ECR I-5539, para 2.

⁴¹⁵ See the discussion in *Badeck* (n 418).

⁴¹⁶ Case E-1/02 *EFTA Surveillance Authority v. The Kingdom of Norway*, OJ 2003 C115/6.

⁴¹⁷ *Briheche* (n 416), para 32; Case C-104/09 *Roca Alvarez v Sesia Start España ETT SA* [2010] ECR I-8661, paras 23-39.

emphasizes gender neutrality over gender specificity in the cases that have come before it. In *Marschall*, the Court said that a:

*Gender specific measure... will not be proportionate to the aims of remedying specific inequalities faced by women in practice and promoting equal opportunity if the same result could be achieved by a gender-neutral provision.*⁴¹⁸

To ensure gender neutrality, the Court has relied upon the ‘principle of proportionality:’

*Which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.*⁴¹⁹

Overall, these cases reveal a concern that positive action measures must be carefully designed to address existing inequalities and not make new ones. Indeed, the Court has said that the distinction between positive action measures that are upheld, or fall foul of EU law is determined by whether, or not they remove:

*Obstacles rather than imposing results, or ensuring equality at starting points rather than at points of arrival, or guaranteeing equality of opportunity rather than equality of result.*⁴²⁰

In effect, this suggests that the CJEU has adopted the narrow conception of substantive equality in its interpretation of the goal that the EU derogation seeks to achieve, as that concept was described in Chapter 1. Support for this suggestion can be found in the Opinion of Advocate General Maduro in *Briheche*:

*Whereas the broad terms in which this objective is framed would seem to include measures designed to achieve substantive equality between men and women in the labour market, the Court has interpreted Article 2(4), in a narrow way, referring to the restricted concept of equality of opportunity.*⁴²¹

⁴¹⁸ Case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen*. [1997] ECR I-6363 Opinion of AG Jacobs, para 43.

⁴¹⁹ Case C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891, para 39. See also, *Briheche* (n 416), para 24.

⁴²⁰ *Marschall* (n 423), para 31.

⁴²¹ *Briheche* (n 416), para 29.

While it is difficult to know whether the CJEU's interpretation falls short against legislative intent, when one considers the economic underpinnings of EU antidiscrimination law and the lack of any legislative proposal to clarify the derogation, it may be concluded that it does not. On the other hand, what is known is that the Court's narrow interpretation of EU law has been met with harsh criticism from some academics, who observe that even where member state measures have been successful in removing obstacles to employment, they have only served to include more women in the male norm. Therefore, while Colm O'Conneide views positive action favourably and believes that these measures are 'essential for delivering real change,'⁴²² other writers are openly critical, arguing that positive action, along with 'special protections' for pregnancy and maternity, 'do not deliver any real change, rather, they work negatively to stereotype women as caregivers.'⁴²³ Their complaint is that women are only accommodated in the workplace; the workplace is not transformed for the benefit of all workers, male and female. A consideration of these criticisms follows.

c Criticisms of positive action.

The case of *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij*, involved an employer's exclusive allocation of nursery places to female employees, save in cases of emergency. The CJEU upheld this particular positive action measure on the basis that it did not reserve to women places of employment, but rather enjoyment of certain working conditions.⁴²⁴ Specifically, the Court held that what it reserved:

*Falls in principle into the category of measures designed to eliminate the causes of women's reduced opportunities for access to employment and careers and are intended to improve their ability to compete in the labour market and to pursue a career on an equal footing with men.*⁴²⁵

In response to this judgment, Brady Mitchell criticizes positive action measures generally for not having 'provided a significant boost to women despite their purported benefits,' and the decision in *Lommers* specifically, for serving to 'perpetuate negative

⁴²² O'Conneide (n 55) 381.

⁴²³ See: Burri and Prechal (n 282) 18.

⁴²⁴ *Lommers* (n 424), para 38.

⁴²⁵ *ibid.*

stereotypes about women in the workplace.⁴²⁶ Likewise, Eugenia Caracciolo di Torella asserts that the ruling ‘sends the message that normally ‘care work is for women’ and men enter the picture only in exceptional circumstances.’⁴²⁷ These observations, while forceful, tend to minimize the gendered reality of women’s lives. This is to say that where an employer’s provision of childcare, as in the *Lommers* case, is *insufficient* to meet the needs of all employees, a gender-neutral measure would fail to improve the situation for female employees. In the absence of a sufficient number of places, it is important that the needs of female employees be emphasized. This emphasis is necessary because a significant amount of research has found that having children has a negative impact on women’s employment rates, and the lack of affordable, quality childcare can operate to exclude women from the labour market, or force them into part-time work.⁴²⁸ As Fineman observes, in carrying the burden of caring responsibilities, it is mothers who ‘bear most of the economic and occupational costs of parenting, even though everyone in a society benefits from good childcare.’⁴²⁹ In light of these findings, *Lommers* suggests that adherence to gender neutrality does little to further substantive equality for women where there are insufficient public and private supports for caring obligations.

It is also suggested that the author’s interpretation of *Lommers* is not critically weakened by the CJEU’s decision in *Roca*, as that case did not involve the provision of a ‘service’ to employees, but a right to leave. In *Roca*, the employer’s positive action measure provided leave to all employed mothers, but only to an employed father where the mother was also an employed person. The CJEU correctly held that such a measure did not comply the terms of Article 2(4) ETD or 157(4) TFEU, as it was:

⁴²⁶ Brady Mitchell, ‘Unfair Discrimination or Necessary for Equal Opportunity? The ECJ Upholds Positive Action in *Lommers v. Minister Van Landbouw*’ (2004) 26 *Loy LA Int’l & Comp L Rev* 469, 472.

⁴²⁷ E. Caracciolo di Torella, ‘Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union.’ (2014) 20 *Eur LJ* 88, 99.

⁴²⁸ See: Eurofound, *Caring for children and dependants: effects on careers of young workers (Background Paper)* (Dublin, Ireland, 2013); Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Implementation of the Barcelona objectives concerning childcare facilities for pre-school-age children COM (2008) 638*; J Waldfogel, ‘The effect of children on women’s wages’ (1997) 62 *Am Soc Rev* 209.

⁴²⁹ Fineman, ‘Evolving Images of Gender and Equality: A Feminist Journey’ (n 40) 35.

*LIABLE to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.*⁴³⁰

The CJEU's response in *Roca* has been praised by Eugenia Caracciolo di Torella, as both 'innovative,' and one that places the CJEU in 'a unique position to affect change' with respect to the stereotypical roles of men as 'breadwinners' and women as 'carers.'⁴³¹ While she may well be correct, it is suggested that di Torella is likely over optimistic in her characterization of the current role played by the CJEU in advancing substantive equality. Arguably, *Roca* is more important for illustrating the delicate balance required by legislatures and employers seeking to adopt measures intended to address the problem of gender inequality, than it is for evidence of a proactive CJEU.

d Potential for progress.

The evidence presented in this Part has sought to show that positive action, like protection for pregnancy and maternity, is an important component of the EU model of equality. Notwithstanding that member state measures are oftentimes clumsy and lacking in any clear understanding of potential negative gender effects, there is a clear commitment to utilize positive action to improve access to employment for women. Indeed, only the boundaries set by the CJEU in interpreting Article 2(4) ETD and 157(4) TFEU, have served to limit member states' efforts to date.

Ultimately, what may prove to be more useful than the ad hoc decisions of the CJEU for advancing gender equality is Article 3 of the Recast Directive 2006/54/EC. The preamble to Directive 2006/54/EC, references the fact that it brought together, 'for reasons of clarity,' the main provisions existing in this field, including CJEU case law. It also references equal treatment as a fundamental right, suggests addressing gender segregation in the workplace through flexible working time and parental leave arrangements, and expressly permits the use of positive measures.⁴³² The preamble also

⁴³⁰ *Roca Alvarez* (n 422), para 36.

⁴³¹ Caracciolo di Torella (n 432) 105.

⁴³² Segregation in the workplace refers to the concentration of women and men in different jobs that are predominantly of a single sex. See: Heidi I. Hartmann and Barbara F. Reskin, *Women's work, men's work sex segregation on the job* (National Academy Press 1986).

suggests that in adopting such measures, ‘member states should, in the first instance, aim at improving the situation of women in working life.’⁴³³ Arguably, the Recast Directive allows for positive action measures of a broader scope than those adopted pursuant to Article 2(4) ETD, especially as it is supplemented by Article 6 of Directive 2004/113/EC providing for equal treatment between men and women in access to and supply of goods and services, the first EU Directive addressing gender equality issues outside the field of employment.⁴³⁴ However, as stated previously, this assertion will only be borne out by future case law.

In the meantime, research conducted at the request of the Commission reveals that the member states have embraced the concept of positive action, with all states having adopted some form of positive action, and several states indicating their willingness to enact measures beyond the employment context.⁴³⁵ Although the majority of measures remain limited to employment, several states have enacted positive action in the areas of education, the provision of goods and services, and in the appointment of women to Company Boards.⁴³⁶ Importantly, in the near future, positive action may also move beyond *voluntary* measures, to become mandated in the EU, in certain circumstances. That is, if the EU Commission’s 2012 proposal for a Directive on improving the gender balance among non-executive directors of companies listed on the stock exchanges is enacted. If it is, it will set a minimum objective of 40% women as non-executive directors of public listed companies, within the three tests outlined above.⁴³⁷ The potential of this measures to advance substantive gender equality cannot be overstated, for historically the EU has relied on soft law voluntary agreements, such as ‘Diversity Charters,’ to increase female and other minority group participation; seeking

⁴³³ Recast Directive (n 15), paras 21-22.

⁴³⁴ Equal Treatment in the access to and supply of goods and services (n 333).

⁴³⁵ See: Goran Selanec and Linda Senden, *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, Including on Company Boards* (Commission, 2012).

⁴³⁶ *ibid.* See also: Susanne Burri and Hanneke van Eijken, *Gender Equality Law in 33 European Countries: How are EU rules transposed into national law?* (Commission, 2014) 7

⁴³⁷ See: Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012) 614 final. For the EU Parliament’s Resolution, containing amendments to the Proposal see: Draft European Parliament Resolution on the proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures. (COM(2012)0614 – C7-0382/2012 – 2012/0299(COD))

to emphasise the ‘business case’ for diversity, by arguing that it results in increased profitability, economic stability and growth.⁴³⁸ The limitations of this voluntary approach have been revealed by statistics, which show that while about 60% of university graduates in the EU are women, only 12% are board members of its biggest listed companies, with only 3% being Presidents of those companies.⁴³⁹

Comparatively speaking, the ‘business case’ argument for diversity is also used in the US.⁴⁴⁰ But, while both the EU and US institutions advocate for the increased participation of women on the boards of publically traded companies, only the EU has made the ground-breaking determination that a lack of significant progress in this area necessitates the adoption of a Directive.⁴⁴¹ In light of its mandate, the proposed Directive has the potential to be far more transformative than the comparable US measure, which stop short at a duty of disclosure only.⁴⁴²

VII Gender Mainstreaming.

As stated in the Introductory Chapter, this soft law strategy seeks to advance significant reforms to institutional structures and procedures, and as Fredman observes, ‘gender mainstreaming was specifically introduced as a response to the deficiencies of the individual rights approach,’⁴⁴³ and focuses on proactive, institutional change.⁴⁴⁴ Indeed, because legislation has been insufficient to address gender discrimination, gender mainstreaming has been embraced by the EU as part of ‘a move beyond the narrow scope of employment rights.’⁴⁴⁵ As such, Bob Hepple suggests that gender mainstreaming, along with positive action, is a proactive measure, which constitutes a ‘fourth generation’ equality strategy, involving a shift away ‘from negative

⁴³⁸ See: Commission, *More Women in senior positions: Key to economic stability and growth* (Luxembourg 2010).

⁴³⁹ Commission, “*Women on the Board Pledge for Europe*” MEMO/11/124 (2011).

⁴⁴⁰ See the discussion in Chapter 5. See also: R.N. Appel, A.L. Gray and N. Loy, ‘*Affirmative Action in the Workplace: Forty Years Later*’ (2004) 22 Hofstra Lab & Emp LJ 549.

⁴⁴¹ Commission, *Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures*, COM(2012) 614 final (2012) (n 441).

⁴⁴² See Catalyst.org (n 63).

⁴⁴³ S Fredman, ‘Changing the norm: Positive duties in equal treatment legislation’ (2005) 12 MJ 369, 391

⁴⁴⁴ Fredman, ‘Transformation or Dilution: Fundamental Rights in the EU Social ‘Space’ (n 72).

⁴⁴⁵ R Guerrina, *Mothering the union: gender politics in the EU* (MUP 2005) Preface.

duties towards positive duties to promote equality.’⁴⁴⁶Fourth generation claims aside, as with all concepts used to address equality issues, gender mainstreaming is a contested concept that has strengths and weaknesses, as well as its supporters and critics. An in-depth discussion of the strategy’s strengths and weaknesses is deferred until Chapter 7, wherein the often-critical analysis surrounding its adoption and implementation in the EU will be used to highlight several important lessons for US nascent efforts. This Part seeks to lay the groundwork for that critical discussion, setting forth the gender mainstreaming measures that exist on the supranational and the national levels of the EU. These measures will show that the EU is fully committed to the concept, and is at the forefront of utilizing gender mainstreaming as a holistic strategy for achieving gender equality in governance.

a Mainstreaming at the supranational level.

First appearing in response to the adoption of the Beijing Declaration and Platform for Action at the fourth World Conference on Women, 1995,⁴⁴⁷ the 1996 Commission Communication recognized the need for, ‘a cultural transformation of individual behaviour,’ and adopted gender mainstreaming as the tool to accomplish this.⁴⁴⁸ The first definition of gender mainstreaming in the EU was given as ‘The systematic consideration of the differences between the conditions, situations, and needs of women and men in all Community policies and actions.’ In this regard, it was noted that this did not:

Mean simply making Community programmes or resources more accessible to women, but rather the simultaneous mobilisation of legal instruments, financial resources and the Community’s analytical and organisational capacities in order to introduce in all areas the desire to build balanced relationships between women and men. In this respect, it is necessary and important to base the policy of equality between women and men on a sound statistical analysis of the situation of women and

⁴⁴⁶ B Hepple, ‘Equality and Empowerment for Decent Work’ in J-M. Servais and others (eds), *Working for Better Times: Rethinking work for the 21st Century* (Geneva, International Labour Office 2007) 225.

⁴⁴⁷ U.N. Beijing Declaration and Platform for Action, 15 September 1995.

⁴⁴⁸ Commission, *Communication from the Commission-incorporating Equal Opportunities for Women and Men into All Community Policies and Activities*. Brussels, 21.02.1996 COM (96) 67 final 2.

*men in the various areas of life and the changes taking place in societies.*⁴⁴⁹

The subsequent, ‘Fourth Action Programme for Equal Opportunities’ emphasized mainstreaming the gender perspective into all areas of Community policies; requiring social transformation by bringing, ‘equality out of the ghetto.’⁴⁵⁰ The mandates of Articles 8 and 10 of the TFEU, which stated that the EU ‘shall aim to eliminate inequalities, and to promote equality between men and women’ in all its activities, bolstered the strategy and cemented a holistic approach to equality, requiring horizontal integration across *all* policy areas and vertical integration throughout *all* levels of the hierarchy. Indeed, in direct contrast to what will be seen as a limited and politically fragile strategy in the US, gender mainstreaming in the EU has *expanded* in its legal commitment, to include ‘social mainstreaming.’⁴⁵¹ This expansion is a direct result of the adoption of the Treaty of Lisbon, which provides support for an intensified social focus in the EU and a formal legal commitment to mainstreaming in economic and social policy. Referred to as a ‘new horizontal social clause’ regarding ‘social progress’ and ‘social justice,’ Article 9 requires the Union take into account the guarantees of adequate social protection when implementing new policies.⁴⁵² The Treaty has also enabled ‘social mainstreaming’ to become embedded in the national legislation of member states, as illustrated by the UK Equality Act of 2010, as previously discussed in Chapter 1.⁴⁵³

The Commission, as the policy making arm of the EU, has also been concerned to ensure that the EU institutions and member states promote equality through their mainstreaming activities. In an effort to ensure a degree of uniformity in these activities, the Commission has relied upon soft law instruments, including a ‘Roadmap for equality between women and men’ (*Roadmap*), a 2008 manual for the implementation of gender mainstreaming in employment, social inclusion, and social protection policies, and the 2011 analysis of good practices in gender mainstreaming, which was commissioned

⁴⁴⁹ *ibid* 5.

⁴⁵⁰ See: Europa, ‘Speech by Mr. Pdraig Flynn, Launch of the Fourth Action Programme for Equal Opportunities-Mechanisms for Mainstreaming-Dublin 7 October 1996.’ <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/96/238&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 13/12/2011.

⁴⁵¹ See: Chapter 7 for a discussion of gender mainstreaming in the US.

⁴⁵² See: Brian Bercusson, *European labour law* (2nd edn, Cambridge University Press 2009) 727 et al.

⁴⁵³ See: UK Equality Act 2010, pt 11, ‘Advancement of Equality.’

from the European Institute for Gender Equality (EIGE). Of these instruments, the *Roadmap* stands out as an important tool for nudging multi-level mainstreaming efforts forward, as it is updated in five-year periods. For instance, the 2006-2010 *Roadmap* sought the integration of gender issues in policy making by means of specific gender objectives and quantified targets; including greater female employment; increased childcare facilities, and increased female graduates in maths, science, and technologies.⁴⁵⁴ Building upon these efforts, but also observing that ‘progress is still too slow in most areas and gender equality is far from being achieved,’ the Commission adopted a new five year *Roadmap* in 2010.⁴⁵⁵ This *Roadmap* set forth almost identical policy areas, but also expressed a specific commitment to gender mainstreaming as ‘integral’ to its policymaking.⁴⁵⁶ The Commission also declared that it sought to promote the ‘full implementation of the Beijing Platform for Action, including the development and updating of indicators.’⁴⁵⁷ This is an important development, as research suggests that indicators are important instruments for guiding policy efforts, and their value depends on the knowledge, willingness, and ability of the member states to accurately collect data and report on them. Recognizing this fact, the new *Roadmap* seeks annual reporting of gender equality efforts by member states, as well as the appointment of a high-level group on gender mainstreaming, among its other recommendations.

In addition to these external efforts, there are the internal gender mainstreaming activities of the EU institutions. For its part, the EU Parliament has tasked three bodies to be in charge of gender mainstreaming and has spent the last decade implementing initiatives and activities in order to intensify its mainstreaming efforts. It has also critically reviewed the success of its efforts to date, concluding that they could be enhanced through measures generating greater engagement; enhancing the capacities

⁴⁵⁴ See: Commission, *Commission Staff Working Document. Background document Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategy for Equality between Women and Men 2010-2015, COM(2010) 491; SEC(2010) 1079.* (2010).

⁴⁵⁵ *ibid*, 5.1.2.

⁴⁵⁶ *ibid* 3.

⁴⁵⁷ Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategy for equality between women and men 2010-2015, COM (2010) 491 final, 6.3.*

and networking of the stakeholders, and by increasing the number of women members to Parliament and their representation in positions of power.⁴⁵⁸

b Mainstreaming at the national level.

At the national level, two Directives mandate that the member states are similarly obligated to undertake gender mainstreaming. In almost identical terms, Article 29 of Directive 2006/54/EC, and Article 12 of Directive 2010/41/EU state that:

*Member states shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities...*⁴⁵⁹

In short, EU secondary law expressly tasks the individual member states to consider the potential negative impacts of their national policies upon women. In order to appreciate just how potentially transformative this mandate is one need only consider the types of regulations and policies that are included. Among others, there are policies pertaining to the provision of maternity leave and maternity pay, the organization of work, the public provision of childcare, and the fixing of school hours—all of which may have differential impacts on the situation of women and men. The problem is, however, that constraints have been placed upon the transformative potential of the strategy, albeit unintentionally. These constraints arise from the fact that as the Directives set forth *only* the goal to be achieved, the member states remain free to undertake gender mainstreaming as they see fit. As a result, and as Jill Rubery's important research reveals, national measures implementing gender mainstreaming vary greatly, in both degree and effect. Consequently, while several states have adopted the strategy via statutory mandate, others have only set up committees tasked with gender

⁴⁵⁸ See: EU Parliament, *Gender Mainstreaming in Committees and Delegations of the European Parliament: Study for the FEMM Committee* (Luxembourg, 2014).

⁴⁵⁹ Recast Directive (n 15); Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L180, 15 July 2010, p.1.

mainstreaming, or have provided only guidelines for mainstreaming, or only a ‘political commitment’ to undertake gender assessments of all new pieces of legislation.⁴⁶⁰

Additionally, despite trying to ensure a degree of success among these varied efforts, including by giving the member states quantitative targets in order ‘to give impetus to their equal opportunity strategy,’ the EU Commission acknowledges that the member states rely mostly upon the Open Method of Coordination (OMC), and soft law instruments, as a mode of adoption and implementation, rather than hard law.⁴⁶¹ This use of the OMC, which is at the core of new governance in the EU, has important implications for the effectiveness of gender mainstreaming. For this reason, a brief discussion of OMC follows.⁴⁶²

c Open Method of Coordination.

OMC is a soft law method, as that term was explained in Chapter 1. Defined by the Commission as ‘an intergovernmental method of *soft coordination*, by which member states are evaluated by one another, with the Commission’s role being one of surveillance,’ OMC is intended to encourage learning induced policy change at member state level without the oppressive use of EU powers to ‘regulate’ and control compliance.⁴⁶³ As such, OMC offers replacement of obligations with incentives, wherein, national governments are engaged in voluntary political coordination through national plans (NAP) regarding common objectives, whose achievement is measured by common indicators.⁴⁶⁴ Overall, the aspiration of OMC is the convergence of member state policy, of harmonization without dictation, and of mutual learning and the

⁴⁶⁰ For a list of the specific member state provisions see: J Rubery, ‘Gender mainstreaming and the open method of coordination: is the open method too open for gender equality policy?’ (ESRC seminar, Gender Mainstreaming: Theoretical Issues and New Developments, Leeds University, 2003).

⁴⁶¹ Rubery, ‘Gender mainstreaming and gender equality in the EU: the impact of the EU employment strategy’ (n 11) 501.

⁴⁶² First adopted in the Treaty of Amsterdam, without using the specific term in the Employment Title, it is the paradigm case of OMC. It was expanded to social policy in 2000 and in 2005 to a single Social OMC.

⁴⁶³ Commission, *Commission Staff Working Document: Lisbon Strategy Evaluation Document. Brussels, 2.2.2010. SEC (2010) 114 final* (2010) 18. See: Manuel Souto-Otero, Timo Fleckenstein and Rod Dacombe, ‘Filling in the gaps: European governance, the open method of coordination and the European Commission’ (2008) 23 *J Education pol’y* 231, 245.

⁴⁶⁴ Europa, *Commission Communication: ‘A renewed commitment for social Europe: Reinforcing the OMC for Social Protection and Social Inclusion.’ (SEC) 2008) 2153.*

development of good practices. This aspiration is emphasized by the European Commission White Paper, 2001, which defined OMC as, ‘a way of encouraging co-operation, the exchange of best practice and agreeing common targets and guidelines for member states.’⁴⁶⁵

Notwithstanding the clear supranational support for OMC, there is significant academic debate concerning its use. On one side of the debate is Benz, a supporter who views it as a, ‘device for generating and spreading best practices and achieving greater convergence towards EU policy.’⁴⁶⁶ Added to this, Ashiagbor argues that it is, ‘a form of governance which has the potential to achieve policy coordination without threatening jealously guarded national sovereignty.’⁴⁶⁷ On the other side of the debate is Syrpis, who is sceptical and asserts that OMC has many ‘unproven benefits,’⁴⁶⁸ and Shore, who critically views it as a means by which European governance is extended into a range of new policy areas that were previously within the exclusive jurisdiction of national governments. For Shore, OMC is ‘eroding state sovereignty in the areas of social protection, inclusion, education, youth and training’ and acting as a, ‘key instrument for ‘Europeanising’ domestic policy agendas,’ which serves to ‘subvert parliamentary democracy and advance a new form of elitism.’⁴⁶⁹ While also being critical of new governance, Edquist views it not as a threat to sovereignty, but as a tool to push member state agendas, and to deter ‘contentious activism.’⁴⁷⁰

While there is likely a grain of truth in each of the criticisms, they tend to ignore the fact that soft law is an indispensable tool in a Union of twenty-eight sovereign countries, often with diverse interests. Consequently, soft law instruments are useful for advancing social policy in areas where national interests create impasse. This has certainly been the case in the EU, where OMC has offered a framework for a myriad of economic and social policies, including employment, social protection, social inclusion, education, and training. Indeed, OMC is epitomized by the European Employment

⁴⁶⁵ Commission, *European Governance: A White Paper* (COM (2001) 428 final, 2001).

⁴⁶⁶ A. Benz, ‘Accountable Multilevel Governance by the Open Method of Coordination?’ (2007) 13 *Eur LJ* 505, 506.

⁴⁶⁷ Ashiagbor (n 300) 241.

⁴⁶⁸ Phil Syrpis, *EU intervention in domestic labour law* (OUP 2007) 159.

⁴⁶⁹ Shore (n 326) 300.

⁴⁷⁰ K. Edquist, ‘EU social-policy governance: advocating activism or servicing states?’ (2006) 13 *JEPP* 500, 512.

Strategy (EES), by which member states are encouraged to develop their national employment policy in accordance with a common plan, and then share, evaluate, and coordinate with other member states. This common plan is encapsulated in the ‘Employment Guidelines,’ which are the priorities and targets for employment policies proposed by the Commission, agreed to by national governments, and adopted by the EU Council. While it is fair to say that the focus of these guidelines is an increased employment rate of women and men in the EU, this goal is not to be achieved at any cost. Rather, it is to be secured through a labour environment of adequate flexibility, protection, and quality employment.⁴⁷¹ Within this environment, ‘family friendly policies,’ which are intended to better reconcile work, private and family life, while promoting equal opportunities, have been part of the EES since the issuance of its first guidelines in 1998, and remain central to its common priorities and targets, including with the Commission’s March 2015 proposal for new policy guidelines.⁴⁷² These new guidelines are intended to supplement those that remain in force since 2010, supporting the achievement of ‘smart, sustainable, and inclusive growth’ and the aims of the yearly cycle of economic policy coordination, called the ‘European Semester.’⁴⁷³ Together, these policies frame the scope and direction for national economic policy coordination and provide the basis for country specific ‘Recommendations,’ which are tailored advice, intended to help member state countries boost jobs and growth.⁴⁷⁴ In part, these guidelines and Recommendations urge member states to consider whether their national measures are up to the task of increasing opportunities for combining work with social responsibilities, including through the provision of flexible working, job-protected, paid leave, and the provision of adequate, affordable adult and child care. If they are not, national governments have the opportunity to address the shortfall in their ‘National Reform Programmes’ (NRP), which are submitted annually for analysis by the

⁴⁷¹ See: Council Decision 2010/07/EU, OJ L 308 of 24.11.2010.

⁴⁷² OJ [1998] C30/1.

⁴⁷³ European Commission, ‘European Employment Strategy’
<<http://ec.europa.eu/social/main.jsp?catId=101&langId=en>> (accessed 27 July 2015)

⁴⁷⁴ See: ‘European Commission: Country Specific Recommendations’
<http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm>
(accessed 27 July 2015)

Commission for compliance with the Europe 2020 strategy, of which the EES forms a key part.⁴⁷⁵

Notably, this annual programme of planning, monitoring, and examining national employment policies has a specific commitment to gender mainstreaming.⁴⁷⁶ The implication of this commitment, as defined by Rubery, is not just that women have access to the labour market, but that there is a fundamental transformation of economic and social structures that underpin the labour market.⁴⁷⁷ This is to say that there is a commitment to changing the underlying causes of inequality, rather than merely focusing on the labour market. As Rubery observes, gender mainstreaming ‘is a strategy which focuses on the supply side of the economy, as opposed to one seeking to change the behaviour of employers.’⁴⁷⁸

There is evidence to suggest that such an approach to gender mainstreaming tends to lead to an expansive view of equality of opportunity, as is illustrated by McGuaran’s research on Ireland’s experience with the strategy. Her research found gender mainstreaming led to ‘a gradual and greater acceptance by policy-makers and implementers of the fact that gender equality could be relevant to many policies.’⁴⁷⁹ McGuaran’s findings bolster Rubery’s research into the gender mainstreaming efforts of member states, in which she found evidence of changes in public policy in areas of job segregation, pay, work-life reconciliation, and childcare provision.⁴⁸⁰ Their research is valuable, for it suggests that gender mainstreaming is an important tool for making gender visible, for creating an understanding of the needs and conditions of women and men (including pregnant workers), and making policy more effective in securing substantive equality. Notwithstanding the foregoing assertions, it is acknowledged that soft law has its limitations, and that the EU’s foray into gender mainstreaming has not been an unqualified success. In Chapter 7, the issues surrounding

⁴⁷⁵ For 2015 County specific National Reform Programmes, see: ‘European Commission: Europe 2020’ <http://ec.europa.eu/europe2020/index_en.htm#map> (accessed 27 July 20105)

⁴⁷⁶ See: Rubery, ‘Gender mainstreaming and gender equality in the EU: the impact of the EU employment strategy’ (n 11) 517.

⁴⁷⁷ *ibid.*

⁴⁷⁸ *ibid* 516.

⁴⁷⁹ Ann McGuaran, ‘*Gender mainstreaming and the public policy implementation process: round pegs in square holes?*’ (2009) 37 *Pol’y & Pol* 215, 228.

⁴⁸⁰ Rubery, ‘Gender mainstreaming and the open method of coordination: is the open method too open for gender equality policy?’(n 465).

the adoption and implementation of the strategy in the EU are discussed, and it is suggested that it is essential for the US to understand the problems that have arisen and to address certain conditions and factors whose existence are deemed essential if its gender mainstreaming strategy to be implemented successfully.

VIII Conclusion

The discussion in this Chapter has done three things. First, it has set forth the historical context in which EU gender discrimination law has developed. As the discussion of comparative method in Chapter 2 emphasized, context matters in the sense that an understanding of the complex socio-political context of the legal systems under comparison is essential if the research questions posed are to be answered persuasively. Secondly, the discussion has shown that by carving out ‘special treatment’ from equal treatment legislation, combined with positive action measures, and the soft law strategy of gender mainstreaming, the EU has adopted a holistic approach to addressing pregnancy discrimination that seeks to ensure that compensation for disadvantages in the professional careers of women continues. Thirdly, this Chapter has laid the foundation for a critical evaluation of the EU model of equality in practice and provided the basis upon which to draw lessons about best practices, and to assess a convergence in US antidiscrimination law.

Chapter 4: The European Model in practice

*Whilst on paper the law exists and is comprehensive, in practice, it is too often circumvented.*⁴⁸¹

I Introduction.

This Chapter is concerned with critically considering the European Union (EU) model in practice. The intention is to highlight the strengths and weaknesses of a ‘special treatment’ approach to tackling pregnancy discrimination, to suggest several lessons for the United States (US) in its efforts to tackle this seemingly intractable problem, and to explore several promising developments in EU gender discrimination law.

This critical examination begins with a review of the case law of the Court of Justice of the European Union (CJEU), illustrating the conflict inherent in legislation providing for formal equality *and* requiring treatment that respects difference. Part III then presents and addresses the arguments and research supporting claims that ‘special treatment’ measures tend to institutionalize motherhood and have fallen short in advancing substantive equality. Part IV closes the discussion with an exploration of the EU response to these criticisms, which is illustrated in the redirection of its gender equality policy. This redirection tells us much about the value placed upon equality for pregnant workers in the EU, where there is an understanding that to be successful, an integrated gender equality strategy must be inclusive and progressive.

Overall, this Chapter presents the argument that while the EU model of equality has limitations, it is a holistic and evolving approach to addressing pregnancy discrimination, which offers additional measures and lessons to the US in its struggle with this pernicious issue.

⁴⁸¹ di Torrella and Masselot, ‘Work and Family Life Balance in EU Law & Policy 40 Years On: Still Balancing; Still Struggling,’ in Commission, *European Gender Equality Law Review: No.2/2013* (2014) 7

II The conflict between protection and equality.

As the Treaties and several Directives mandate equality *and* protection for pregnancy and maternity, there is both great potential to advance substantive equality and great potential for conflict when these provisions are applied in practice. Advocate General (AG) Trstenjak, in the case of *Virgine Pontin v T-Comalux SA*, has highlighted the potential to advance equality, observing that, with regard to the Equal Treatment Directive (ETD) and the Pregnant Workers Directive (PWD), both those directives do not operate merely in parallel with each other but are to a certain extent interlocked.⁴⁸² The results of this study reveal that while there is indeed interconnectivity between the equality Directives, it is not absolute. Rather, there exists significant conflict in EU antidiscrimination law when applied in practice. This conflict suggests the need for a new equality Directive, the substance of which was initially discussed in Chapter 3.

a The ‘productive worker.’

This examination takes as its starting point the valuable research conducted by Annick Masselot and Eugenia Caracciolo di Torella into the case law of the CJEU up until 2001. In their article, *Pregnancy, Maternity and the organisation of family life: An attempt to classify the case law of the Court of Justice*, they introduce the thesis that over the years the CJEU has shown itself to be more comfortable dealing with the treatment of pregnant workers than with those on maternity leave, and conclude that the manner in which the Court has treated these workers is based upon the male norm, social stereotypes, and the concept of a ‘productive worker.’⁴⁸³ This examination of CJEU case law up until 2014 will build upon their conclusions, showing that case law addressing hiring and dismissal has indeed been far more effective in terms of advancing equality for women than case law addressing issues of pay or leave. This examination will also reveal that while much of the case law subsequent to 2001 can be interpreted to offer support for Masselot and di Torella’s conclusions, it can also be interpreted to support another conclusion. That is, the conclusion proffered by the results

⁴⁸² Case C-63/08 *Virgine Pontin v T-Comalux SA* [2009] ECR I-10467, para 46. Equal Treatment Directive (n 122), Pregnant Workers Directive (n 112)

⁴⁸³ Masselot and di Torella (n 395)

of this research, which is that the CJEU is more concerned with the economic impact of its measures, than with continuing gender stereotypes. This is to say that although the Court may not have done as much as it could to ensure substantive equality, or clarify conflicting legislative provisions, its failure to may be related as much to the fact that pregnancy is a riddle that cannot be resolved, in terms of its need for special treatment, as it is to do with the Court's desire to interpret EU law in a manner that is palatable to the member states. Indeed, it is suggested that the Court's interpretation reflects the strength of the economic underpinnings of EU antidiscrimination law and the fact that the perpetuation of gender stereotypes is more firmly rooted in the limitations of the Directives themselves, than in the failures of the Court. The Court is limited to working within the confines of EU legislation. Legislation that is reflective of the lack of desire, at the time that it was adopted, to tackle sex discrimination and gender roles beyond the confines of the workplace.⁴⁸⁴

To make this point more clearly, this examination will separately address three areas of EU protection for pregnancy and maternity: hiring and dismissal, leave, and pay. This discussion will reveal a concern for the economic impact of legislation is often reflected in the Court's judgements regarding pay and maternity leave.⁴⁸⁵ This is to say that while economic concerns have historically been rejected by the CJEU as regards discrimination, they have not been rejected as regards the provision of pay and leave.⁴⁸⁶ While the CJEU is unequivocal in stating that discrimination on grounds of pregnancy can never be, 'justified by the financial consequences' that ensue to an employer as a result of the special protections that the ETD and PWD afford, pay and leave are the locus where the concepts of equality and special protection under the PWD collide with the provisions of Article 141 EC, the Equal Pay Directive (EPD), and the ETD.⁴⁸⁷

⁴⁸⁴ See Chapter 3 for a discussion of the economic basis to EU antidiscrimination law.

⁴⁸⁵ See Chapter 5 for the argument that US courts also balance competing interests when applying the concept of indirect discrimination.

⁴⁸⁶ See: *Silke-Karin Mahlburg v Land Mecklenburg-Vorpommern*, (n 342), para 34. Also, Case C-109/00 *Tele Danmark A/S v. Handels-og Kontorfunktionærernes Forbund i Danmark (HK)* [2001] ECR I-6993, para 23.

⁴⁸⁷ See Equal Treatment Directive (n 122); Recast Directive (n 15); Pregnant Workers Directive (n 112); see: *Busch*, (n 341), para 44 .

b The pregnant worker—hiring and dismissal.

The results of this research confirm the findings of Masselot and di Torella, showing that the CJEU is at ease with enforcing a negative prohibition against a refusal to hire, or the dismissal of a worker, from the beginning of pregnancy, until the end of maternity leave. Indeed, it is here that the Court has been willing to expound upon the interlocking nature of the equality Directives to ensure that the greatest numbers of women are afforded legal protection. Arguably, the Court has been assisted in this regard by the fact that individually the equality Directives do not contain all of the protections afforded EU workers. For instance, it is not the PWD that affords protection against a refusal to hire a pregnant worker or employment on terms suggestive of discrimination on grounds of sex. These protections are afforded by Article 2(3) of the ETD 76/207/EEC, which prohibits unfavourable treatment of women in their access to employment and working conditions, ‘without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.’⁴⁸⁸ While the PWD expressly prohibits dismissal during pregnancy and maternity, save in exceptional circumstances, the decision to dismiss a worker on the grounds of pregnancy and/or the birth of a child constitutes direct discrimination on grounds of sex.⁴⁸⁹ As such, it is also prohibited by the ETD.

The Preamble to the PWD also states that the protections it affords should not work ‘to the detriment of directives concerning equal treatment for women and men.’ However, the problem is the PWD does not express exactly how this is to be achieved and consequently the CJEU has been left to make this determination. The results of this study suggest that the Court has been more willing to find the Directives interlocking, and less willing to defer to the economic concerns of the member states and employers in the hiring and dismissal of a pregnant worker, than in the provision of ‘maternity leave,’ and ‘maternity pay.’ A brief review of dismissal cases will help to make this point more clearly, showing that the CJEU is highly sensitive to the precarious situation of pregnant workers and the families they support when employers make the

⁴⁸⁸ Now Article 28 of the Recast Directive (n 15).

⁴⁸⁹ Pregnant Workers Directive (n 112). See, *Hertz* (n 126), para 13; *Habermann-Beltermann*, (n 340), para 15; *Webb* (n 125), para 19.

determination to dismiss them. This has been the case where the health and safety protections adopted by member states appear to conflict on their face with equality. The Court has declared that they may be permissible protections, but they cannot be used by employers as the basis for dismissal. This was the case in *Habermann-Beltermann*, wherein the Court held that an employer could not terminate an employment contract on account of pregnancy, even where there was a statutory prohibition on nighttime work.⁴⁹⁰

This review found cases involving dismissal are generally divided into two areas of focus—those in which the Court has delineated the *circumstances* in which dismissal is prohibited and those in which the Court has determined the *category* of workers entitled to the protections of the equality Directives. We shall consider first the cases addressing the circumstances surrounding dismissal, before pressing on to consider whom the Directives protect.

i. Circumstances surrounding dismissal.

To recall from Chapter 3, it is settled EU case law that dismissal of a female worker on account of pregnancy, or essentially on account of pregnancy, can affect only women and therefore constitutes direct sex discrimination.⁴⁹¹ Added to this, Article 10 of the PWD prohibits dismissal from the beginning of pregnancy to the end of maternity leave. This suggests to an employer that there is a clear period of time during which dismissal should not occur, absent exceptional circumstances. A problem arises however, where the dismissal is of worker with an *illness* that falls outside of the protected period. The EU has expressly addressed the problem of incapacity during pregnancy and maternity by providing a right to paid leave.⁴⁹² For illness that either continues, or arises after the end of maternity leave, the CJEU has been careful to affirm the temporal nature of the protection afforded by the PWD, while also ensuring that the principle of equal treatment is upheld. For instance, in the *Hertz* case, the Court stated that while neither the PWD nor the ETD prohibit the dismissal of a woman for absences

⁴⁹⁰ *Habermann-Beltermann* (n 340), para 26.

⁴⁹¹ *Dekker* (n 333), para 12; *Hertz* (n 126), para 13; *Habermann-Beltermann* (n 340), para 15; *Webb* (n 125), para 19.

⁴⁹² Pregnant Workers Directive (n 112) Arts. 8, 10, 11.

occurring *after* the protected period, employers cannot use the limitation to excuse an otherwise prohibited dismissal.⁴⁹³ In *Brown v Rentokil*, the Court delineated further the circumstances in which dismissal is prohibited, stating that when computing the period justifying the dismissal, an employer may take into account a woman's absences for illness arising after maternity leave, but may not take into account absences for illness that arose during pregnancy and maternity leave.⁴⁹⁴ The Court expanded upon these rulings in *Nadine Paquay v Société d'architectes Hoet + Minne SPRL*, when it stated that both the PWD and the ETD prohibit dismissal that occurs *after* the protected period, where the decision to dismiss was taken *while* the worker was pregnant, and the decision 'had been formed in a number of stages.'⁴⁹⁵

Another circumstance in which the Court has unequivocally stated that the ETD and PWD prohibit dismissal concerns the employment contract itself. In the case of *Webb*, the Court stated that it matters not that at the time of her dismissal the pregnant worker is unable to fulfil the task for which she is recruited.⁴⁹⁶ Nor does it matter whether she is employed under a contract for an indefinite period, or for a fixed term. In *Tele Danmark A/S v. Handels-og Kontorfunktionærernes Forbund i Danmark (HK)*, and *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios*, two cases involving fixed term contracts in which the judgments relating to dismissal and non-renewal were released on the same day (4 October 2001), the CJEU made clear that the PWD makes no distinction as to the scope of the prohibition against dismissal according to the duration of the employment relationship.⁴⁹⁷ It also said that while the non-renewal of a fixed-term contract, when it comes to the end of its stipulated term, cannot be regarded as dismissal under Article 10 of the PWD, it could be regarded as direct sex discrimination under the ETD, if the non-renewal was motivated by the worker's pregnancy.⁴⁹⁸

⁴⁹³ *Hertz* (n 126), paras 16 and 19.

⁴⁹⁴ *Brown v Rentokil*, (n 124), paras 25-28.

⁴⁹⁵ Case C-460/06 *Nadine Paquay v Société d'architectes Hoet + Minne SPRL*. [2007] ECR-I-8511, para 20.

⁴⁹⁶ *Webb* (n 125), para 27.

⁴⁹⁷ *Tele Danmark* (n 491), para 33; *Melgar*, (n 341), para 43.

⁴⁹⁸ *ibid.* *Melgar* (n 341), para 47.

These judgments lead to two inescapable conclusions. First, employers in the EU cannot use fixed-term contracts as a means to avoid the prohibition against dismissal of pregnant workers. Secondly, the PWD and the ETD provide women with *dual* legal protection from dismissal. As stated in the Opinion of AG Tizzano in *Melgar*, this is:

*Protection of a more general nature deriving from the prohibition of discrimination on grounds of sex, set out in Directive 76/207 and more specific protection offered by Directive 92/85, which, in Article 10, prohibits dismissal.*⁴⁹⁹

ii. Who is protected?

A second area of focus for the CJEU concerns the situation in which an employer defends the dismissal on the basis that the woman was not a ‘pregnant worker’, within Article 2(a) of the PWD. This is to say:

A pregnant worker who informs her employer of her condition, in accordance with national legislation and/or practice.

This situation is well illustrated by the case of *Dita Danosa v. LKB Lizings SIA*. There, the dismissal concerned a pregnant woman who was a member of a capital company’s board of directors. The CJEU declared that who is considered a ‘worker,’ is determined by finding that the person ‘performs services for, and under the direction of another person, for which there is receipt of remuneration.’⁵⁰⁰ Based upon this definition, the fact that a person is a member of a board of directors of a Company, does not, in and of itself rule out finding a relationship of subordination rather than of self-employment.⁵⁰¹ Instead, subordination is determined from the facts and circumstances of the relationship between the board and the director. Moreover, even if the facts do not support the conclusion that a director is a worker for the purposes of the application of the PWD, dismissal would be otherwise contrary to the ETD, as it prohibits dismissal for reasons connected with pregnancy.⁵⁰²

⁴⁹⁹ *ibid*, para 47.

⁵⁰⁰ *Dita Danosa v. LKB Lizings SIA* (n 126), paras 39-41

⁵⁰¹ *ibid*, para 47.

⁵⁰² *ibid*.

The case of *Mayr* was initially discussed in Chapter 2, and offers a further illustration of the interlocking nature of the Directives. In that case, the employer claimed that the worker was not entitled to the protection afforded by the PWD, as she was not pregnant at the time of her dismissal. Instead, at that time, Ms. Mayr was out on sick leave because she was undergoing In Vitro Fertilization (IVF), and although her eggs had been fertilized, they had yet to be implanted in her.⁵⁰³ In light of this fact, the CJEU had:

*The opportunity of ruling for the first time on the compatibility with Community law of the termination of an employment contract on the grounds of a worker's possible future pregnancy.*⁵⁰⁴

The Court's response was to accept that life (pregnancy) did not occur before the transfer of fertilized ova into the woman's uterus, and refused to find that the protections afforded by the PWD apply to a woman undergoing IVF. Nevertheless, it determined that the provisions of the ETD precluded dismissal where a woman was at an advanced stage in IVF, and where dismissal was based on the fact that the woman had undergone such treatment.⁵⁰⁵

These judgments are insightful. They serve to illustrate the interlocking nature of the equality Directives. They also illustrate just how proactive the CJEU has been in adopting an expansive interpretation of the protections afforded by the ETD and the PWD and ensuring uniformity in the laws of the member states in the area of hiring and dismissal. This proactiveness will stand in stark contrast to the judgments issued by the Court in cases addressing a worker's right to leave and/or pay during pregnancy and maternity. The discussion below will reveal that in those cases, deference to the economic interests of the member states has required the Court to undertake an increasingly strict interpretation of the equality Directives. The upshot of which, it is suggested, is to challenge the EU and/or the member state legislatures to respond.

⁵⁰³ IVF involves combining eggs and sperm outside the body in a laboratory. Once an embryo or embryos form, they are then placed in the uterus.

⁵⁰⁴ *Mayr* (n 144) Opinion AG Ruiz-Jarabo Colomer, para 65.

⁵⁰⁵ *ibid*, para 52-54.

c Maternity leave—a limited right

The judgments of the CJEU, in cases involving maternity leave reveal a lack of dynamic interpretation and clear hesitancy to find the equality Directives interlock to afford greater substantive equality. This lack of dynamic interpretation dates back to before the enactment of the PWD, to when the ETD contained the only derogation from equal treatment for pregnant workers. In *Hoffman*, the Court was required to interpret Article 2(3) of ETD, which states that:

This Directive shall be without prejudice to provisions concerning protection of women, particularly as regards pregnancy and maternity.

In its initial interpretation, the Court determined that member states were free to provide for maternity leave for mothers, to the *exclusion* of fathers.⁵⁰⁶ The Court referred to the ‘special relationship’ between a mother and her child after childbirth and the ‘undesirable pressures’ to return to work prematurely, concluding that:

*Directive 76/207 is not designed to settle questions concerning the organization of the family, or to alter the division of responsibility between parents.*⁵⁰⁷

Unsurprisingly, *Hoffman* has been the source of much academic debate, including criticism for reinforcing the ‘gender stereotype of women as caregivers and the ideology of motherhood based upon rhetoric of ‘protection.’⁵⁰⁸ Hervey and Shaw write that *Hoffman* represents, ‘The archetypal statement of the perpetuation of ‘separate spheres’ ideology and the ‘acceptance that the private sphere is beyond the reach of [EU] law.’⁵⁰⁹ Considering *Hoffman* in the context of other decisions, Foubert argues that ‘the Court has often endangered women’s position in the labour market, by simply reinforcing women in their traditional roles of child bearers and child carers.’⁵¹⁰ Added to this, McGlynn argues that ‘The rhetoric of protection taps into a stream of thinking

⁵⁰⁶ Case 184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECR 3047, para 26; Also, Case 163/82 *Commission of the European Communities v Italian Republic* [1983] ECR 3273, para 16

⁵⁰⁷ *Hofmann* (n 511), para 24.

⁵⁰⁸ See: Clare McGlynn, ‘Ideologies of Motherhood in European Community Sex Equality Law’ (2000) 6 *Eur LJ* 29.

⁵⁰⁹ TK Hervey and J. Shaw, ‘Women, work and Care: Women’s Dual Role and Double Burden in Ec Sex Equality Law’ (1998) 8 *J Eur Soc Pol’y* 43, 50.

⁵¹⁰ Foubert (n 397) 226.

which sees all women as delicate and in need of paternal/patriarchal control and supervision.⁵¹¹

Notably, although the Commission had the opportunity to correct the CJEU's interpretation in its original proposal for a Pregnant Workers Directive (Directive 92/85/EEC), it chose not to do so. Instead, it expressly deferred to the member states, providing that the Directive's leave provisions were limited to pregnant workers, workers who have recently given birth, or workers who are breastfeeding, 'within the meaning of national legislation, and/or national practice.'⁵¹²In light of the divisive debate surrounding the adoption of the PWD, this deference is not surprising.⁵¹³It is also not surprising, that in light of this provision, in all the cases in which it has considered the issue of maternity leave since the adoption of the PWD, the CJEU has restated its conclusion in *Hoffman* that Article 2(2) of the ETD (now Recast Directive 2006/54/EC Article 2(2) (c)) recognizes that it is legitimate to ensure the protection of:

*A woman's biological condition during and after pregnancy and, secondly, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.*⁵¹⁴

While these judgments justify a conclusion that the CJEU is patriarchal, merely continuing the historical treatment of women as objects of guardianship, the results of this research suggest they also justify another conclusion: that the CJEU is concerned less with gender stereotypes and paternalism, and more with the economic repercussions of its judgments. Indeed, three recent judgments addressing the issue of maternity leave suggest, contrary to the assertions of McGlynn, that the Court does not view all women as in need of protection, rather only those who are covered by the express provisions of the Directives as transposed into the laws of the member states. Beginning with *Montull*, the CJEU observed that self-employed women who are not 'employed' have no right to maternity leave under the PWD. The PWD 'covers only pregnant workers and workers

⁵¹¹ McGlynn (n 513) 35.

⁵¹² Pregnant Workers Directive (n 112), Article 2(a), (b), (c).

⁵¹³ See discussion of UK objection to the PWD in Chapter 3.

⁵¹⁴ See: *Hofmann* (n 511), para 25. For more recent cases, see: *C.D.* (n 395), para 34; *Kiiski* (n 345), para 56; *Montull* (n 385), para 50

who have recently given birth or are breastfeeding and who work under the direction of an employer.⁵¹⁵ The Court also stated that while the PWD permitted the sharing of maternity leave with the father, it only did so where the mother had a right to leave. Meaning, therefore, that a father's right to share maternity leave is not independent of the mother's right.⁵¹⁶

Following on from this, in the 2014 cases of *C.D. v .S.T.* and *Z. v. A Government Department*, the CJEU held that member states are not required to provide maternity leave pursuant to Article 8 of the PWD, to a female worker who, as a commissioning mother has had a baby through a *surrogacy* arrangement, even in circumstances where she may breastfeed the baby following the birth, or where she does breastfeed the baby.⁵¹⁷ The Court also held that the refusal to provide paid leave does not constitute discrimination on grounds of sex, under the latest version of the ETD (Articles 4 and 14 of Directive 2006/54/EC), as the refusal of leave is equally applicable to the commissioning father.

In effect, in all three cases, the CJEU was unwilling to find a right to maternity leave, where member state law had *not* expressly provided for it. By refusing to apply the provisions of the ETD in circumstances in which the PWD failed to afford substantive equality, the CJEU chose to defer to the national laws of the member states, even though many of them had not contemplated advances in medical technology. To reach this decision, it was necessary for the CJEU to accept the Opinion of AG Wahl, over that of AG Kokott, issued on the same day. It was also necessary for the Court to make a strong comparison to the EU right to leave on the adoption of a child, where recital 27 in the preamble to Directive 2006/54/EC states that:

It is for the member states to determine whether or not to grant such a right to paternity and/or adoption leave and also to determine any

⁵¹⁵ *ibid*, *Montull* (n 385), para 59

⁵¹⁶ *ibid*.

⁵¹⁷ *ibid*, *C.D.* (n 395), *Z v A Government department* (n 395). Note: Surrogacy involves IVF using the sperm and eggs from the future genetic parents, after which the embryo is transferred into the womb of a 'surrogate' mother. The pregnancy will be carried by the surrogate. See: Commission, *Written questions by Members of the European Parliament and their answers given by a European Union institution [2013] OJ C362E/1, Questions for written answer E-0010081/13 to the Commission. Oreste Rossi (EFD) (1 February 2013)*.

conditions, other than dismissal and return to work, which are outside the scope of this Directive.

These rulings suggest that the CJEU is uncomfortable advancing gender equality in areas not expressly provided for in the Directives or national law, and where to do so would impose significant economic costs upon the EU member states. This is somewhat surprising; in light of the historic role the Court has played in advancing the rights of pregnant workers. As observed in Chapter 3, the CJEU determined that pregnancy was *sui generis* even before the EU adopted the PWD. Likely, this hesitancy reflects the fact that maternity leave involves life outside of work and an area of equality that the Court has not inherently been willing to step into, in the absence of legislative provision. Arguably, it is also reflective of the fact that the financial cost of maternity leave has been the subject of an ongoing debate in the EU, following the Commission's proposal for an amendment to the PWD, seeking to expand the length of maternity leave, and making it fully paid.⁵¹⁸ Added to this, the legislative connection of maternity leave to a woman's biological condition means that neither a man nor a surrogate mother can lay equal claim to it.

However, while, such a construct has made it difficult for the CJEU to further equality for pregnant workers, the Court has, in recent decisions, shown a renewed purpose, wherein it has carefully parsed out maternity leave from leave accorded to workers, in their capacity as parents of a child. For instance, in *Roca Alvarez* the CJEU distinguished the *Hoffman* decision and determined that the ETD precluded member states from passing measures which:

*Provides that female workers who are mothers and whose status is that of an employed person are entitled, in various ways, to take leave during the first nine months following the child's birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child's mother is also an employed person.*⁵¹⁹

⁵¹⁸ See: Parliament, *Costs and Benefits of Maternity and Paternity Leave* (n 380) and EU Parliament, *Fully paid maternity leave of 18 and 20 weeks—Impact Assessment*. (2010).

⁵¹⁹ *Roca Alvarez* (n 422), para 39.

It may be concluded that with these recent decisions, the Court has issued a challenge to the member states and its fellow EU institutions—to either amend their national laws, and/or amend the PWD. It waits to be seen what their response will be.

d Maternity leave—a protected right.

Despite being a limited right, it is undeniable that EU maternity leave is strongly protected by the dual provisions of the PWD and the ETD. Established case law holds that if a woman is entitled to utilize the right to maternity leave under the PWD, this utilization must not affect her employment relationship, the rights that are derived from that relationship, or result in discrimination to her. Added to this, if a woman in the EU is treated unfavourably because of absence on maternity leave, she suffers discrimination on grounds of her pregnancy, and this constitutes discrimination within the ETD.⁵²⁰ Furthermore, it is irrelevant whether the unfavourable treatment occurs within the context of an *existing* employment relationship, or a *new* employment relationship.⁵²¹

A number of prominent cases have brought the status of maternity leave into sharp focus. In *Sarkatzis Herrero v Imsalud*, the CJEU found unfavourable treatment where a national rule provides that seniority and eligibility for promotion only run from the date of taking up a new employment position and the worker in question is delayed from starting a permanent position by taking maternity.⁵²² In *Land Brandenburg v Ursula Sass*, the Court said that unfavourable treatment also occurs regardless of the fact that the worker is not treated any worse than a male colleague starting work on the same day, because the treatment stemmed ‘exclusively’ from taking maternity leave. Additionally, the CJEU has stated that the inclusion of a period of national statutory maternity leave, even if longer than any EU mandatory minimum, is required in the calculation of a qualifying period for classification to a higher salary grade, where failure to do so would result in a woman who has taken maternity leave, not being able to attain the higher salary grade until 12 weeks *after* a male colleague who started

⁵²⁰ Case C-284/02 *Land Brandenburg v Ursula Sass* [2004] ECR I-10895, para 25.

⁵²¹ Case C-294/04 *Carmen Sarkatzis Herrero v Instituto Madrileño de la Salud (Imsalud)* [2006] ECR I-1513, Opinion of AG Stix-Hackl, para 39.

⁵²² *ibid*, para 46 of the Court’s judgment.

employment on the same day that she did.⁵²³ In *Loredana Napoli. v. Ministero della Giustizia-Dipartimento dell'Amministrazione penitenziaria*, the Court said that unfavourable treatment also occurs where a woman on compulsory maternity leave is excluded from a vocational training course that is necessary for promotion.⁵²⁴ Additionally, where national law provides full maternity pay during maternity leave, with the requirement of employment for at least three months without interruption before the start of the leave, such a provision is impermissible, as it will dissuade a worker from exercising her right to take a different form of leave before taking maternity leave.⁵²⁵

It is also established case law that a period of leave guaranteed by EU law cannot affect the right to take another period of leave guaranteed by that law.⁵²⁶ As the right to maternity leave is a protected right, it does not serve to replace or defeat any other protected right. Maternity leave in the EU has a different purpose than other types of leave. As observed above, it is a protected purpose, a gender-specific leave, related to a woman's 'biological condition' and 'special relationship' to her newborn child. Consequently, a woman must be given the option to defer any non-maternity leave that she was unable to take.⁵²⁷ This means that any conflict between annual leave and maternity leave is a conflict between two *absolute* rights of workers, neither of which permit any derogation. Therefore, where an employer or collective bargaining agreement fixes the period of annual leave for the entire workforce and it overlaps with maternity leave, effectively causing a loss of annual leave,⁵²⁸ the worker on maternity leave must be able to take her annual leave during *another* period, regardless of any, 'organizational difficulties' that result.⁵²⁹ This rule is equally applicable where maternity

⁵²³ *Sass* (n 525).

⁵²⁴ *Loredana Napoli* (n 333).

⁵²⁵ Joined Cases C-512/11 and C-513/11 *Terveys- ja sosiaalialan neuvottelujärjestö TSN ry v Terveyspalvelualan Liitto ry and Ylemmät Toimihenkilöt YTN ry v Teknologiateollisuus ry, Nokia Siemens Networks O* [2014] ECR O.

⁵²⁶ Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxemburg* [2005] ECR I-3067, para 33; *Kiiski* (n 345), para 56.

⁵²⁷ *ibid*, *Commission of the European Communities v Grand Duchy of Luxemburg* (n 529), para 32; Case C-366/99 *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie et Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation* [2001] ECR I-9383, para 43.

⁵²⁸ Case C-342/01 *María Paz Merino Gómez v Continental Industrias del Caucho SA* [2004] ECR I-2605, para 41.

⁵²⁹ *ibid*, Opinion of AG Mishco, paras 45-47.

leave conflicts with parental leave.⁵³⁰This means that a denial of an employee's request for a change in leave, from parental leave to pregnancy leave, amounts to discrimination.⁵³¹

The CJEU has also determined that resetting the clock to zero when calculating the minimum contribution period for a right to claim maternity leave any time a woman changes her employment status, amounts to discrimination. In *INAMI*, the most recent case considering the right to maternity leave, the CJEU issued a judgment on 21 May 2015, stating that the:

*PWD prohibits a member state from imposing a new six-month minimum contribution period prior to eligibility for a maternity allowance merely because the employment status or post of the worker concerned has changed.*⁵³²

As Advocate General Sharpston observed, to hold otherwise would discourage women from embracing new career opportunities, for fear of losing entitlement to maternity allowance.⁵³³

In light of these judgments, it seems fair to conclude that maternity leave is first among equals in the EU, in terms of its status as a protected right. This protected status is markedly different to the US national right to leave afforded by the Family and Medical Leave Act (FMLA).⁵³⁴As the comparative discussion in Chapter 5 will reveal, while the FMLA's gender-neutral leave provisions are broader than those of the PWD, in the sense that they do not exclude men, adoptive, or surrogate parents, the fact is that few US workers have the right to take twelve weeks unpaid leave, as eligibility requirements are strict. Furthermore, even where a woman has the right to take FMLA leave for pregnancy and maternity, the employer can require her to use accumulated

⁵³⁰ See: Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145/4 as amended by Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by Business Europe, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ L68/13.

⁵³¹ *Kiiski* (n 345), para 55. See also, *Busch* (n 341), para 38.

⁵³² Case C-65/14 *Rosselle v Institut national d'assurance maladie-invalidité (INAMI)*[2014] ERC 0, para 46.

⁵³³ *ibid*, Opinion of AG Sharpston, para 54.

⁵³⁴ Family and Medical Leave Act 1993, 29 USCS 28.

paid vacation and/or sick time.⁵³⁵ Not only this, when taking this leave, the employee is only entitled to the employment benefits that accrued prior to the date on which the leave commenced, and not those she would have been entitled to had she not taken leave.⁵³⁶ This is not the case in the EU, where there is the recognition that there is no point in a woman taking pregnancy and maternity leave if it results in her being worse off in her working conditions by doing so.

e The conflict between maternity ‘payment’ and ‘pay.’

To reiterate, in the EU, discrimination on grounds of pregnancy can never be ‘justified by the financial consequences’ that ensue to an employer as a result of the special protections that the ETD and PWD afford.⁵³⁷ Nevertheless, a closer review of case law addressing the conflict between what constitutes ‘pay’ and what constitutes ‘payment’ within the context of pregnancy and maternity makes clear that economic considerations are acceptable, as:

*Community law leaves some discretion to national authorities to take into account the social and economic conditions in their country and to decide what income can be considered adequate for a woman on maternity leave and which conditions are necessary to ensure that she will not be prejudiced in her future professional life.*⁵³⁸

Community law in this context means Article 119 EEC (now 141 EC), which established the principle of equal pay for men and women. The second and third paragraphs of the Article providing that:

For the purposes of this Article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

⁵³⁵ *ibid*, subsection 2612(d) (2) (A).

⁵³⁶ *ibid*, subsection 2614 (a) (2) and (3).

⁵³⁷ *Busch* (n 341), para 35; *Silke-Karin Mahlburg v Land Mecklenburg-Vorpommern* (n 342), para 29; *Dekker* (n 333), para 12.

⁵³⁸ Case C-194/08 *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung* [2010] ECR 00, Opinion of AG Poiares Maduro, para 25

The principle of equal pay was defined by Article 1 of the EPD (now Article 4, Recast Directive) to mean, ‘for the same work, or for work to which the equal value is attributed.’ Regarding the worker on *maternity leave*, the PWD provides in Article 11(2) (b) the, ‘right to maintenance of a payment... and/or entitlement to an adequate allowance...’ Historically, the CJEU has interpreted EU law to mean that maternity pay is *not* required to be full pay. Indeed, this has been the Court’s interpretation even before the PWD was adopted. Beginning with *Gillespie v. Northern Health*, the Court stated that while neither the Treaty, nor the EPD required full pay during maternity leave, there were no criteria laid down for determining the amount.⁵³⁹ Instead, its adequacy was to be determined by the national court, with reference to the length of the leave and other protections afforded by national law. The impact of this judgment was only lessened when the Court laid down the principle of calculation that:

*To the extent that it is calculated on the basis of pay received by a woman before the commencement of maternity leave, the amount of benefit must include pay rises awarded between the beginning of the period covered by reference pay and the end of maternity leave, as from the date on which they take effect.*⁵⁴⁰

The pay provisions of the PWD were first applied by the CJEU in *Margaret Boyle v. EOC*. In that case, the Court clarified that in terms of maternity pay, the PWD set forth the floor amount of ‘sick pay’ as the amount below which payments to workers on maternity leave may not be set, although member states were free to provide for a more favourable level of pay, including full pay, *if they so chose*.⁵⁴¹ The Court also allowed member states to make the issuance of greater maternity payments conditional, which meant that they could require repayment of any amount in excess of what would have been the ‘sick pay’ amount, if a woman failed to return to work after the completion of maternity leave.⁵⁴² Furthermore, the Court held that EU law permitted national legislation providing that annual leave ceased to accrue during the period

⁵³⁹ Case C-342/93 *Joan Gillespie and others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* [1996] ECR I-475, para 20.

⁵⁴⁰ *ibid*, para 25

⁵⁴¹ Case C-411/96 *Margaret Boyle and Others v Equal Opportunities Commission* [1998] ECR I-6401, paras 53, 69, 80, 82 and 85.

⁵⁴² *ibid*, para 51.

beyond the fourteen weeks provided for by Article 8 PWD (supplemental leave), but pension rights accrual could not.⁵⁴³

Considering the cases of *Gillespie* and *Boyle*, Masselot and di Torella suggest that the CJEU used the wrong approach regarding maternity pay; applying ‘special protection,’ when it should have been concerned only with equality.⁵⁴⁴ They criticize the Court’s approach as one based on the idea of a ‘productive worker’ rather than equality, due to the court’s position that a woman on maternity leave can have no comparator.⁵⁴⁵ Their argument holds fast against the author’s review of recent case law in which the CJEU has reiterated that women on maternity leave are *sui generis*, and that they may, but are not required to receive full pay. Indeed, beginning with *Alabaster v. Woolwich*, decided more than a decade after *Gillespie*, the CJEU had the opportunity to reconsider its decision.⁵⁴⁶ Instead, it restated paragraph 17 of the judgment in *Gillespie*, that:

*A woman taking maternity leave provided for by national legislation are in a special position which requires them to be afforded special protection, but which is not comparable, in particular, either with that of a man or with that of a woman actually at work.*⁵⁴⁷

The opinion of AG Kokott in *Kiiski* also lends credibility to Masselot and di Torella’s conclusion that the CJEU considers women on maternity leave to be ‘unproductive’ workers, as the AG stated that:

*Although women on maternity leave are doubtless in need of special protection, their position is not comparable to individuals who are actually at work, that is to say, in active service.*⁵⁴⁸

Finally, two judgments released in 2010 cement the authors’ conclusions. In *Sanna Maria Parviainen v Finnair Oyj*, the CJEU stated that the situation of pregnant workers and workers on maternity leave ‘cannot be treated alike for all

⁵⁴³ *ibid*, para 71.

⁵⁴⁴ *Gillespie* (n 544), para 19. The PWD did not apply *ratione temporis* to the facts of the case.

⁵⁴⁵ Masselot and di Torella (n 395) 250.

⁵⁴⁶ Case C-147/02 *Michelle K. Alabaster v. Woolwich plc and Secretary of State for Social Security* [2004] ECR I-3101

⁵⁴⁷ *ibid*, para 46

⁵⁴⁸ *Kiiski* (n 345), para 69.

purposes.⁵⁴⁹ Then, in *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung*, the Court concluded that:

*Workers taking maternity leave... are in a special position which requires them to be afforded special protection, but which is not comparable with that of a man or with that of a woman actually at work, or on sick leave.*⁵⁵⁰

Ultimately, while it is true that these judgments can fairly be criticised for a focus upon protection, rather than equality, the results of this study suggest they more clearly illustrate the limitations of EU law, and the Court's overriding concern for the economic impact that a requirement of full pay imposes upon the member states, than with continuing gender stereotypes. These limitations and concerns extend to cases concerning the pay of a pregnant worker during temporary transfer, or incapacity, as discussed below.

f Temporary transfer or incapacity.

CJEU case law reveals that the ability of a member state to determine 'adequacy' extends beyond maternity allowance, to include the pay of a pregnant worker who has been temporarily transferred to another job during the course of her pregnancy. This is so, despite the fact that it is a compulsory transfer for health and safety reasons pursuant to Article 5, of the PWD. Article 5 requires employers evaluate the specific risk of exposure to hazardous agents, processes, or working conditions for a pregnant worker, to communicate those risks, prohibit the exercise of certain activities, and provide for a temporary adjustment in working conditions, and/or working hours, or transfer to another job.⁵⁵¹ Considering this issue, the CJEU has determined that despite the fact that payment to the worker is pay within the meaning of Article 141 EC; the worker is *not* entitled to receive the pay on average that she received before her transfer. Rather, her

⁵⁴⁹ Case C-471/08 *Sanna Maria Parviainen v Finnair Oyj* [2010] ECR I-6529, para 38.

⁵⁵⁰ *Gassmayr* (n 543). *Opinion of AG Poiares Maduro*, para 25.

⁵⁵¹ Case C-203/03 *Commission of the European Communities v Republic of Austria* [2005] ECR 1935, paras 43-44; *Gassmayr* (n 543), para 34.

pay cannot be less than that paid to the workers doing the job to which she is temporarily assigned, with any:

*Pay components or supplementary allowances relating to her professional status, such as allowances relating to her seniority, her length of service and her professional qualifications.*⁵⁵²

In effect, the transferred worker is not entitled to all the pay components and supplementary allowances that are dependent on the actual performance of specific duties.⁵⁵³ This is problematic because the consequence for a transferred pregnant worker and the family she supports can be the loss of 40% of what her pay had been prior to compulsory transfer, where 40% consisted of, ‘supplementary allowances’ that were contingent upon the performance of, ‘specific functions in particular circumstances,’ which the worker did not do upon transfer.⁵⁵⁴ However, it is fair to say that partial pay is far better than an unpaid leave of absence or the dismissal from employment that a US pregnant worker is often presented with.⁵⁵⁵

Additionally, although pregnancy is considered *sui generis* in the EU, the right to pay for a pregnant worker who is on sick leave, prior to maternity leave is also the same as any other worker on sick leave. This is to say that the pregnant worker may not be deprived of full pay when all workers are entitled to full pay when incapacitated for work, but there is no principle or rule that requires her to receive full pay, per se.⁵⁵⁶ Instead, the payment of wages to a pregnant worker is the same as that for a worker on sick leave, which falls within Article 141 EC and the ETD, as amended. The CJEU has stated that while pregnancy itself is not comparable to a pathological condition:

*Pregnancy is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and...may cause incapacity for work...*⁵⁵⁷

⁵⁵² *Parviainen* (n 554), paras 60, 62.

⁵⁵³ *ibid*, para 61.

⁵⁵⁴ *ibid*, para 53.

⁵⁵⁵ See the discussion in Chapter 5.

⁵⁵⁶ See: *Northwestern Health Board v Margaret McKenna*, (n 341), paras 43, 53, 56, 61. Also, Case C-66/96 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Berit Høj Pedersen v Fællesforeningen for Danmarks Brugsforeninger and Dansk Tandlægeforening and Kristelig Funktionær-Organisation v Dansk Handel & Service*. [1998] ECR I 7327.

⁵⁵⁷ *Brown v Rentokil* (n 124), para 22.

This means that where a pregnant worker is on sick leave because of a pathological condition related to pregnancy, a sick leave scheme, which does not distinguish between a pregnancy-related illness and *any other* form of illness, may provide for a reduction of pay based on the length of absence. Added to this, where the occupational sickness scheme of a member state provides for absences for illness to be offset against a total number days of paid sick leave, it may include absences for pregnancy-related illness, provided the pay is not lower than the minimum to which a pregnant worker is otherwise entitled.⁵⁵⁸

In sum, where the pregnant worker is transferred, or prohibited from working, her income must be made up of her average basic salary and components relating to occupational status, and may exclude supplementary allowances. This is because Article 11(1) of the PWD is the only provision governing the income to which a pregnant worker is entitled during pregnancy, and it refers to maintenance of ‘payment,’ not pay. Where a pregnant worker is unable to work by virtue of an illness arising during pregnancy, or the worker has given birth and is on maternity leave, that same worker is then entitled to an income that is at least equivalent to a ‘sickness’ allowance. In all of the foregoing situations, the worker may, but is not entitled to receive full pay.

Masselot and di Torella criticise the CJEU for not finding a right to full pay, arguing that the Court could have found that the PWD prohibits any kind of reduction in income, when interpreting the term ‘adequate allowance’ for the purposes of income during maternity leave (Article 11(2) (b)).⁵⁵⁹ While their assertion is correct, it is a common riposte to say that if the legislative institutions of the EU had wanted to mandate full pay, they would have done so. Instead, the Directives are deliberately circumscribed, deferring to the national laws of the member states. These assertions will be addressed further in subsection (h). Instead, the next subsection turns to discuss the manner in which EU law addresses the issues of multiple discrimination against pregnant workers, and discrimination against those associated with pregnant workers. The results of this exploration of the concepts of ‘multiple’ and ‘associative’ are

⁵⁵⁸ *Northwestern Health Board v Margaret McKenna* (n 341), para 69.

⁵⁵⁹ Masselot and di Torella (n 395) 258.

intended to further support the assertion that the limitations of and conflicts in EU law offer compelling evidence of the need for a new equality Directive.

g ‘Multiple’ and ‘associative’ discrimination.

i. Multiple discrimination.

In the EU, and the US for that matter, a pregnant worker may suffer discrimination on multiple grounds, including sex, race, nationality, religion, age, or disability. While EU and US law provides protection against discrimination for a number of protected categories, a pregnant worker who seeks redress against ‘multiple,’ or dual forms of discrimination, is required in both jurisdictions to prove each ground separately.⁵⁶⁰ This is to say that the protection against discrimination afforded by EU and US antidiscrimination law does not actively target multiple/dual discrimination against pregnant workers. Rather protection is secured through what Solanke aptly terms ‘single-dimension silos.’⁵⁶¹ Neither the EU’s PWD, nor the US Civil Rights Act of 1964 expressly target multiple discrimination, or multiple inequalities, rather several legal measures separately address the protected categories. This means that a pregnant worker, discriminated on several grounds, must seek redress under each enumerated ground.⁵⁶² Undoubtedly, this failure to expressly address multiple discrimination can impose additional procedural and financial burdens upon a pregnant worker, who must, as part of any litigation strategy, decide whether to pursue, one, or all grounds. This difficulty is illustrated by the EU case of *Maria-Luise Lindorfer v Council of the EU*, where the two AGs and the Court were presented with the issue of multiple discrimination on the basis of sex, age, and nationality, regarding the calculation of pensionable service years under a community pension scheme. Ultimately, the CJEU chose to deal with each ground separately, ruling only that there had been discrimination based on sex.⁵⁶³

⁵⁶⁰ See Chapters 5 and 6 for a discussion of national and state laws prohibiting multiple discrimination in the US, otherwise termed ‘intersectional’ discrimination.

⁵⁶¹ Solanke I, ‘Infusing the silos in the Equality Act 2010 with synergy’ (2011) 40 ILJ 336, 345. See also: M. Verloo, ‘Multiple Inequalities, Intersectionality and the European Union’ (2006) 13 EJWS 211.

⁵⁶² See Chapter 6 for a discussion of multiple discrimination in the US.

⁵⁶³ Case C-227/04 *Maria-Luise Lindorfer v Council of the EU* [2007] ECR I-6767.

This silo approach has been heavily criticised by scholars on the basis that isolating gender equality from other forms of inequality is irrational, and ignores its compounding effect.⁵⁶⁴ While the cogency of these criticisms cannot be ignored, it is suggested that the criticism properly lies in the limitations of the antidiscrimination laws, rather than with the courts. Considering EU law for the moment, multiple discrimination is only referred to in recital 14 of the Racial Equality Directive 2000/43/EC, and in recital 3 of the Employment Equality Directive 2000/78/EC. The recitals of the Gender Equality Directive 2006/54/EC and the Pregnant Workers Directive do not contain any such reference.⁵⁶⁵ Why is this?

It is suggested that there are at least two reasons for the limitations of EU gender equality law as regards multiple discrimination. The first stems from the confusion surrounding the concept itself, which renders the adoption of legislation difficult. Indeed, the discursive analysis surrounding the concept suggests that ‘multiple discrimination’ is but one of several terms used to describe discrimination against women on grounds beyond sex and gender. Others include, ‘additive,’ ‘compound,’ and ‘intersectional’ discrimination. Taking Burri and Schiek’s definition of these terms:

‘Additive’ or ‘compound’ discrimination would signify instances of discrimination on more than one ground, where the role of the different grounds can still be distinguished. Intersectional discrimination would refer to such discrimination against women where the influence of various grounds cannot be disentangled...⁵⁶⁶

Nevertheless, it is proffered that conceptual confusion is a weak reason for EU gender equality law failing to address multiple discrimination. After all, the EU institutions have a varied amount of literature to rely upon in crafting an appropriate legislative provision, and can rely on input from a variety of stakeholders. Indeed,

⁵⁶⁴ For a review of the literature, see: European Network of Legal Experts in the Field of Gender, Susan Burri and D. Schiek, *Multiple Discrimination in EU Law: Opportunities for legal responses to intersectional gender discrimination* (Commission, 2009).

⁵⁶⁵ Council Directive 2000/43/EC of June 29 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; Recast Directive (n 15); Pregnant Workers Directive (n 112).

⁵⁶⁶ Burri and Schiek (n 569) 3.

Article 8 B (3) of the Treaty of Lisbon gives the Commission a broad mandate for this input, providing that:

The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

Notably, this conceptual confusion may be overcome in the near future, as the Preamble to the 'Rome Declaration on Non Discrimination, Diversity and Equality,' which was issued in 2014 by the Italian Presidency of the EU Council, expressly references 'the necessity to combat multiple discrimination experienced by women...' It also includes a commitment to welcome the 2015 establishment of a High-Level Group on Non-Discrimination, Equality, and Diversity by the Commission, for the development of common objectives for equality and non-discrimination.⁵⁶⁷ It is expected that these common objectives will include addressing the problem of multiple and associative discrimination in the EU.

Arguably, a second and more valid reason for the limitation of EU law is member state objection to the expansion of its anti-discrimination regime. This is to say that, while the EU institutions understand that, 'discrimination on more than one ground has a stronger effect of exclusion, than discrimination on only one ground,' and that associative discrimination can be just as harmful to an individual as any other form of discrimination, the adoption of specific measures regulating these types of discrimination remain a challenge for a union with twenty-eight member states, each having different interests.⁵⁶⁸ A short discussion of the failure of the Commission to secure adoption of the so-called 'Horizontal Directive,' since its proposal in 2008, will serve to highlight the extent of these challenges.⁵⁶⁹

The proposed amendments to the Horizontal Directive, which were suggested by the EU Parliament in April, 2009, specifically provided for protection against 'multiple'

⁵⁶⁷ Italian Presidency of the Council of the European Union, *Rome Declaration on Non Discrimination, Diversity, and Equality* (2014).

⁵⁶⁸ See, Burri and Schiek (n 569) 20.

⁵⁶⁹ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientations {SEC (2008)2180} {SEC (2008) 2181 }/ COM/2008/0426 final.

and ‘associative’ discrimination.⁵⁷⁰ However, at the last Council discussions in December 2011, it was stated that further discussion was necessary on a number of grounds, including the ‘legal certainty in the Directive as a whole.’⁵⁷¹ Four years later, these discussions have yet to occur; suggesting that it is fair to conclude the Directive is dead. Even if it is not, a close examination of its provisions suggests that the proposed Directive, while helpful, is severely limited in its approach to tackling the problem of ‘multiple’ and ‘associative’ discrimination. This is because the Directive does not include gender as a protected category. It also does not apply to employment, in direct contrast to the much broader legislation found in some of the EU member states.⁵⁷² Nevertheless, it can be said to represent an acknowledgement by the EU that the problem of multiple and associative discrimination must be tackled, and puts the issue squarely on the radar for future equality initiatives.

ii. Associative discrimination.

Associative discrimination is discrimination against an individual because of association with another person who has a protected characteristic. While the ETD and PWD do not expressly prohibit associative discrimination, the CJEU has found that EU law protects against associative discrimination where the protected characteristic is disability. In *Coleman v. Attridge*, the CJEU found that Directive 2000/78/EU applies not only when the disabled person is the direct victim of discrimination, but also when the direct victim of discrimination is a person associated with the disabled person. For example, where there is dismissal of an employee who is not disabled, but whose child is disabled.⁵⁷³ Unfortunately, this reasoning has not been extended to prohibit an employer from affording less favourable treatment to a man on the grounds of a woman’s pregnancy. In the United Kingdom (UK) case of *Kulikaoskas v. Macduff Shellfish*, Judge Lady Smith distinguished *Coleman*, and held that the concern of the PWD, the ETD, and the national law at issue was with the woman’s ‘biological

⁵⁷⁰ Amendments to Proposal 2008/0140.

⁵⁷¹ Council, *Press Release: 3131st Council Meeting: Employment, Social Policy, Health & Consumer Affairs, 1 & 2 December 2011 17943/1/11 REV1 Presse 471 PR CO 75 11.*

⁵⁷² See, for example, the UK Equality Act 2010.

⁵⁷³ See: C-303/06 *S. Coleman v Attridge Law and Steve Law* [2008] ICR 1128.

condition’ and ‘not with the wider objective of promoting conduct that secured the autonomy of women or respect for their gender.’⁵⁷⁴This reasoning is difficult to understand, as it ignores the fact that a woman’s biological condition may be put at considerable risk if her partner loses their income! It also reveals the need for any new Proposal for a PWD to expressly address the problems of multiple and associative discrimination.

III The problem with ‘special treatment’ and other reconciliation measures

Following on from Masselot and di Torella’s conclusion that the manner in which the CJEU has treated pregnant workers and workers on maternity leave is based upon the male norm and social stereotypes, this Part turns to consider the broader debate surrounding the use of ‘special treatment’ measures to address the problem of pregnancy discrimination. Recalling from the discussion in Chapter 2, there is a deep and trenchant debate, wherein some sophisticated arguments suggest that maternity leave specifically, and reconciliation measures generally (otherwise called ‘family friendly’ and ‘work life balance’ measures in the US) have tended to institutionalize motherhood and have fallen short in advancing substantive equality. As stated in Chapter 1, reconciliation refers to the EU soft law strategy that encourages member states to adopt measures to enable men and women to balance the conflicting demands of work, private life, and caring responsibilities, which in turn, increase labour market participation rates and birth rates. These measures include the provision of childcare, paid leave, and flexible working arrangements. My exploration of EU reconciliation measures will show that while the criticisms are compelling, these measures offer practical solutions to difficult problems, where the role of the EU institutions in ensuring equality is limited. The crux of the problem is that as the supranational institutions have no authority in family policy, the actual adoption of measures to facilitate equal opportunities is the responsibility of the member states. Therefore, while the EU institutions may seek to emphasise gender equality, member states may elect to emphasise other goals in the measures they adopt. Indeed, the discussion below reveals that as gender equality is but one of a number of

⁵⁷⁴ *Kulikaoskas v Macduff Shellfish* [2011] ICR 48; [2010] Eq LR 276 [22], [32], [34], [37], [38].

goals member states seek to achieve through their provision of maternity leave and other reconciliation measures, there is a gap between the equality EU institutions seek, and the reality of what has been achieved to date.

a The critics and the research.

Critics assert that while opening the workplace doors to women, ‘special treatment’ and other reconciliation measures have sometimes failed to challenge the male norm, and often served to entrench it.⁵⁷⁵Clare McGlynn argues:

*The quid pro quo for the positive outcome is the perpetuation of outmoded assumptions about childcare and parenting, which conform to the dominant ideology of motherhood and may therefore, have a detrimental impact on women’s opportunities for the future*⁵⁷⁶

This argument has traction. A significant amount of research has been undertaken into the impact of maternity leave upon women’s careers, including a 2013 study by the Pew Research Group, which found the gender pay gap between women and men increases with longer maternity leave.⁵⁷⁷In contrast to short-term maternity leave, which increases women’s attachment to the labour force, translating into higher wages,⁵⁷⁸long paid maternity and parental leave induces a significant delay in return to work, a pay penalty, and lower level occupational positions, with contrasting implications for women of different socio-economic classes.⁵⁷⁹In the EU, awareness of

⁵⁷⁵ See the discussion in Chapters 1, 2 and 6.

⁵⁷⁶ McGlynn (n 513) 40.

⁵⁷⁷ The gender pay gap is defined as the difference between male and female median earnings divided by male median earnings. Maternity leave is offered as one among other reasons for the pay gap, see Gretchen Livingston, *The link between parental leave and the gender pay gap* (Pew Research Center, 2013); Pew Research Center, *One Pay Gap, Millennial Women Near Parity-For Now: Despite Gains, Many See Roadblock Ahead* (December, 2013).

⁵⁷⁸ See: Gornick and Meyers J Waldfogel, ‘Understanding the "Family Gap" in Pay for Women with Children’ (1998) 12 J Economic Perspectives 137.

⁵⁷⁹ See: Livingston; R. Lalive and others, ‘Parental leave and mothers’ careers: The relative importance of job protection and cash benefits.’ <Discussion paper series // Forschungsinstitut zur Zukunft der Arbeit, No. 5792, <http://nbn-resolving.de/urn:nbn:de:101:1-201106224739>> accessed 2/6/2014; H. Mandel, ‘Winners and Losers: The consequences of Welfare State Policies for Gender Wage Inequality’ (2012) 28 EU Sociological Rev 241; R. Ray and JC Gornick, ‘Who cares? assessing generosity and gender equality in parental leave policy designs in 21 countries’ (2010) 20 J Eur Social Policy 196; Morris (n 128); B.R. Bergmann, ‘Long Leaves, Child Well-Being, and Gender Equality’ (2008) 36 Pol & Soc’y 350; W. Sigle-Rushton and J Waldfogel, ‘Motherhood and Women’s Earnings in Anglo-American, Continental European, and Nordic Countries’ (2007) 13 Feminist Economics 55; CJ Ruhm, ‘The Economic Consequences of Parental Leave Mandates: Lessons From Europe’ (1998) 113 Q J Econ 285.

the potential negative impact of maternity leave upon women's careers has even begun to affect its take-up. This is the case in the UK, where 43% of women return from maternity leave earlier than they would prefer, and about half of those say they do so because of fears over job security.⁵⁸⁰

Added to this, there is a vast amount of academic and feminist research and critique charging that while reconciliation policies 'have enabled more women to become economically active, they have also exacerbated gender occupational inequality.'⁵⁸¹ For instance, the research of Mandel et al., into the source of wage inequality in twenty countries reveals that although more women have been recruited into the EU labour force, they are disproportionately in low paying jobs, leading them to conclude that 'family friendly policies do not contribute to narrowing the gender gap.'⁵⁸² These findings are supported by Vogel-Polsky's research, which concludes:

*Community legislation has proved a necessary but not sufficient remedy against sex discrimination; while the Equality Directives have been useful in combating individual cases of sex discrimination, they have to date had no significant impact on the sex segregated labour market.*⁵⁸³

This is to say that higher proportions of women remain in lower paid occupations, including teaching and childcare, while men are more likely to be found in higher paid occupations, including construction and technology, which in turn, has grave implications for women and the families they support, as women are more likely to live in poverty than men are.⁵⁸⁴ But, there is no need to take sides here, as research conducted at the request of the Commission acknowledges the range of strengths and weaknesses with its reconciliation policy. A 2005 comparative review of the reconciliation measures of thirty European countries revealed the measures adopted have generally been gender polarizing; reflecting cultural assumptions that care work is woman's work, with most

⁵⁸⁰ NCT, *Parental Leave Survey* (25/04/2014).

⁵⁸¹ Mandel and Moshe Semyonov Hadas, 'Family Policies, Wage Structures, and Gender Gaps: Sources of Earnings Inequality in 20 Countries' (2005) 70 *Am Soc Rev* 949, 949.

⁵⁸² *ibid* 964.

⁵⁸³ Eliane Vogel-Polsky and others, *Study on Positive Action Programmes as Strategies to Integrate Female Workers and Other Hard-to-Place Groups into the Labour Market—summary reports V/30/83-EN* (Commission, 1982) 38.

⁵⁸⁴ See: Heather Odle-Dusseau, Anna C. McFadden and Thomas W. Britt, 'Gender, Poverty, and the Work-Family Interface' in Maura J. Mills (ed), *Gender and the Work-Family Experience* (Springer 2015)

measures focusing mainly on the issues faced by women while working, and rarely addressing the role of men in caring responsibilities.⁵⁸⁵To be more specific, the review found national measures varied greatly, and that while ‘best practices’ combined maternity and paternity leave, childcare, and flexible working, as found in the Nordic countries of Sweden, Denmark, and Finland, overall, national policies generally failed to address the connection between the distribution of care work and gender inequality.⁵⁸⁶In fact, in all the countries reviewed, the burden of family and care responsibilities generally relied much more on women than on men, even if there were differences between the countries. As the Report stated:

*Women are generally seen as carers... Consequently, reconciliation of work, private and family life is often perceived as a women’s issue.*⁵⁸⁷

The findings of a subsequent Report, conducted at the request of the Commission in 2014, found no change in this polarization. Rather the conclusion reached was that:

*There is a considerable gender gap in the proportion of mothers and fathers who have reduced their working hours to take care of a child. Women are much more likely to reduce their working hours for this reason and the figures are particularly pronounced in Germany, the Netherlands, the UK, and Austria.*⁵⁸⁸

Two features immediately emerge from this critical review of EU reconciliation measures. The first is that member state measures are overwhelmingly focused at women. The second is that they are limited to the workplace. As these features help explain the gap in the equality the EU institutions seek and the reality of what these measures have achieved to date, they are separately discussed below.

⁵⁸⁵ Commission, *The social situation in the European Union* (2001).

⁵⁸⁶ Commission, *Reconciliation of work and private life: A comparative review of thirty European countries* (Luxembourg, ISBN: 92079-00053-5, 2005). See also the research of Ray and Gornick (n 593).

⁵⁸⁷ The European Network of Legal Experts in the Field of Gender Equality, *Legal Approaches to Some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries* (2008) 7

⁵⁸⁸ Barbara Janta, *Caring for Children in Europe: How childcare, parental leave and flexible working arrangements interact in Europe* (2014) 13. < <http://europa.eu/epic/studies-reports/docs/rr-554-dg-employment-childcare-brief-v-0-16-final.pdf> > accessed 19/9/15

b Woman focused

A common theme in feminist criticism is that EU reconciliation policies have failed to encompass a broader understanding of care; that family responsibilities are the responsibilities of *all* workers, regardless of sex, race, class, and so forth, and that reconciliation laws merely serve to perpetuate the traditional division of gender roles. Put more succinctly, the focus on women has meant that reconciliation measures merely serve to reinforce the dominant ideology of motherhood, and are a lost opportunity for achieving structural change As Guerrina asserts:

*The focus on women and mothers contradict the ethos of reconciliation policies, the purpose of which should be to challenge hegemonic gender narratives and divisions of labour in the family.*⁵⁸⁹

The consequence of such a focus, as Gornick and Meyer's astutely observe, is to put 'aside larger political questions about the organization of paid work and care, as well as the nature of men's economic, and familial roles.'⁵⁹⁰ While Gornick and Myers also suggest there may well be 'a trade-off between some policies that make it easier for women to combine work and family and women's advancement at work,'⁵⁹¹ the results of this research suggest the trade-off would likely be minimized if EU equality policies were more inclusive, regarding men. Instead, EU reconciliation measures have tended to be more detrimental and less emancipating than their advocates hoped. These advocates include Bob Hepple, who calls family-friendly reconciliation policies part of a new stage in gender equality, 'the fourth stage is one in which the focus is moving towards comprehensive, and transformative equality'⁵⁹² He views reconciliation of workplace demands and family responsibilities as the natural expansion area for EU gender equality initiatives, representing a move from a childbearing focus to a childrearing focus. He is correct. However, the dual economic/social focus of EU equality policy and

⁵⁸⁹ R Guerrina, 'Parental leave rights in Italy: reconciling gender ideologies with the demands of Europeanization' in N. Busby and G. James (eds), *Families, Care-giving and Paid Work* (Elgar 2011) 109.

⁵⁹⁰ Gornick and Meyers (n 115) 3.

⁵⁹¹ F.D. Blau and L.M. Kahn, *Female Labor Supply: Why is the US Falling Behind?* (2013) 10.

⁵⁹² B Hepple, 'Chapter 5. Equality at Work' in B Hepple, Veneziani, B. (ed), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945-2004*, vol 1 (1 edn, Hart 2010) 130.

the taxonomy of regimes across the member states have clearly limited the gender positive effects of these measures to date.⁵⁹³

It is suggested that the tendency of EU reconciliation policy to institutionalize motherhood has been exacerbated by the failure of the member states to meet targets for providing childcare, as set by the Council at the Barcelona Summit in 2002. EU reports show that more than a decade after these targets were set, there are large differences in availability, quality, and cost of coverage across the member states, with only about half surpassing the 33% benchmark for children under the age of three.⁵⁹⁴ The consequence of this particular failure is that more than six million women aged 25-49 say they are forced into not working, or can only work part-time, because of their family responsibilities, with more than one quarter finding the lack of childcare facilities, and, or their cost, being the main problem.⁵⁹⁵

Research reveals that the greatest factor influencing a woman's decision to work part-time is parenthood, 'because these women are often involved in childcare duties when care services are lacking or not meeting the needs of full-time-working parents.'⁵⁹⁶ Research indicators also show that temporary and part-time work may lead to lower pay and poorer working conditions than most other forms of employment.⁵⁹⁷ Research also reveals that too many part-time jobs create a 'golden ghetto' for women,⁵⁹⁸ as motherhood is related to an employment 'penalty.'⁵⁹⁹ Furthermore,

⁵⁹³ See the discussion of the economic and social basis to EU gender equality measures in Chapter 3.

⁵⁹⁴ Presidency conclusions, Barcelona European Council, 15-16 March 2002, SN 100/1/02 REV. To provide childcare by 2010 to at least 90% children between age three and mandatory school age and at least 33% age under three. See also the research of Janta (n 602). See also, Platenga and Remery (n 53).

⁵⁹⁵ Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, SEC(2008), COM(2008) 638 final* (Brussels, 2008) 3 See also, M. Gstrein, L. Mateeva and U. Schuh, *Research Note: Deficiencies in the Supply of Family Friendly Service* (2007). < <http://irihs.ihs.ac.at/3332/> > accessed 13/5/2014

⁵⁹⁶ Europa, *Female Labour Market Participation* (2014) 3.

⁵⁹⁷ See: Commission, *Opinion on flexible and part-time working arrangements and the gender dimension of the labour market* (2012); Esther Sandor and Eurofound, *Part-time work in Europe: European Company Survey 2009* (Luxembourg, 2011); Eurofound, *Temporary agency work in the European Union* (EF/04/104/EN, 2007).

⁵⁹⁸ Heidi Hartmann and Vicky Lovell, 'A US Model for Universal Sickness and Family Leave' in JC Gornick and MK Meyers (eds), *Gender equality: Transforming family divisions of labour (The Real Utopias Project, Vol. VI)* (Verso 2009) 338.

⁵⁹⁹ See: S. Aisenbrey, M. Evertsson and D. Grunow, 'Is there a career penalty for mothers' time out? A Comparison of Germany, Sweden, and the United States' (2009) 88 *Social Forces* 573; T Kricheli-Katz, 'Choice, Discrimination, and the Motherhood Penalty' (2012) 46 *Law & Society Rev* 557; Sigle-Rushton and Waldfogel (n 593).

motherhood has a long reach throughout women's lives, translating into lower pay, lower occupational status, and lower pension rights. Moreover, this penalty continues after care duties have ceased.⁶⁰⁰

In light of the foregoing, it may be concluded that EU provision of maternity leave or the right to flexible working will do little to advance substantive equality, if men are not properly included in the equality equation.

c Workplace focused

A second feature that emerges from EU reconciliation measures is that they are workplace focused. A focus that fails to fully acknowledge that inequalities in the private sphere maintain inequalities in the public sphere. This is to say that inequality in household labour is linked to inequalities in the workplace. As observed by the Commission, 'Europe has not yet achieved a full balancing of men and women's domestic tasks and family involvement.'⁶⁰¹ Although men work longer paid hours, women perform more unpaid housework and caring hours, translating into a longer workweek.⁶⁰² It is this double burden upon women of paid and unpaid work that national practices and policies can either reinforce, or challenge. It is generally acknowledged that historically, member state reconciliation policies have reinforced this double burden. However, with the redirection of member state reconciliation policy, as discussed in Part IV, this burden may ultimately be challenged.

Notwithstanding the foregoing, this research found several good reasons for the workplace focus of EU reconciliation measures. First, as stated above, the EU institutions have no authority in family life. Secondly, equal economic independence is viewed by the EU institutions as a, 'prerequisite for enabling both women and men to

⁶⁰⁰ See the research of Michelle J Budig and P. England, 'The Wage Penalty for Motherhood.' (2001) 66 *Am Soc Rev* 204. Gornick and Meyers, *Gender equality: Transforming family divisions of labour (The Real Utopias Project, Vol. VI)* (n 612) 9, where the authors refer to the pay penalty as a 'mommy tax.' See also, J.R. Kahn, J. Garia-Mangano and S.M. Bianchi, 'The Motherhood Penalty at Midlife: Long-Term Effects of Children on Women's Careers' (2014) 76 *J Marriage & Fam* 56.

⁶⁰¹ Nadja Bergmann Sophia Belghiti-Mahut, Marc Gärtner, Jeff Hearn, Øystein Gullvåg, Majda Hrženjak Holter, Ralf Puchert, Christian Scambor, Elli Scambor, Hartwig Schuck, and Alan White & Katarzyna Wojnicka Victor Seidler, *Final Report: The Role of Men in Gender Equality-European strategies & insights* (Commission, 2012) 7; E.F.I.L.W.C., *Family Life and Work: Second European Quality of Life Survey* (Office for Official Publications of the European Communities 2010).

⁶⁰² Commission, *Tackling the gender pay gap in the European Union* (Luxembourg, 2014) 7.

exercise control over their lives and to make genuine choices.’⁶⁰³As economic independence is sought to be achieved through participation in the labour market, a focus on the removal of barriers to women’s workplace participation is deemed essential to advancing equality between women and men.

Finally, there are the overriding economic needs of the Union. This is to say that the push for reconciliation measures has as much to do with the economic needs of the EU and the reality of labour shortages, as it has to do with a desire for women to achieve economic equality. These economic needs are highlighted by the fact that a majority of OECD countries, including the US and those in the EU, have seen low or declining fertility rates, accompanied by longer life expectancy.⁶⁰⁴A resulting concern is increased public expenditure on pensions and care for the elderly, while being accompanied by a declining shortage of labour. Consequently, in 2010, with the global economic crisis acting as a key concern, and faced with the prospect of a shrinking working-age population, Commission President Jose Manuel Barroso, outlined a Europe 2020 strategy as one based on ‘smart, sustainable and inclusive growth.’⁶⁰⁵With an ambitious target of 75% employment for women and men, ages 20-64 by 2020, a woman who permanently leaves the workforce upon pregnancy, or birth of a child is a lost labour opportunity in the EU, where 2/3 of the working age population are employed, compared to 70% in the US.⁶⁰⁶Furthermore, with variation among the member states, the participation rate for women who have children is lower than for women without children, with 32% of employed women aged 25 to 54 having one child of less than 6 years working part-time, while for employed women with three children or more, where the youngest is aged 6 or less, 50% are working part-time.⁶⁰⁷It is against this background

⁶⁰³ Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategy for equality between women and men 2010-2015*, COM (2010) 491 final 4.

⁶⁰⁴ OECD is the acronym for the Organization for Economic Cooperation and Development, established in 1961. See: Council, *Joint Employment Report* (SOC 209 ECOFIN 112 EDUC 44, 2011); also OECD, *Doing Better for Families* (2011). Notably, Ch. 1. ‘Families are Changing.’

⁶⁰⁵ Commission, *Strategy for equality between women and men*. (n 312).

⁶⁰⁶ Commission, *Europe 2020: A Strategy for smart, sustainable and inclusive growth COM (2010) 2020 final* (Brussels, 2010).

⁶⁰⁷ Eurostat.ec, ‘8 March 2013: International Women’s Day- Almost a third of women and 5% of men having a young child worked part-time in 2011 ‘ Eurostat Press Office.
<http://ec.europa.eu/eurostat/en/web/products-press-releases/-/3-07032013-AP>>accessed 31/8/2015

that the EU has adopted two ‘Flagship Initiatives’—an ‘Agenda for new skills and jobs’ and the ‘European Platform Against Poverty.’ In part, these initiatives seek to increase the activity rate of women, through the promotion of programmes, national ‘flexicurity’ measures, and reconciliation policies; including longer maternity leave, subsidized childcare, expanded paid leave, and flexible working.

From the discussion thus far, several points may be made. First, as gender equality is but one of a number of goals for EU reconciliation measures, it should not be surprising that a gap has emerged between the equality sought and the reality of what these measures have achieved thus far. Secondly, it should also not be surprising that ‘special treatment’ is not a ‘silver bullet’ for tackling pregnancy discrimination, or achieving gender equality in the workplace. As the discussion throughout this and earlier Chapters revealed, it would be naive to expect any single measure to completely end the inequality, disadvantage, and exclusion faced by pregnant workers, especially as all gender discrimination laws have some unintended negative effects. Added to this, there is a significant amount of research suggesting that discrimination has evolved over time, becoming immune to the traditional antidiscrimination regime.⁶⁰⁸ This evolution has often been referred to in the literature in terms of ‘generations.’ A brief discussion of these generations will help underscore the challenge posed to EU and US policy-makers in their future equality initiatives.

d First and second-generation discrimination.

As Susan Sturm, in her essay on ‘second generation’ employment discrimination explains, the existence of ‘first generation’ or blatant discrimination, which was targeted by first generation anti-discrimination legislation, has metamorphosed into ‘second generation’ bias, and ‘third generation’ discrimination.⁶⁰⁹ First generation sex and pregnancy discrimination has been easy for employers to understand. A letter refusing to employ a pregnant woman or the dismissal of a woman from her employment, upon becoming pregnant, with the accompanying statement that ‘this is no job for a pregnant

⁶⁰⁸ See statistics in Chapter 1.

⁶⁰⁹ S. Sturm, ‘Second Generation Employment Discrimination: A Structural Approach’ (2001) 101 *Colum L Rev* 458.

woman,' has generally become a thing of the past, with antidiscrimination law prohibiting such behaviour.⁶¹⁰ Nevertheless, as Sturm observes, and the evidence presented in this thesis reveals, inequality continues. This inequality is of a new form that Sturm calls 'second generation' bias, which involves 'practices and patterns of interaction among groups within the workplace that over time, exclude, non-dominant groups.'⁶¹¹ The excluded groups include women, minorities, and the disabled, as revealed by Sturm's evaluation of employment regulation in the US. Sturm's work observes that patterns of interaction shaped by organizational structure, 'influence workplace conditions, access and opportunities for advancement over time, and thus constitute the structure for inclusion, or exclusion.'⁶¹² Indeed, significant socio-legal research conducted into the legal profession, university academics, the science fields, and the boardrooms of private companies has illuminated how discrimination in this changed environment has served to limit women's access to and success in the workplace, and resulted in underrepresentation in leadership positions.⁶¹³

Added to this is a plethora of scholarly research in the EU and the US indicating that pregnancy, maternity, and motherhood operate to compound other gender-based employment inequalities, including with regard to wages and occupational status. The research shows that these inequalities cannot be fully explained by differences in education, work experience, race, or job characteristics.⁶¹⁴ Rather, gender stereotypes and statistical discrimination serve to impact the careers of women, because of assumptions that women who have children are less committed, less productive, and less competent employees.⁶¹⁵ Joan C. Williams coined the term 'maternal wall' to describe

⁶¹⁰ This is not to say that blatant discrimination does not continue, see Chapter 1.

⁶¹¹ Sturm (n 623) 460.

⁶¹² *ibid* 471.

⁶¹³ For a review of the literature, see: Barbara Bagilhole, 'How to Keep a Good Woman down: An Investigation of the Role of Institutional Factors in the Process of Discrimination against Women Academics' (1993) 14 *Brit J of Sociology of Ed* 261.

⁶¹⁴ A sample of the research includes: J. Staff and J Mortimer, 'Explaining the Motherhood Wage Penalty During the Early Occupational Career' (2012) 49 *Demography* 1; M Gangl and A Ziefle, 'Motherhood, Labour Force Behaviour, and Women's Careers: An Empirical Assessment of the Wage Penalty for Motherhood in Britain, Germany, and the United States' (2009) 46 *Demography* 341, 364; Hadas Joya Misra, Michelle J Budig and Stephanie Moller, 'Reconciliation policies and the effects of motherhood on employment, earnings and poverty' (2007) 9 *J Comp Pol'y Analysis* 135; 'Waldfogel, 'The effect of children on women's wages'(n 433).

⁶¹⁵ For a review of the studies, see: S. Bernard, I Paik and S. Correll, 'Cognitive Bias and the Motherhood Penalty' (2007-2008) 59 *Hastings LJ* 1359. See also: Kricheli-Katz (n 612).

how women with family obligations face challenges to their progression in employment, as marriage and childcare negatively affect perceptions of their commitment in the workplace.⁶¹⁶The research of Michelle Budig and Melissa Hodges further reveals that motherhood more strongly penalizes women who are less educated and in lower income levels.⁶¹⁷

The policy responses of the EU and the US to the disadvantage created are the concept of ‘indirect/disparate impact discrimination’ and the derogation of positive/affirmative action, involving changes in recruitment, promotion, mentoring, and training. However, as the evidence presented in Chapter 3 suggested, and the discussion in Chapter 5 will confirm, these policies have been differently applied in the two jurisdictions, and, while these measures have been partially effective in addressing the problem in some professional areas, significant barriers to equality remain. The complexity is that women live integrated lives, that:

*Women’s careers are complex and multidimensional, yet work practices appear to exist in a single dimension—the male-defined organizational dimension.*⁶¹⁸

Indeed, evidence of women’s disadvantage in the workplace has been sufficiently robust that in cases pertaining to pregnancy and maternity discrimination, US and EU courts have taken ‘judicial notice of the real-world prevalence of the stereotype that pregnant women and young mothers will make undesirable employees,’⁶¹⁹and the ‘fact that pregnancy and motherhood entail disadvantages for the women concerned in their professional careers.’⁶²⁰These disadvantages may be compounded by ‘third generation discrimination,’ which, according to Gráinne de Búrca, involves ‘deep patterns of systemic inequality, and can be seen across the field of

⁶¹⁶ See: S.J. Ceci and W.M. Williams, ‘Understanding current causes of women’s underrepresentation in science’ (2011) 108 Proceedings of the National Academy of Sciences 3157; Faye J. Crosby, Joan C. Williams and Monica Biernat, ‘The Maternal Wall’ (2004) 60 J Social Issues 675; Deborah A. O’Neil, Margaret M. Hopkins and Diana Bilimoria, ‘Women’s Careers at the Start of the 21st Century: Patterns and Paradoxes’ (2008) 80 J Business Ethics 727.

⁶¹⁷ Michelle J Budig and Melissa J. Hodges, ‘Statistical Models and Empirical Evidence for Differences in the Motherhood Penalty across the Earnings Distribution’ (2014) 79 Am Soc Rev 358.

⁶¹⁸ O’Neil, Hopkins and Bilimoria (n 630) 735.

⁶¹⁹ See: *Miriam Zambrano-Lamhaouhi v. NY City Board of Education et. al.* 866 FSupp 2d 147(EDNY 2011) 172.

⁶²⁰ See: Case C-218/98 *Abdoulaye v Regie Nationale des Usines Renault SA* [1999] ECR I-5723, para 56.

access to public and social services, such as housing, education, and health.’⁶²¹In turn, these disadvantages highlight the multiple dimensions of poverty and exclusion; requiring modern, effective and targeted ‘social protection,’ as discussed below.⁶²²

e A proactive CJEU or legislative reform?

In response to Masselot and di Torella’s criticisms of the CJEU, the results of this research suggest three reasons for the failure of the court to resolve the conflicts inherent in the EU law. First, there is the overwhelming lack of legislative clarity in the equality Directives themselves. While the ETD was intended to put into effect the principle of equal treatment between men and women in regards to ‘working conditions,’ the concept of ‘working conditions’ has never specifically been defined by the EU legislature. Likewise, the PWD, while declaring that the protections it affords should not work ‘to the detriment of directives concerning equal treatment for women and men,’ lacks any direction as to how this is to be achieved. Added to this, the PWD’s overriding purpose of ‘improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding,’ curtails its ability to be a truly effective substantive equality measure. The basis for the measure is a paternalistic concern based upon the biological condition of the woman, rather than a clear acknowledgement that childbearing has historically had a negative impact upon the careers of women.

Finally, as the CJEU considers the issues arising from pregnancy and maternity on a case-by-case basis, its decisions only ever lead to ad hoc change. This is particularly true of the conflict arising from the application of the concepts of ‘pay,’ ‘payment,’ and ‘allowance’ under the provisions of the equality Directives and Article 119 EEC (now Article 141 EC). The resolution suggested here is supranational legislative action rather than a call for a more ‘proactive’ CJEU, as Masselot and di Torella demand. Their demand ascribes to a supranational court far more power to effect

⁶²¹ Gráinne de Búrca, ‘Stumbling into Experimentalism: The EU Anti-Discrimination Regime’ in Charles F. Sabel, Zeitlin, Jonathan (ed) *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010) 218. See also, Commission, *Sex Discrimination in access to education: evaluation of the need for and effectiveness of current measures in the Member States* (2011).

⁶²² See: Communication: ‘The European Platform against Poverty and Social Exclusion’ COM (2010) 758 Final 5.

legal change than may be reasonable to expect, in light of the separate roles played by the EU institutions, and the underlying economic basis of EU equality measures, as discussed above and in Chapter 3. Instead, the suggestion of this thesis is the adoption of a new equality Directive, which, at a minimum, recasts the conflicting provisions of EU secondary law into a single Directive, as previously discussed in Chapter 3. A new Directive would help ensure that subsequent changes to national laws are harmonious, and uniform.

This argument is not intended to ignore the fact that as the driving force behind European integration, the CJEU has historically interpreted the EU Treaties and secondary legislation in a most expansive manner.⁶²³ Nor, that its interpretation has often enabled equality measures to be more effective than they would otherwise be, if left solely to member states. As Karen Alter's important empirical work has shown, the CJEU is 'perhaps the most active and influential international legal body in existence.'⁶²⁴ However, today, the CJEU is operating in a different environment. One in which the EU is recovering from a world economic recession that began in 2008, and is the deepest seen since the end of the World War II. According to EU records:

*Gross domestic product (GDP) fell by 4% and industrial production dropped by 20% to 1990 levels. After two years of growth, the EU re-entered recession in 2012. In 2013, unemployment reached 12% on average across the euro.*⁶²⁵

It is against this backdrop that the CJEU has been tasked in the most recent cases coming before it to consider the right to receive 'full pay' during pregnancy and maternity, and of men and surrogate mothers to claim maternity leave. While it is undeniable that political concerns have no place in the decisions of the Court, the language of the Treaties and the equality Directives ensure that the economic concerns of the member states, as translated into national law, do. Therefore, it would be naive to

⁶²³ See generally, Clifford J Carrubba and Lacey Murrah, 'Legal Integration and Use of the Preliminary Ruling Process in the European Union' (2005) 59 Int'l Org 399.

⁶²⁴ Karen J. Alter, *The European court's political power: selected essays* (OUP 2009) 186.

⁶²⁵ Commission, 'Economic and Financial Affairs: European Economy Explained—Growth 2020' (19/2/2014).

<http://ec.europa.eu/economy_finance/explained/hot_economic_topics/growth/index_en.htm> accessed 2/1/2015

expect the CJEU to engage in an expansive interpretation of EU law, to the economic detriment of the member states, and where EU legislation is not explicit. To do otherwise, would risk losing the Court's hard won expansive legal competence, which a large body of sophisticated research reveals has led it to be 'the most effective supranational judicial body in the history of the world.'⁶²⁶It would also increase the tensions that already exist between the CJEU, the member states, and their national courts, some of which seek to impose constitutional constraints upon EU law.⁶²⁷These tensions are well illustrated by the comments made by Justice Underhill in a sex discrimination case at the UK tribunal appeal level, in which he expressed the opinion that, 'even judgments of the European Court are not to be read like sacred texts.'⁶²⁸Thus, faced with an increasing number of jurisdictional challenges by the national courts and decried by national governments as an activist court in need of reigning in,⁶²⁹it would be foolhardy for the CJEU to act in place of the EU legislature, particularly when a High-Level Group on Non-Discrimination, Equality, and Diversity is being established by the EU Commission and is specifically tasked with 'the development of common objectives for equality and non-discrimination.'⁶³⁰In sum, I agree with the Opinion of AG Wahl, as approved by the CJEU in *Z. v A Government Department*, which is to say that on this issue, 'I do not believe that it is for the Court to substitute itself for the legislature.'⁶³¹

f Third generation discrimination.

Sandra Fredman argues that social protection is best assured through enforceable socio-economic rights that impose proactive duties on governments.⁶³²However, as the

⁶²⁶ For example, Alex Stone Sweet, *The Judicial Construction of Europe* (OUP 2004)1.

⁶²⁷ See: the discussion of the rulings of the German Constitutional Court and the France's Conseil Constitutionnel in Karen J. Alter (n 580) 210.

⁶²⁸ UKEAT/0069/09/JOJ *Newcastle-upon-Tyne NHS Hospital Trust v Armstrong & others* [2010] All ER (D) 215 (Mar), para 71.

⁶²⁹ See generally: Dawson M, Witte BD and Muir E (eds), *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar 2013)

⁶³⁰ See: Patrick Hennessy, 'Conservative MPs demand veto over Britain's EU Judges' *The Telegraph* (London, Monday 12 September 2011) Politics.

<<http://www.telegraph.co.uk/news/politics/8754790/Conservative-MPs-demand-veto-over-Britains-EU-judges.html>> accessed 12/09/2011

⁶³¹ *Z v A Government department* (n 395), para 120.

⁶³² S Fredman, 'New Horizons: Incorporating socio-economic rights in a British Bill of Rights' [2010] PL 297.

discussion so far has revealed, EU and US antidiscrimination law is concerned with status discrimination, and as Charlotte O'Brien observes, 'The reconciliation project has been treated as something different to, and unconcerned with, socio-economic restructuring.'⁶³³ Nevertheless, the results of this research suggest the EU antidiscrimination regime is evolving in response to the fact that these new forms of discrimination are not easily addressed, and that rigid regulatory measures are weak tools for addressing deeply entrenched structural and systemic discrimination, where there is no single intentional act, or actor. In this evolving regime, the dual concepts of 'dignity' and 'social inclusion,' accompany the traditional equality concepts, as found in the language in Articles 1A and 10A of the Treaty of Lisbon; the Preamble to the Charter of Fundamental Rights, as well as Articles 1, 25, and 31, and the Europe 2020 Strategy.⁶³⁴ Arguably, if emphasized in the national measures of the member states and by the CJEU in the cases that come before it, this new regime will move the EU away from a 'fault-based' model for anti-discrimination measures, to one that seeks the restructuring of institutions rather than individual change. As Karon Monaghan writes, this requires a shift in obligations from individuals, 'least able to make change' to institutions.⁶³⁵ Indeed, it requires a 'transforming' strategy, intended to achieve gender equality, without which, as Fredman argues, discrimination, and social exclusion, 'will remain unchanged.'⁶³⁶ While gender mainstreaming remains the focal EU transformative strategy for achieving this change, as discussed further in Chapter 7, there is evidence to suggest that the EU model of equality is otherwise being redirected, including with a push for two new equality Directives, and efforts to make member state reconciliation measures more effective. The discussion of the new equality Directives was undertaken in Chapter 3. Below, the refocus of reconciliation measured is addressed within a broader discussion of the redirection of the EU model of equality.

⁶³³ Charlotte O'Brien, 'Confronting the care penalty: the case for extending reasonable adjustment rights along the disability/care continuum' (2012) 34 J SocWel & Fam L 5, 20.

⁶³⁴ Treaty of Lisbon (n 266), Commission, 'European Commission: Europe 2020' (n 620).

⁶³⁵ Karon Monaghan, *Equality law* (OUP 2007) 627.

⁶³⁶ Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (n 47) 175; Commission, *Manual for Gender Mainstreaming: employment, social inclusion, and social protection policies*. (ISBN: 978-79-09266-4, 2008) 11.

IV The EU Model of equality redirected.

The discussion in Parts II and III of this Chapter served to illustrate the gap between the substantive equality EU antidiscrimination law seeks to achieve, and equality in fact. This final Part seeks to present evidence of a redirection in the EU model of equality.

a Reconciliation refocused

Understanding that no single law can be expected to completely resolve discrimination, but can present yet another stepping stone on the road to tackling a pernicious problem, the results of this research reveal that the EU institutions have redirected their efforts in recognition that:

Gender equality cannot be achieved by an anti-discrimination policy alone, but requires measures to promote harmonious coexistence and balanced participation by men and women in society...⁶³⁷

As previously stated, EU equality measures seeking to protect pregnancy and maternity are focused on the biological and productive role of women. In contrast, measures seeking to provide reconciliation between paid work and family life are focused on the caring role of workers. While the former is exclusively reserved to women, the latter is not, and as Hugh Collins observes, this distinction allows a ‘shift towards policies to tackle socially constructed inequalities and in particular to promote a more equal sharing of paid and unpaid work between men and women.’⁶³⁸ However, as this research, the Commission’s research, and the feminist research discussed above has revealed, poorly designed policy has constrained the potential of EU reconciliation measures. As an EU Parliamentary working paper on atypical work in the EU observed regarding occupational segregation, ‘A serious question arises as to whether attempts to create more security for atypical workers are prone to produce unintended

⁶³⁷ Regulation (EC) No 1922/2006 of the European Parliament and of The Council 20 December 2006 on establishing a European Institute for Gender Equality, OJ L403/9 Preamble, para (11).

⁶³⁸ Hugh Collins, *Employment law* (OUP 2003) 253.

effects.⁶³⁹The unintended effect Parliament was referring to is an increase in the number of workers in involuntary temporary and part-time work, from 53.7% and 18% in 2001, respectively, to 60.3% and 25.6% in 2009,⁶⁴⁰ along with the correlative pay penalty for part time work.⁶⁴¹

In response to the criticisms and reports on the negative gender impact of its reconciliation measures, the EU institutions have endeavoured to refocus member state efforts. Beginning in December 2007, the Council called on the Commission to evaluate the legal framework supporting reconciliation and the possible need for improvement. Additionally, a ‘Resolution’ of Parliament recognized that, ‘responsibility for children is a responsibility shared between parents irrespective of sex’ and urged the member states to ‘mutualise the costs of maternity and parental leave allowances in order to ensure that women no longer represent a more costly source of labour than men.’⁶⁴² Subsequently, in March 2008, the Council reiterated that further efforts should be made by the member states and the Commission to reconcile work with private and family life for both women *and* men, and in 2011, the Council emphasized that:

*Active participation and involvement of men in reconciliation measures is crucial for reaching the work-life balance, since both women and men could benefit from family-friendly employment policies and from equal sharing of unpaid work and of responsibilities in the household. In this regard, due attention should be paid to tackling gender stereotypes.*⁶⁴³

Urging member states to redirect the focus of their reconciliation measures to address the role of men in achieving gender equality, the Council stated:

⁶³⁹ EU Parliament, *Working Paper: Atypical Work in the EU, SOCI 106 EN 3-2000* (I-2929 Luxembourg, 2000) 26.

⁶⁴⁰ Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions An Agenda for new skills and jobs: A European contribution towards full employment, COM/2010/0682 final* (2010) 3 "Improving the quality of work and working conditions."

⁶⁴¹ See: Mary Gregory and Sara Connolly, ‘Feature: The Price of Reconciliation: Part-Time Work, Families and Women’s Satisfaction’ (2008) 118 *Econ J F1*.

⁶⁴² EU Parliament, *European Parliament resolution of 27 September 2007 on equality between women and men in the European Union, 2007/2065INI* (007). Preamble (D) and para 28.

⁶⁴³ Council, *Council Conclusions on the progress of the implementation by the Member States and the EU institutions of the Beijing Platform for Action—Women and the Economy: Reconciliation of Work and Family Life*. (2008); Council, *Council Conclusion Reconciliation of work and family life in the context of demographic change, Luxembourg, 17 June 2011* (2011), para 22.

*In order to improve the status of women and promote gender equality, more attention should be paid to how men are involved in the achievement of gender equality, as well as to the positive impact of gender equality for men and for the well-being of society as a whole.*⁶⁴⁴

In support of this redirection, the Commission's Strategy for Equality Between Women and Men 2010-2015 has sought to address the role of men in achieving gender equality.⁶⁴⁵ With an understanding that an integrated, holistic gender equality strategy must be inclusive, the Commission's recommendations include the development of a 'Framework for Action on Men,' as an impetus to what it aptly called a 'stalled revolution.'⁶⁴⁶ The idea being that gender equality will only advance if men are involved in making the social changes necessary to achieve it. Importantly, the core of the social change sought is with regard to gender segregation in the home because, as stated in Part III, inequality in household labour is linked to inequalities in the workplace. In order to challenge these inequalities, the EU institutions accept the 'need for more effective reconciliation policies.'⁶⁴⁷ These more effective policies promote a balanced approach to equality in private, family, and working life through a more gender egalitarian division of household and caring labour, as secured through the adoption of 'sharing' measures, including:

- Gender neutral parental leave measures.
- Gender neutral workplace flexibility rights.
- Measures tackling gender segregation in education, training, and employment.
- Measures tackling gender stereotyping in education and childcare.⁶⁴⁸

⁶⁴⁴ Council, *Press Release: 267th Council Meeting: Employment, Social Policy, Health and Consumer Affairs* (2006) 38 Note 1.

⁶⁴⁵ Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategy for equality between women and men 2010-2015*, COM (2010) 491 final.

⁶⁴⁶ Commission, *Analysis note: Men and Gender Equality: tackling gender segregated family roles and social care jobs* (March 2010) 37.

⁶⁴⁷ Hervey and Shaw, 'Women, work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law' (n 514); Commission, *Opinion on The Future of Gender Equality Policy after 2010 and on the priorities for a possible future framework for equality between women and men* (2010) 7.

⁶⁴⁸ Commission, *Opinion on The Future of Gender Equality Policy after 2010 and on the priorities for a possible future framework for equality between women and men*.

Arguably, Article 33(2) of the CFR aids the EU institutions in their refocusing efforts, with its mandate that:

*To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.*⁶⁴⁹

It is possible that this new balanced approach will result in greater substantive equality in the EU, especially if the recent withdrawal of the Commission's Proposal for a new Pregnant Workers Directive leads to a more comprehensive gender equality Directive being proposed, and men's 'right to care' is secured, as discussed further below.⁶⁵⁰

b A Proposal for a Directive for Gender Equality, Accommodation & Leave.

Recalling from the discussion in Chapter 3, Part V, Subsection c, in October 2008, the EU Commission submitted a proposal for a new Pregnant Workers Directive. However, on 1 July 2015, after being stuck in the legislative process for almost seven years, the Commission elected to withdraw it, stating that by doing so:

*This opens the way for a fresh approach to meet the policy objectives of improving the protection of mothers, better reconciling professional and family life and facilitating female participation in the labour market.*⁶⁵¹

While it is unknown exactly what this new approach will be, what is known is that the EU Commission and Parliament are presented with a clear opportunity to do more than merely filling the gaps in their original Proposal. Here, it is appropriate to offer some suggestions as to how that opportunity should be used.

⁶⁴⁹ Gornick and Meyers, *Gender equality: Transforming family divisions of labour (The Real Utopias Project, Vol. VI)* (n 612). See also, J.L. Hook, 'Gender Inequality in the Welfare State: Sex Segregation in Housework, 1965–2003' (2010) 115 *Am J Sociology* 1480. There is a similar pattern in the US, see: Mylène Lachance-Grzela and Geneviève Bouchard, 'Why do Women Do the Lion's Share of Housework?' (2010) 63 *Sex roles* 767, 768.

⁶⁵⁰ See: MINUTES of the 2133rd meeting of the Commission held in Brussels (Berlaymont) on Wednesday 1 July 2015 (PV 2015) 2133 final)14.

⁶⁵¹ European Commission Press Release. Delivering for parents: Commission withdraws stalled maternity leave proposal and paves the way for a fresh approach. (Brussels, 01 July 2015) <http://europa.eu/rapid/press-release_IP-15-5287_en.htm> accessed 26/8/2015

First, it is suggested that the EU Commission and Parliament should propose a ‘Directive for Gender Equality, Accommodation & Leave,’ which would ascribe maternity leave rights to a broader category of workers; thereby shifting the focus from the biological condition of women, to the needs of all workers. More specifically, it is suggested that as with the 2008 Proposal, the Commission should use Article 153 of the TFEU, as the basis for this new Directive, which provides that:

With a view to achieving the objectives of Article 151 TFEU, the Union shall support and complement the activities of Member states in improving the working conditions to protect the safety and health of workers and in ensuring equality between women and men with regard to labour market opportunities and treatment at work.

Building upon the Preamble contained in its original Proposal, the Commission should also expressly highlight that equality is a fundamental right under Articles 21 and 23 of the CFR, and that surrogates and men are included with adoptive parents in the assertion that ‘all parents have the right to care for their child.’⁶⁵²

Secondly, this Directive should be used as a vehicle for recasting and legislatively clarifying the conflicts that have arisen over the years between the PWD and other EU equality legislation, as discussed in Part II, above. More specifically, this new Directive should recast the PWD and consolidate it with the ETD, the Parental Leave Directive (2010/18/EU), and the Self Employed Directive (2010/41/EU). While this new ‘Directive for Gender Equality, Accommodation, and Leave’ should retain the gender focused provision of workplace *accommodation* for pregnant and breastfeeding workers, and include measures intended to make leave more attractive to men, it should also re-write the concept of maternity leave, to deemphasize paternalism towards women and maximize health and safety for *all* workers. This may be best achieved by providing a gender-neutral right to job protected, fully paid leave, to be used by *all* EU workers for ‘self-care’ or the ‘care of others.’ As the right of leave for ‘self-care’ and ‘care of others’ is more expansive than an express right of leave for pregnancy and

⁶⁵² European Parliament legislative resolution of 20 October 2010 on the proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (COM (2008) 0637–C6-0340/2008 -2008/0193(COD)), Preamble at paras 4, 21.

maternity, it naturally includes men, surrogates, women undergoing IVF, and others in its provisions.⁶⁵³ It is suggested that without either amending or recasting the PWD, in order to address the lacuna in EU antidiscrimination law as revealed by CJEU case law, the goal of greater substantive equality in the EU will likely remain elusive, and its promising trajectory will stall.

c The EU ‘right to care.’

In Chapter 1, it was suggested that one element of a truly holistic approach to addressing the problem of pregnancy discrimination is the collaboration between governmental and non-governmental stakeholders. In the new balanced approach in the EU, and in an effort to be both collaborative and inclusive, men are called upon to become the ‘gatekeepers of equality,’ and are supported in their right to care.⁶⁵⁴ This right to care is to be secured by making parental leave, the mainstay of EU reconciliation policy, more attractive to men than it has been to date. The fact is, while gender-neutral parental leave has been supported in the EU since the 1995 Framework Agreement on parental leave was concluded between several social partners and given legal effect in Directive 96/34/EC, statistics reveal that women continue to use it more than men, even in Sweden, where parental leave was first introduced in 1974.⁶⁵⁵ This difference in use is illustrated by the findings of a 2004 Euro barometer survey in which 84% of the men interviewed stated that they had never taken parental leave, nor were they thinking of doing so. The reasons men do not take parental leave in the EU have been well documented. They include a concern that taking leave will negatively impact their career prospects, a gender stereotypical belief that parental leave is for women, and

⁶⁵³ IVF involves combining eggs and sperm outside the body in a laboratory. Once an embryo or embryos form, they are then placed in the uterus. Surrogacy involves IVF using the sperm and eggs from the future genetic parents, after which the embryo is transferred into the womb of a ‘surrogate’ mother. The pregnancy will be carried by the surrogate. See: Commission, *Written questions by Members of the European Parliament and their answers given by a European Union institution [2013] OJ C362E/1* (2013), Questions for written answer E-0010081/13 to the Commission. Oreste Rossi (EFD). (1 February 2013).

⁶⁵⁴ Morris (n 128) 87.

⁶⁵⁵ T. Axelsson, *Report for the research project ‘Paternity leave: Impacts on male careers’: Men’s parental leave in Sweden: policies, attitudes, and practices*. (Vienna, 2014), Magnus Bygren and Ann-Zofie Duvander, ‘Parents’ Workplace Situation and Fathers’ Parental Leave Use’ (2006) 68 J Marriage & Fam 363; Ann-Zofie Duvander and Mats Johansson, ‘What are the effects of reforms promoting fathers’ parental leave use?’ (2012) 22 J Eur Soc Pol’y 319, 327.

because fathers' earnings are generally higher than mothers' earnings, unpaid or poorly paid parental leave reinforces existing social and economic pressures against gender equality.⁶⁵⁶ As Gornick and Meyers conclude, 'individuals cannot make unconstrained choices until they have both realistic opportunities and social approbation for those choices.'⁶⁵⁷

Responding to these statistics, and in an effort to encourage men to take parental leave, to assert their 'right to care,' and assume an equal share of caring, the EU adopted a Revised Agreement on Parental Leave, as implemented by Directive 2010/18/EU. A quick review of this Directive will help to illustrate the redirection of EU equality policy.

The strength of Directive 2010/18/EU lies in the fact that it applies to *all* EU workers, men, and women, irrespective of their type of employment contract. It also increases the length of leave from three to four months, makes leave a non-transferable individual right, and is accompanied by the right to request flexible working upon return to employment.⁶⁵⁸ There is however, one fundamental weakness in the Directive. It is its failure to mandate *full* pay during leave. As the research of Ray, Gornick, and Schmitt, into the parental leave policies of twenty-one countries found:

*In the absence of generous paid leave, traditional gender roles and the typically lower earnings levels of mothers lead to the large majority of parents to choose to have mothers not fathers to stay at home to give care.*⁶⁵⁹

While it can be concluded that the lack of full pay will prohibit the Directive from being truly transformative, in light of the economic conditions in which households operate, it is asserted that it can still help to de-couple care from motherhood and reduce employer 'incentives to discriminate against potential leave takers.'⁶⁶⁰ This

⁶⁵⁶ EEIG, *Eurobarometer Survey: European's attitudes to parental leave* (2004). See also the General Considerations: Parental Leave Directive 2010/18/EU (n 535), para 12.

⁶⁵⁷ Gornick and Meyers, 'Further Thoughts' in Gornick and Meyers, *Gender equality: Transforming family divisions of labour (The Real Utopias Project, Vol. VI* (n 612) 438.

⁶⁵⁸ Parental Leave Directive 2010/18/EU (n 535).

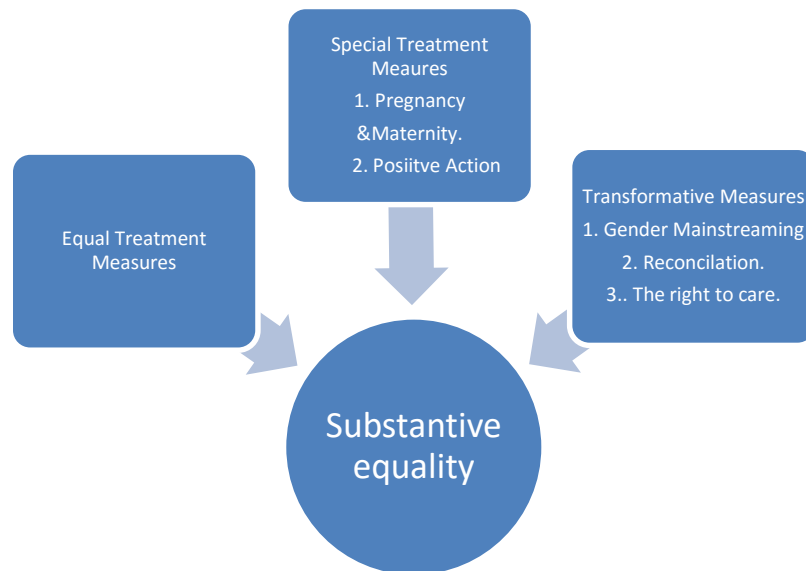
⁶⁵⁹ R. Ray, J.C. Gornick and J. Schmitt, *Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality* (CEPR, 2008) 21.

⁶⁶⁰ AMM Cotter, *Pregnant Pause: An International Legal Analysis of Maternity Discrimination* (Ashgate Publishing, Ltd. 2010) 18.

assertion is not without basis, as the Directive is modelled on the 2002 and 2008 reforms to the Swedish parental leave system, which was found to result in an increase in leave use by fathers from 43% to 75%.⁶⁶¹ It is suggested that the new Parental Leave Directive should have similar results, which will help to de-marginalizes men in EU equality law. And, as di Torella observes, it should also help complete ‘the deconstruction of the two-sphere structure’ between caring and non-caring work.⁶⁶² As such, the Directive constitutes a powerful and potentially transformative equality measure, as well as evidence that the EU model of equality, in its redirected format, is truly holistic in its approach to seeking greater substantive equality.

The redirected European model of equality is depicted in the following diagram:

Figure 1 European Model of Equality—*redirected*.



Source: Author’s analysis of EU equality measures

d Lessons for the US.

If the discussion of the EU model of equality in this and the last Chapter was at all clear, several important points will have thus far emerged. First, the EU model of equality is well developed, proactive, and provides exceptionally strong protections

⁶⁶¹ Duvander and Johansson (n 660).

⁶⁶² Caracciolo di Torella (n 432).

from discrimination for pregnant and breastfeeding workers and women on maternity leave. Secondly, this model of equality has limitations. Not all workers benefit from EU protections, and some equality measures actually exacerbate gender disadvantage in other ways. Thirdly, there are weaknesses that result from reliance upon soft law measures. In the absence of hard law mandates, policy-makers are free to emphasize labour maximization over gender equality. However, soft law also reflect the challenges posed to the enactment of antidiscrimination law, and the impact of the economic underpinnings of the EU.⁶⁶³

Finally, a particular strength of the EU model of equality is its ability to quickly respond to the conflicts and limitations inherent in its antidiscrimination regime and the fact that discrimination continues in a changed environment. As Geddes observes, ‘major changes can occur at the EU level in relatively little time if a contingent opportunity is seized.’⁶⁶⁴

In light of the foregoing, two initial lessons emerge for the US in its struggle against pregnancy discrimination. First, pregnancy creates a unique riddle where anti-discrimination measures seek formal equality between women and men. In response to this, the EU accepts that gender equality does not require the choice of one concept over another or of ‘hard’ law over ‘soft’ law. Formal equality and special treatment may co-exist together. However, where they do, they are bound to collide. The problem is, without express legislative definition of what is meant by equality, courts are left to resolve the issue, and as the important work of Gerald Rosenberg has revealed, courts are poor substitutes for legislatures.⁶⁶⁵ Consequently, it may be concluded that if there is to be clarity and consistency, legislative bodies should take the opportunity to define equality concepts and goals, both expansively and definitively. However, in light of the difficulty in securing support for antidiscrimination law, legislatures may prefer to

⁶⁶³ See: Paul Blyton, *Work-life integration: international perspectives on the balancing of multiple roles* (Paul Blyton ed, Palgrave Macmillan 2006) 72, for a discussion of the fact that reconciliation policies ‘require a significant revenue base in order to finance such commitments.’

⁶⁶⁴ Andrew Geddes, ‘Britain, France, and EU Anti-Discrimination Policy: The Emergence of an EU Policy Paradigm,’ (2004) 27 (2) WEurPol 334, 351.

⁶⁶⁵ Gerald N. Rosenberg, *Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago Press 1993).

embrace ‘soft law’ solutions, or language that is sufficiently ambiguous as to advance substantive equality where some movement forward is to be preferred over stasis.

Secondly, no single anti-discrimination measure can hope to end discrimination, nor can it advance equality between women and men without some unintended negative consequences. New generations of discrimination exist in which there is an absence of discriminatory intention and where employment practices and systems have led to systemic discrimination. This changed environment requires the adoption of a holistic approach to tackling systemic discrimination against women generally, and pregnant workers specifically. A holistic approach was previously defined in Chapter 1 as existing of four elements. To restate, these elements require a macro approach to tackling the problem of discrimination, collaboration between stakeholders, a combination of hard antidiscrimination law and soft law initiatives, and the reconsideration, and redirection of policy efforts where research, evaluations, reports, and studies suggest that tweaking is necessary. This is to say that well-targeted measures require well-informed policies, which in turn, requires careful study and evaluation. As Guerrina observes:

*Trying to understand the overall impact of social policies on gender structures is inherently difficult. However, it is an important exercise, as only by exposing the gendered nature of political narratives, can we then assess the extent to which substantive equality has been institutionalized.*⁶⁶⁶

V Conclusion

This Chapter concluded the discussion and critical evaluation of the varied aspects of the EU model of equality. A detailed analysis of the EU model in practice has revealed the conflicts inherent in legislation providing for formal equality and requiring treatment that respects difference, offering valuable insights for the US in its efforts at addressing discrimination against this particular category of workers. A broader consideration of EU equality policy has also revealed the strengths and weaknesses of measures that overwhelmingly focus on women and the workplace. While

⁶⁶⁶ Guerrina, ‘Parental leave rights in Italy: reconciling gender ideologies with the demands of Europeanization’ (n 603) 105.

acknowledging that the EU model of equality is not without its limitations, evidence has been presented to support a characterization of the EU model as one that is holistic in its approach and truly committed to achieving substantive equality between women and men. This is to say, the EU model of equality is not static. Rather, it is one that seeks to meet the challenge of discrimination in a changed environment, redirecting its equality policy, and moving away from the narrow conception equality and reconciliation as between paid and unpaid work for women, towards a broader and more transformative conception of ‘sharing’ family responsibilities between women and men.⁶⁶⁷ As Walby writes, ‘The EU does not simply follow the lead of national governments, but on equal opportunity issues has often been in advance of many member states.’⁶⁶⁸

It is against this model of equality that the US model will now be considered and compared and the central research question will be addressed: Is the trajectory of US antidiscrimination law shifting away from a purely formal equality approach to addressing pregnancy discrimination, towards a more holistic approach that seeks greater substantive equality, and imposes a duty to promote or achieve equality?

⁶⁶⁷ See: Stratigaki, ‘The Cooptation of Gender Concepts in EU Policies: The Case of “Reconciliation of Work and Family”’ (n 311). The author argues that ‘sharing’ was the original meaning of the concept of reconciliation, which shifted to ‘encouraging flexible forms of employment.’

⁶⁶⁸ Sylvia Walby, ‘The European Union and Gender Equality: Emergent Varieties of Gender Regime’ (2004) 11 *Social Politics* 4, 17.

Chapter 5: The US model of equality

*We know a lot about the disease of workplace inequality, but not much about the cure.*⁶⁶⁹

I Introduction

This Chapter begins the in-depth discussion of the US model of equality, wherein evidence of major developments at the national, state, and local level are presented, which serve to suggest that the trajectory of US antidiscrimination law is shifting away from a purely formal equality approach to addressing the problem of pregnancy discrimination, towards a more holistic approach that seeks greater substantive equality. One of the major developments to be discussed in this Chapter is the adoption of the 2008 Amendments Act (ADAAA) to the American's with Disabilities Act (ADA), which suggests that impairments *resulting* from pregnancy, including gestational diabetes/preeclampsia may be disabilities requiring employers to provide 'reasonable' accommodation to an employee.⁶⁷⁰ While it is acknowledged that there are important limitations in the Act and its application to pregnancy is a matter of judicial interpretation, the growing case law is promising.

The results of the author's systematic and detailed review of the antidiscrimination laws of the fifty US states and Washington D.C. reveal another promising development—an increasing number of state and local measures, adopted and proposed, that are intended to address the nationally unresolved problem of pregnancy discrimination.⁶⁷¹ By virtue of the Tenth Amendment to the US Constitution, all state legislatures are free to adopt *broader* equality laws and measures than those provided by Congress, as long as they do not conflict with Constitutional guarantees and are not pre-empted by federal law, under the Supremacy Clause of the Constitution (Article VI, Clause 2).⁶⁷² In Chapter 6, a discussion of this comparative review is undertaken,

⁶⁶⁹ Alexandra Kalev, Frank Dobbin and Erin Kelly, 'Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies' (2006) 71 Am Soc Rev 589, 590.

⁶⁷⁰(n 140).

⁶⁷¹ See the discussion in Chapter 6.

⁶⁷² *California Fed. Sav. & Loan Assn. v. Guerra* 479 US 272 (1987) (footnote 22), for a discussion of pre-emption and Congressional intention 'to occupy the field,' thus 'prohibiting state law in a particular area.'

wherein it is suggested that although these state measures are *ad hoc* and can never offer the broad protection that national laws can, they suggest a degree of ‘legal convergence’ of the US approach with the EU holistic approach to addressing pregnancy discrimination and advancing equality.⁶⁷³

The final and arguably most dramatic development in US antidiscrimination law is the adoption of gender mainstreaming as domestic equality strategy. In keeping with the historic use of executive power by Presidents when seeking to expand civil rights protections and shape the public debate, in 2009 President Obama issued Executive Order No. 13506, ‘Establishing a Whitehouse Council on Women and Girls.’⁶⁷⁴The Order requires that all:

Federal programs and policies address and take into account the distinctive concerns of women and girls, including women of colour and those with disabilities.

This Order is discussed in Chapter 7, wherein it is suggested that with its adoption and implementation, the trajectory of US antidiscrimination law is shifting perceptibly, this is to say that it is moving away from a purely formal equality ‘rights-based’ approach to gender quality, towards one that seeks to impose a duty to promote or achieve equality.

Before offering evidence of a shifting trajectory, this Chapter aims to present the national equality model against which this shift is taking place. Following on from the discussion of the historical background to the EU model of equality undertaken in Chapter 3, Parts II and III place the US model in historical context, with a discussion of its Constitutional and statutory ‘rights’ based approach to addressing discrimination, and a comparative review of its legislative authority and legislative forms. Part IV and V build further upon the discussion in Chapters 3 and 4, aiming to provide accounts of the most significant differences and similarities between EU and US antidiscrimination law. Then, Part VI critically considers the US model in practice, revealing clearly the lacuna in protection from pregnancy discrimination that a requirement of formal equality

See also: William J. Brennan Jr., ‘State Constitutions and the Protection of Individual Rights’ (1977) 90 Harv L Rev 489.

⁶⁷³ See Chapter 1 for a discussion of ‘holism’ and Chapter 2 for a discussion of ‘legal convergence.’

⁶⁷⁴ Executive Order No. 13506 (n 12).

creates. Part VII closes the Chapter with a discussion of several congressional measures that offer practical solutions to the problem of inequality, disadvantage, and exclusion in the workplace, and with the suggestion that the patchwork protections these measures afford offer initial evidence the US is moving towards a more holistic approach to tackling pregnancy discrimination.

II The historical basis.

In Chapter 3, it was shown that the EU approach to gender equality has a dual focus on market integration and concern for human dignity, diversity, and social inclusion. In contrast, a review of the literature examining US law reveals an approach to equality that is ‘rights based’ and underpinned by the American ideals of ‘liberty, equality, justice, and fair opportunity for everybody.’⁶⁷⁵ Before undertaking a close review of US pregnancy discrimination law in practice, it will be helpful to consider here the historical basis of the US approach to gender equality.

a Constitutional rights.

There is a vast amount of academic research chronicling the ‘rights based’ approach to US antidiscrimination legislation.⁶⁷⁶ Much of that research references the institutional, cultural, and political history behind its benchmark antidiscrimination legislation of 1964, which has its roots in the US Constitution (Constitution) and the governmental exclusion of non-whites. This research reveals that the Constitution, when it was adopted in 1789, was fundamentally concerned with curbing abuse of government power, based upon a belief that ‘government would do too much’ for people, rather than on the notion of equality.⁶⁷⁷ As Associate US Supreme Court Justice Ginsburg has written:

⁶⁷⁵ P. Burstein, *Discrimination, jobs, and politics: The struggle for equal employment opportunity in the United States since the New Deal* (University of Chicago Press 1998) 1.

⁶⁷⁶ See: R.B. Ginsburg, ‘Constitutional Adjudication in the United States as a Means of Advancing The Equal Stature of Men and Women Under the Law’ (1997) 26 Hofstra L Rev 263.

⁶⁷⁷ *James R. Jackson v. City of Joliet, et al.*, 715 F2d 1200 (7th Cir 1983) 1203.

*The word "equal" or "equality" does not even appear in the body of the U.S. Constitution or in the first ten amendments, ratified in 1791, the amendments composing the Bill of Rights.*⁶⁷⁸

The Constitution did not address social or economic rights. Instead, the notion of equality was that which was within the drafter's historical vision.⁶⁷⁹ This vision did not include non-whites.⁶⁸⁰ Indeed, the first census in 1790 divided the US population into 'free white males' and 'free white females,' 'all other free persons' and 'slaves,' all of which was underpinned by Section 2, Article I of the Constitution, until it was altered by the Fourteenth Amendment in 1868.⁶⁸¹ That 'free white' men and 'free white' women were listed as separate categories reveals that women were a distinct relational and subordinate category to men. It was a relational category that the Fourteenth Amendment to the Constitution, a post-Civil War Amendment and tool originally intended to eliminate racial discrimination, did not initially address. This is to say that while broadly providing that, no state shall, 'deny to any person within its jurisdiction the equal protection of the laws,' Section 1 of the Amendment was not initially construed by the US Supreme Court (USSC) to mean equality between women and men. Instead, it was construed to end racism. In fact, it was not until over one hundred years *after* its enactment that the Fourteenth Amendment was successfully relied upon to address sex discrimination.⁶⁸² With this success, members of the USSC have declared that America has been positively 'transformed by the standards, promises, and power of the Fourteenth Amendment.'⁶⁸³ This includes Justice Souter, who calls the Amendment 'the most significant structural provision adopted since the original Framing [of the Constitution]'⁶⁸⁴ and Justice Ginsberg, who views it as part of the 'story' of the extension of the Constitution, containing commitments having 'growth potential.'⁶⁸⁵ While these

⁶⁷⁸ Ginsburg (n 697) 264.

⁶⁷⁹ Cathy Albisa and Jessica Schultz, 'The United States: A Ragged Patchwork' in Malcolm Langford (ed), *Social rights jurisprudence: emerging trends in comparative and international law* (CUP 2008) 231.

⁶⁸⁰ A. Morning and D. Sabbagh, 'From sword to plowshare: using race for discrimination and antidiscrimination in the United States' (2005) 57 *Int'l Social Science J* 57, 58.

⁶⁸¹ *ibid.*

⁶⁸² See: *Reed v Reed* 404 US 71 (1971).

⁶⁸³ William J. Brennan Jr., 'The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights' (1986) 61 *NYUL Rev* 535, 536; See: *Legal Aid Society of Alameda County v. Brennan* 381 F Supp 125 (NDCal1974).

⁶⁸⁴ *MacCreary County v. ACLU of Ky.* 545 US 844 (2005) 872.

⁶⁸⁵ R.B. Ginsburg, '*Gender and the Constitution*' (1975) 44 *U Cin L Rev* 1.

are fair assessments, the author's study of federal case law found the Fourteenth Amendment to be a woefully inadequate tool for pregnant workers. It also found this inadequacy has three root causes. The first being that the Constitutional proscription of discrimination is limited to the actions of government actors. There is no Constitutional right of redress against the wrongs of private employers. The Fourteenth Amendment only prohibits discriminatory conduct by the states, and the Fifth Amendment only prohibits discriminatory conduct by the federal government.

Secondly, as the proscription applies only to intentional discrimination, an employer in a constitutionally based claim cannot be liable in the absence of motive. As the court observed in *Zichy v. City of Philadelphia*:

*The principle difference between the two standards is that under the Fourteenth Amendment, sex discrimination becomes illegal only if intended, while under Title VII proof of intent is unnecessary and discriminatory impact alone establishes liability.*⁶⁸⁶

Finally, as the Fourteenth Amendment provides for 'equal protection,' it commands only the achievement of formal equality under a rigid Aristotelian approach, as previously discussed in Chapter 1. To recall, this approach seeks procedural fairness only, not result. It emphasizes the like treatment of persons under like circumstances and conditions. Under the provisions of the Constitution, this means that once a class of persons is determined to exhibit characteristics that are different, there can be constitutionally justified different treatment. The Constitution does not require things 'which are different in fact or opinion to be treated in law as though they were the same.'⁶⁸⁷ Meaning, therefore that same rights do not necessarily result in equal rights. It also means, as Judge Posner wrote in the case of *Jackson v City of Joliet*, that the Constitution is a 'charter of negative rather than positive liberties.'⁶⁸⁸

⁶⁸⁶ *Kathleen Zichy and Jane E. Shofer v. The City of Philadelphia* 392 F Supp 338 (ED Pa March 19, 1975) 346.

⁶⁸⁷ *Tigner v Texas* 310 US 141 (1963) 147.

⁶⁸⁸ *James R. Jackson v. City of Joliet, et al.* (n 698) footnote 9.

b Civil rights.

The history of civil rights legislation in America has been well chronicled, and I do not profess to have an important opinion on the issue.⁶⁸⁹ Nevertheless, a brief foray into the context in which civil rights legislation was adopted, with its focus upon tackling race discrimination, will help to clarify the context in which sex, and then pregnancy discrimination came to be statutorily prohibited in the US.

This exploration begins with the end of the US Civil War, which while ending slavery, is generally acknowledged to have failed to end race discrimination.⁶⁹⁰ Following the Civil War, in 1865, Congress enacted the Thirteenth Amendment, which provided that ‘Neither slavery nor involuntary servitude shall exist within the United States, or any place subject to their jurisdiction. ‘However, a number of states attempted to avoid its requirement by passing ‘Black Codes,’ which placed significant legal limitations on the newly free slaves. Partially in response to this, Congress adopted various Reconstruction laws, including the Civil Rights Act of 1866, which granted citizenship and the same rights enjoyed by white citizens, to all *male* persons in the US ‘without distinction of race, color, or previous condition of slavery or involuntary servitude.’⁶⁹¹ This idea of equality was also embedded in the Constitution with the adoption of the Fourteenth Amendment in 1868, as discussed above, which was followed by implementing legislation. Nevertheless, as Maslow and Robison’s research into US civil rights legislation and the battle for equality from 1862-1952 observes, the laws enacted between 1866-1875 did not ‘succeed in obtaining actual as well as legal equality for the freedmen.’⁶⁹² Indeed, the years into the twentieth century are defined by the efforts of many US states to avoid equality and preserve the status quo.⁶⁹³ The USSC was also complicit in this continued race discrimination, as illustrated by its decision in

⁶⁸⁹ See otherwise: Will Maslow and Joseph B. Robison, ‘Civil Rights Legislation and the Fight for Equality, 1862-1952’ (1953) 20 U of Chicago LR 363; Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (OUP 1994); Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (The Free Press 1984).

⁶⁹⁰ Maslow and Robison (n 710) 367.

⁶⁹¹ *ibid* (emphasis added).

⁶⁹² *ibid* 370.

⁶⁹³ See: George C. Wright, *Racial Violence in Kentucky, 1865-1940: Lynchings, Mob Rule, and Legal Lynchings* (LSU 1996).

Plessy v Ferguson, which upheld segregation as constitutional under its ‘separate but equal’ doctrine.⁶⁹⁴

In an effort to counteract the inequality, disadvantage, and exclusion of non-whites, civil rights organizations were formed, including the National Association for the Advancement of Colored People (NAACP) in 1909.⁶⁹⁵ While the original goal of the NAACP was to end segregation in education, it achieved success in a variety of additional areas, including, employment, housing, voting, public accommodation, and transportation. Its most famous case, *Brown v Board of Education*, is generally acknowledged to have spurred the civil rights movement of the 1950s and 1960s, which culminated in the Civil Rights Act of 1964.⁶⁹⁶

If any of the foregoing discussion has been at all clear, it should be evident that the initial focus for civil rights legislation in the US was race discrimination, not sex discrimination. This is not to say that there was not a call for civil rights for women. While assembled on 19 July 1848, at Seneca Falls, New York, the First Women’s Rights Convention delegates drew up a declaration of sentiments modelled upon the Declaration of Independence. They asserted ‘that all men and women are created free and equal,’ and demanded equality before the law and in educational and economical opportunities. Indeed, a Constitutional Equal Rights Amendment (ERA) was viewed as the most permanent means of redress.⁶⁹⁷ Calls to Congress for labour reforms also included the request to provide equal pay for equal work for women in all industries, which culminated in the Equal Pay Act of 1963.⁶⁹⁸

Nevertheless, it is generally acknowledged that sex did not figure into the initial debates concerning the adoption of the nation’s benchmark civil rights legislation, which spanned the course of twenty years, from the introduction of the first Bill to prohibit

⁶⁹⁴ *Plessy v Ferguson* 163 US 537 (1896), this case involved a Louisiana statute that required all railway companies to have ‘separate but equal’ accommodations for white and non-white passengers.

⁶⁹⁵ August Meier and John H. Bracey, Jr., ‘The NAACP as a Reform Movement, 1909-1965: “To Reach the Conscience of America” ’ (1993) 59 J Southern History 3, 4.

⁶⁹⁶ *Brown et al. v. Board of Education of Topeka et al.* 347 US 483 (1954).

⁶⁹⁷ Doris Stevens, ‘The “Blanket” Amendment- A Debate. I. Suffrage Does Not Give Equality’ *The Forum* (1886-1930), p 148 <<http://proquest.umi.com>> accessed March 17, 2011, from American Periodicals Series Online. (Document ID: 160336751).

⁶⁹⁸ Philip S Foner, *History of the Labor Movement in the United States*, vol 1 (International Publishers 1998) 388; EPA (n 171).

discrimination, ‘on the basis of race, color, or creed,’ in 1942.⁶⁹⁹ There is also evidence to suggest that the prohibition of discrimination because of ‘sex’ was only included in the Civil Rights Act of 1964, as a result of a last minute amendment offered by Rep. Howard W. Smith, arguably ‘in a spirit of satire and ironic cajolery.’⁷⁰⁰ As Mr. Smith has been described as a ‘staunch opponent of all civil rights legislation,’⁷⁰¹ and ‘not a civil rights enthusiast,’⁷⁰² some scholars have concluded that he offered the Amendment as an attempt to derail the Bill, which backfired.⁷⁰³ In contrast, others, including Jo Freeman, assert that this conclusion is wrong and that the Amendment was the result of the actions of ‘policy entrepreneurs.’⁷⁰⁴ While it may never be known which view is accurate, as the lack of any lengthy discussion on the Amendment renders a definitive conclusion difficult, what is known is that it was one of the most ‘filibustered bills in modern times.’⁷⁰⁵ The Bill underwent ‘over 21 congressional hearings and thousands of pages of the Congressional Record as well as public and scholarly debate, before it became national law.’⁷⁰⁶ Ultimately, the amendment was adopted after a ‘hasty debate’ under the so-called ‘five-minute rule.’⁷⁰⁷ Notwithstanding the inclusion of a statutory prohibition against sex discrimination, the provision was not interpreted by the USSC to include pregnancy discrimination.⁷⁰⁸ Instead, pregnancy discrimination *only* came to be prohibited in the US when the Pregnancy Discrimination Act (PDA) was adopted by Congress in 1978.⁷⁰⁹

By way of summary, some clear differences are evident in the context in which sex discrimination was initially legislatively addressed in the EU and the US. Recalling

⁶⁹⁹ See: Francis J. Vaas, ‘Title VII: Legislative History’ (1966) 7 BC Intl & Comp Law Rev 431.

⁷⁰⁰ *ibid.*

⁷⁰¹ Jo Freeman, ‘How “Sex” Got Into Title VII: Persistent Opportunism as a Maker of Public Policy’ (1990) 9 Law & Ineq 163, 163.

⁷⁰² Vaas (n 720) 442.

⁷⁰³ See: Freeman (n 722). Also: M.E. Gold, ‘A Tale of Two Amendments: The Reason Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth’ (1980-1981) 19 Duq L Rev 453.

⁷⁰⁴ Freeman (n 722). See also, Robert C. Bird, ‘More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act’ (1997) 3 Wm & Mary J Women & L 137.

⁷⁰⁵ See: C. Ellis, ‘Women’s Rights and Positive Action through Legislation: The American Experience’ (1984) 8 Trent LJ 19, 23.

⁷⁰⁶ Burstein (n 696) 9.

⁷⁰⁷ Vaas (n 720) 442.

⁷⁰⁸ See: *Gilbert* (n 37).

⁷⁰⁹ PDA (n 117).

from the discussion of EU law in Chapter 3, sex discrimination in the form of unequal pay was addressed in the original constitutional treaty in 1957 for reasons of economic principles. In the US, sex discrimination was initially considered less in need of amelioration than race discrimination, and was addressed in the Civil Rights Act of 1964 for reasons that remain debatable. A further distinction, as the following discussion will reveal, is that notwithstanding pregnancy discrimination is sex discrimination in the EU and the US, the US has elected to tackle the problem through a mandate of formal equality. In contrast, EU antidiscrimination law provides special protection from the beginning of pregnancy until the end of maternity leave.

III Legislative authority and legislative form.

This Part comparatively explores legislative authority and the legal measures that may be adopted to address pregnancy discrimination in the US. However, due to word constraints, what is provided here can only be an overview, which is intended to aid the understanding of the substantive provisions discussed in Parts IV and V. This discussion will also serve to further highlight the similarities and differences between EU and US antidiscrimination law.

a Congress and Congressional measures.

Recalling the discussion in the foregoing Chapters, it should be understood that as ‘avant-garde,’⁷¹⁰and innovative as the EU may be, ‘somewhat more than an international organization but less than a state,’⁷¹¹it remains a creature of international Treaty. Moreover, despite the fact that a ‘Constitutional Treaty’ was proposed in 2005, and a former President of the EU Commission has called for a federation of EU states, at most, the EU can be considered a confederation of independent nation states, from which its member states are free to withdraw.⁷¹²Consequently, even though the CJEU

⁷¹⁰ See: Weiler (n 323) 2406. The author asserts that, "Europe increasingly means the European Community in much the same way that 'America' means the United States." See also: M. Avbelj, ‘The Treaty of Lisbon: An Ongoing Search for Structural Equilibrium’ (2009-2010) 16 Colum J Eur L 521, 521 for a discussion of how the new Treaty contains "too little for a federation and too much for a confederacy."

⁷¹¹ David Schleicher, ‘What if Europe Held an Election and No One Cared?’ (2011) 52 Harv Int’l LJ 109

⁷¹² See: President Barroso, *Speech at Yale Global Constitutionalism Seminar, the Hague* (2012).

references the European Treaty as ‘the basic constitutional charter,’ the EU equality model is the offspring of delegated institutional authority, wherein the form and reach of equality measures is limited *only* by the inability of the member states to agree, rather than by the terms of any written Constitution, as is the case in the US.⁷¹³ As discussed in Chapter 3, the US is defined by its federal system of government, in which power is divided between the fifty individual states and the federal government. Under this division, national legislative power is vested in Congress, by virtue of the Constitution, which states in Article 1, Section 1 that:

*All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*⁷¹⁴

Here, a brief review of the role of Congress will serve to highlight the differences between EU and US legislative authority.

The US Senate has one hundred members, two from each state in the Union, who are elected in accordance with the 17th Amendment to the Constitution. The House of Representative has four hundred and thirty five permanent members, apportioned between the states based upon their total population. The main function of Congress is to make national law. In doing so, Congress may propose one of four types of action—a Bill, a resolution, a joint resolution, a concurrent resolution, and a simple resolution. A Bill is the form used for most national legislation, and once the Bill is approved in identical form by both bodies of Congress, it becomes law in any of three situations: if

- It is signed by the President; or
- The President has failed to sign it within 10 days, where Congress is in session; or

⁷¹³ First expressed in Case 294/83 *Partie Ecologiste ‘Les Verts’ v. European Parliament* [1986] ECR 1339 [23]. For a more recent expression, see: C-335/09 *Republic of Poland v European Commission* [2012] ECR 0 [35]

⁷¹⁴ For a description of the US legislative process, see: Library of Congress., ‘IV. Forms of Congressional Action’ (*Thomas.loc.gov*, 24 July 2007).
<<http://thomas.loc.gov/home/lawsmade.bysec/formsfaction.html>> accessed 29/8/2014

- Where a Presidential veto of the Bill has been overcome by a two-thirds vote in each House.

There is little practical difference between a Bill and a Joint resolution. Both Bills and resolutions are subject to the same procedure, except that when a Joint Resolution amending the Constitution has the approval of 2/3 of each house, it does not require Presidential approval. Instead, it is sent to the US States, requiring 3/4 of the states to ratify before the Constitution is amended.⁷¹⁵ In contrast, a concurrent or simple resolution is not legislative, but merely a vehicle for expressing the facts, principles, opinions, and purpose of Congress.⁷¹⁶ A further distinction is that a concurrent resolution is a resolution of both Houses of Congress, whereas a simple resolution is the resolution of only one. As they are not legislation, they are not sent to the President for approval.

Pursuant to the legislative powers discussed above, Congress has enacted a variety of antidiscrimination and equality laws, which directly or indirectly benefit pregnant workers. These laws are as follows:

- The Equal Pay Act of 1963 (EPA), which makes it illegal to pay men and women differently if they perform equal work in the same workplace;⁷¹⁷
- Title VII of the Civil Rights Act of 1964, (Title VII) which prohibits employment discrimination based on race, color, religion, national origin and sex;⁷¹⁸
- The Age Discrimination in Employment Act of 1967, (ADEA) prohibits discrimination in employment against individuals at least 40 years of age;⁷¹⁹
- Section 501 and 503 of the Rehabilitation Act of 1973, makes it illegal to discriminate against a qualified individual with a disability in federal government;⁷²⁰

⁷¹⁵ U.S. Constitution, Article V. Also, *Hollingsworth v. Virginia* 3 Dall 378 (1798).

⁷¹⁶ See: *INS v Chadha* 462 US 919 (1983), for a discussion of Congressional legislation and the presentment clause of the US Constitution.

⁷¹⁷ EPA (n 171).

⁷¹⁸ Title VII (n 171).

⁷¹⁹ Age Discrimination in Employment Act of 1967 (Pub. L. 90-202) (ADEA).

⁷²⁰ Rehabilitation Act of 1973, (Pub. L 93-112) 29 U.S.C. Ch. 16.

- The Pregnancy Discrimination Act of 1978,(PDA) amends Section 701 of the Civil Rights Act of 1964, to prohibit sex discrimination on the basis of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth;⁷²¹
- Title I of the American’s with Disabilities Act of 1990 (ADA) makes it illegal to discriminate against a qualified individual with a disability in the private sector, state and local government;⁷²²
- Section 102 and 103 of the Civil Rights Act of 1991, amends Title VII and the ADA to permit jury trials, awards of compensatory and punitive damages in intentional discrimination cases;
- The Family and Medical Leave Act of 1993 (FMLA) permits eligible employees in a covered workplace to take up to 12 weeks of leave for reasons of birth, adoption, or to care for a newborn, or to care for a spouse, son, daughter, or parent with a serious health condition, or for their own serious health condition;⁷²³
- The Genetic Information Non Discrimination Act of 2008 (GINA); prohibits discrimination against employees or applicants because of their genetic information;⁷²⁴
- Americans with Disabilities Act Amendments Act of 2008 (ADAAA), expressly overturned Supreme Court judgments in *Sutton v. United Airlines*, *Toyota Motor Manufacturing*, and *Kentucky Inc. v. Williams*, on the basis that they narrowed the scope of protection afforded by the ADA. It also found existing EEOC regulations on the ADA to be inconsistent with Congressional intent; and⁷²⁵
- The Patient Protection and Affordable Care Act of 2009 (ACA), amends the Fair Labo[u]r Standards Act of 1938 (FLSA) to require employers of 50 or more employees covered by the FLSA, to provide unpaid

⁷²¹ PDA (n 117).

⁷²² ADA (n 141).

⁷²³ Family and Medical Leave Act 1993, 29 USCS 28.

⁷²⁴ The Genetic Information Nondiscrimination Act of 2008.

⁷²⁵ ADA Amendments Act of 2008 (n 141).

reasonable break time for employees to express breast milk for one year after a child's birth, as well as 'a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, to be used to express milk.'⁷²⁶

In addition to enacting legislation, Congress has the power to amend the Constitution, and to date there have been twenty-seven such amendments. In accordance with the provisions of Article V, an amendment requires either a proposal by Congress with a 2/3 majority vote, in both the House and the Senate, or by a constitutional convention called for by 2/3 of the state legislatures. Notably, in every Congress since 1923, a proposal has been submitted for an 'Equal Rights Amendment' (ERA), providing that 'equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex'.⁷²⁷ Although this ERA never obtained the necessary number of ratifications for it to be enacted after Congress adopted a joint resolution proposing it in 1972, the results of this research suggest that its proposal provided impetus for the enactment of similar amendments to a number of state Constitutions.⁷²⁸ As the discussion in Chapter 6 will reveal, these state ERAs have led to the creation of a new body of law, much of which has benefitted women generally, and pregnant workers specifically. The power of state legislatures to enact this body of law will now be explored.

b State legislatures and state measures.

State legislatures have available to them the same legislative measures as Congress, but state laws only apply within state borders. More specifically, under the Tenth Amendment to the US Constitution, all powers *not* granted to the federal government are reserved for the states and the people. Pursuant to these powers, the states may enact prophylactic legislation intended to redress past discrimination, so long as it has not been pre-empted by federal law. Pre-emption renders state law invalid

⁷²⁶ ACA (n 120).

⁷²⁷ See: Barbara A. Brown, Thomas I. Emerson and Gail Falk, 'The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women' (1971) 80 Yale LJ 871, 886.

⁷²⁸ Generally, see: J.H. Wilkinson III, 'The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality' (1975) Va L Rev 945.

under Article VI, paragraph 2 of the Constitution—the so-called ‘Supremacy Clause,’ by, which the US Constitution and federal laws are declared the supreme laws of the land. The results of this research suggest that it is of central importance to pregnant workers that Congress has decided *not* to occupy the field with respect to laws designed to address discrimination. This means that as Congress is not the *sole* source of legislation designed to secure equality for pregnant workers, the individual states of the Union may enact measures that go *beyond* congressionally mandated minimums, so long as they are not inconsistent with the purposes of the PDA, do not violate the prohibitions contained in Title VII, nor conflict with Constitutional guarantees.⁷²⁹In Chapter 6, the equality measures enacted by the fifty states and Washington D.C. are critically explored for their ability to broaden the rights and protections afforded to pregnant workers, as well as for their limitations compared to EU measures. Overall, the evidence presented in Chapter 6 will seek to show that these state measures play a critical role in shifting the US antidiscrimination regime towards achieving greater substantive equality.

c Presidential policy and executive power.

Presidential policy and executive power play a central role in shifting the trajectory of US pregnancy discrimination law. This is because under the provisions of the Constitution, national lawmaking is a power that is shared by both Houses of Congress and the President.⁷³⁰The President has the limited and qualified power to nullify proposed legislation by veto, which informs Congress that the legislation being proposed does not accord with Presidential policy. In addition to this negative power, Presidential policy is a significant source of legislative proposals by Congress. As noted by John V. Sullivan, Congressional Parliamentarian:

The ‘executive communication’ has become a prolific source of legislative proposals. The communication is usually in the form of a message or letter from a member of the President’s Cabinet, the head of an independent agency, or the President himself, transmitting a draft of a

⁷²⁹ See: *Guerra* (n 693). Also: Brennan Jr., ‘State Constitutions and the Protection of Individual ‘Rights’ (n 693).

⁷³⁰ *Chadha*, (n 737) 947.

*proposed bill to the Speaker of the House of Representatives and the President of the Senate.*⁷³¹

In the case of the current President, Barack Obama, the results of this research reveal that his social policy has been a source of a number of legislative proposals that seek to advance substantive equality between women and men, while also benefitting pregnant workers, either directly, or indirectly.⁷³² A case in point is the healthcare reform law (ACA), which is arguably the landmark legislation of his Presidency. The ACA is of key interest to this research, because although it is not an antidiscrimination law per se, it contains three important provisions intended to improve the health and safety of pregnant workers, including:

- Banning health insurers from requiring that women pay more for the same insurance coverage as men;
- Requiring that all insurance plans provide maternity health coverage;
- Requiring break time for nursing mothers in workplaces with 50 or more employees.⁷³³

This use of a health and safety measure to advance substantive equality is informative. It suggests that a President may find it easier to address workplace disadvantage using health legislation rather than antidiscrimination law. The failure to secure an amendment to the PDA, to include breastfeeding as a protected activity, (S418), or passage of the ‘Breastfeeding Promotion Act’ (H.R. 2790) in 2003, which was followed by a similarly doomed proposal in 2005 (H.R.2122), reveals the difficulty of expanding the US antidiscrimination regime and the role health and safety legislation plays in making breastfeeding a protected activity, of sorts.⁷³⁴ As the discussion in Chapter 2 revealed, there are significant conceptual and philosophical differences between US feminists in their support for equal treatment, versus support for measures,

⁷³¹ John V. Sullivan, ‘How Our Laws Are Made’ (*Library of Congress*, 24/7/2007). <<http://thomas.loc.gov/home/lawsmade.bysec/sourceofleg.html>> accessed 2/2/15

⁷³² For example, OPS, *Fact Sheet: White House Unveils New Steps for Strengthening Working Families Across America* (2015).

⁷³³ ACA (n 120).

⁷³⁴ For a history of US legislation in this area, see: CRS, *CRS Report for Congress. Breastfeeding: Federal Legislation* (The Library of Congress, 2006).

which require employers to treat some workers differently, in order that they may be treated equally. The adoption of the ACA suggests that these conceptual barriers, while significant, are not insurmountable, and may be overcome through the adoption of laws directed at health, safety, and labour conditions. Indeed, this was the case with regard to the provision of workplace leave in the FMLA, wherein its supporters described the proposal as a ‘labor standard’ as opposed to a ‘benefits’ Bill.⁷³⁵ In Part VII, the ACA, the FMLA, and the ADAAA are considered more closely for the patchwork protections they afford pregnant workers, and their role in shifting the trajectory of US antidiscrimination law towards greater substantive equality.

In addition to Presidential proposals, the results of this research suggest the power of the President to issue an Executive Order, for the management of the federal government, has been an important tool for shifting the trajectory of US antidiscrimination law. Indeed, as the evidence presented in Chapter 7 will reveal, the power to issue an Executive Order has enabled the adoption of gender mainstreaming as a domestic equality strategy. The discussion will also reveal that this use of an Executive order to promote equal opportunities in the US is not unusual.⁷³⁶ In point of fact, *every* Executive Order issued in the civil rights arena to date, has been followed by some form of federal legislation. Suggesting therefore, that the issuance of an Executive Order is merely the first step in the process of adopting gender mainstreaming as a national equality strategy.

IV The US ‘rights based’ approach to equality.

This Part begins the in-depth exploration of the substantive provisions of the US model of equality in comparative context. A discussion of the right to equal treatment between women and men, the statutory exceptions and defences available to employers, and the US derogation for gender based affirmative action will help provide a foundation for the critical consideration of US antidiscrimination law in practice, which is undertaken in Part VI.

⁷³⁵ Elving (n 162) 78.

⁷³⁶ For a brief history of Executive Orders in the area of civil rights, see: *Legal Aid v Brennan* (n 704) 127 (fn1).

a Statutory equality.

To restate, Title VII is the nation's landmark civil rights legislation, which prohibits discrimination on the basis of 'race, color, national origin, religion, and sex (including pregnancy).' It applies to hiring, discharge, transfer, promotion, demotion, compensation and 'terms, conditions, or privileges of employment.' In light of its statutory requirement of equal treatment, it may be concluded that Congress cemented the formal equality, rights-based approach to resolving discrimination into the US model of equality. This is to say that Title VII's prohibition of discrimination 'because of sex,' did not signal a paradigm shift in the US approach to equality. This is the case, despite the fact, as noted by the USSC in *Alexander v Gardner*, when it was enacted by Congress, Title VII was intended to supplement Constitutional rights and sought 'to assure equality in employment opportunities by eliminating those practices and devices that discriminate,' and provided for, 'statutory rights against invidious discrimination in employment and...a comprehensive scheme for the vindication of those rights.'⁷³⁷ Part of the problem was that Title VII was initially limited to regulation of workplace behaviour, and only later extended to pregnancy, when the PDA was enacted in 1978 to:

*Guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.*⁷³⁸

Today, while it can be said that fuller participation is apparent in the fact that women make up almost half of the US workforce, equal participation, particularly for pregnant workers, is arguably less evident, as a review of federal case law, in Part VI will show.⁷³⁹ Another part of the problem is that neither Title VII nor the PDA defines discrimination. Instead, the PDA merely amended Title VII to provide that:

The terms 'because of sex' or 'on the basis of sex,' include, but are not limited to because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or

⁷³⁷ *Alexander v Gardner Denver Co.* 415 US 36 (1974) 44.

⁷³⁸ Statement of Senator Williams, sponsor of the PDA *123 Cong. Rec.* 29658 (1977).

⁷³⁹ For statistics, see: Whitehouse Council on Women & Girls, *Keeping America's Women Moving Forward* (2012) 32, BLS, *BLS Reports: February 2013: Women in the Labor Force: A Databook* (2013).

*related medical conditions shall be treated the same for all employment-related purposes.....*⁷⁴⁰

This research reveals that as the statute rests firmly upon the concept of formal equality and the need for a ‘comparator’, equality remains elusive for many pregnant workers. This is because the comparator is typically the ‘unencumbered worker,’ usually male and without carer responsibilities. Scholars, including Robin Guerrina, fairly criticize this unencumbered worker norm as resulting in merely ‘homologizing them with the male subject.’⁷⁴¹ Likewise, Joan Williams observes that this norm merely affords women ‘access to men’s traditional roles.’⁷⁴² Arguably, this norm is also discordant with US society, where caregiver responsibilities for children and adults are increasingly the norm. This new norm is illustrated by the fact that in 2011, the share of married-couple families where both parents work totalled 58.5%.⁷⁴³ In 2014, this number increased to 60%.⁷⁴⁴ Moreover, it was estimated that nearly one fifth of employed people in 2008 were caregivers to a person over 50.⁷⁴⁵ Consequently, with a demographic aging of the US population, as in the EU, where care giving for children and elderly family members is likely to become the prevalent norm, the notion of the traditional workplace comparator is becoming ever more redundant.⁷⁴⁶

The final part of the problem is that there is no provision in US antidiscrimination law for the ‘uniqueness’ of pregnancy. As the USSC ruling in *California Federal Sav. & Loan v. Guerra*, (*Guerra*) emphasized, the legislative history of the PDA was ‘devoid of any discussion of preferential treatment of pregnancy.’⁷⁴⁷ This fact was also noted in the dissent of Dennis, C.J., in *Kazmier v. Widmann*, wherein it was stated that the PDA failed to ‘affirmatively grant pregnant workers leave time or the right to return to their job.’⁷⁴⁸ Nor does the PDA create any new rights or remedies for women. Rather, as noted by the USSC in *Newport News. v.*

⁷⁴⁰ PDA (n 117).

⁷⁴¹ Guerrina, *Mothering the union: gender politics in the EU* (n 450) 26.

⁷⁴² Williams, ‘Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA’ (n 8) 90.

⁷⁴³ USDOL, *Employment Characteristics of Families News Release* (USDOL-13-0730, 2013).

⁷⁴⁴ COEA, *Work-Life Balance and the Economics of Workplace Flexibility*. (2010) 2.

⁷⁴⁵ *ibid.*

⁷⁴⁶ See Chapter 4 for EU statistics.

⁷⁴⁷ *Guerra* (n 693)) 286.

⁷⁴⁸ *Kazmier and USA v Mary Widmann* 225 F3d 519 (5th Cir 2000) 546.

EEOC, the PDA *merely* clarifies the scope of Title VII; recognizing that certain inherently gender-specific characteristics may not form the basis for disparate treatment of employees.⁷⁴⁹ To recall from Chapter 1, disparate treatment involves treating some employees less favourably than others because of their sex. Disparate impact discrimination involves facially neutral employer policies that fall more harshly on one group than another.⁷⁵⁰ Notwithstanding these distinctions, federal case law suggests that US antidiscrimination law adheres to the status quo, through the guise of the gender-neutral concept of workplace ‘*pregnancy blindness*,’ in light of the concern that:

*The root of discrimination against pregnant women is the impression that once pregnant they will leave the labor force, which results in a view of women as marginal workers preventing them from receiving equal treatment in employment,*⁷⁵¹

The evidence presented in Part VI will show that this ‘pregnancy blindness’ requires pregnant workers to be treated the same as other employees—equally well, or equally badly. Furthermore, pregnancy-related illnesses are not always considered a disability, nor are they considered *sui generis*, as in the EU. Rather, they are considered temporary sicknesses, like any other, and for which the pregnant worker is to be treated the same as any other worker—no better and no worse. This means that an employer may dismiss a pregnant worker, for if the pregnant worker’s condition impacts their ability to work, they are deemed sick, and as sick workers, they are subject to workplace rules, including dismissal for excessive absences. That is, unless the employee is eligible for any of the patchwork of protections afforded by the other equality measures discussed in Part VII and Chapter 6.

b Exceptions and defences.

One clear similarity between EU and US antidiscrimination law is that the right to equality in the workplace is not absolute. As previously observed in Chapter 3, there are statutory exceptions and defences to EU and US antidiscrimination legislation that

⁷⁴⁹ *Newport News Shipbuilding & Dry Dock Co. v EEOC* 462 US 669 (1983) 680

⁷⁵⁰ Called ‘direct’ and ‘indirect’ discrimination in the EU. See Chapter 3.

⁷⁵¹ *Kelber v. Jt. Industry Board of the Electrical Industry* 27 F3d 42 (2nd Cir 1994) 43. Referencing H.R. Rep. No. 948, 95th Congress, 2d Sess.3 (1978), reprinted in 1978 U.S.C.C.A.N. 4751.

operate to enable employers' sexually discriminatory policies to be upheld in certain, narrowly defined circumstances. However, unlike the EU, they translate to mean that although the safety of a pregnant worker's foetus cannot render an employer's discriminatory policies valid, the safety of customers or third parties can. This was the case in *Burwell v. Eastern Airlines*, where the court held that the safety of airline passengers could operate to justify sexually discriminatory policies resulting in the layoff of flight attendants during their first five months of pregnancy.⁷⁵² By upholding these types of employer policies, USSC Associate Justice Ginsburg has criticised the Court for decisions that are 'a study in male hesitancy and legal timidity.'⁷⁵³ She is correct. USSC decisions interpreting the sex discrimination provisions of Title VII have historically been restrictive, revealing a preference for legislative expression over judicial interpretation.⁷⁵⁴ Case law also reveals that the USSC's timidity in addressing sexually discriminatory policies has been furthered by Title VII's *express* permission of sex-based discrimination, where sex is considered to be a 'bona fide occupational qualification' (BFOQ) reasonably necessary to the operation of the business or enterprise.⁷⁵⁵ In *Price Waterhouse v Hopkins*, the USSC observed that this provision shows, 'Congress' unwillingness to require employers to change the very nature of their operations in response to the Statute,' because the Statute's goal is to, 'eradicate discrimination while preserving workplace efficiency.'⁷⁵⁶ Timidity aside, it may be argued that the lack of any national, job protected paid leave during pregnancy exacerbates the impact of many of these decisions to a degree not felt by a worker in the EU.⁷⁵⁷ It can also be argued that the BFOQ defence to direct discrimination authorizes US courts to balance the limited and competing rights provided to pregnant employees, against the prerogatives of employers. Viewed critically, Baer argues that as the US government is business-friendly, 'employer's interests are more important than those of

⁷⁵² *Burwell v. Eastern Air Lines, Inc.* 68 FRD 495 (1975), cert denied 371. See also, *In re National Airlines, Inc.* 434 F Supp 249 (SD Fla 1977) 259.

⁷⁵³ R.B. Ginsburg, 'From No Rights to Half Rights to Confusing Rights-For Women, the Supreme Court's Decisions Are a Study in Male Hesitation and Legal Timidity' (1978) 7 Hum Rts 12.

⁷⁵⁴ See: *Newport News* (n 770) and *Nevada Dept. of Human Resources et al. v. William Hibbs et al.* 538 US 721 (2003).

⁷⁵⁵ Civil Rights Act of 1991 §109, 42 U.S.C. §2000e et seq. Section 703e, § 2000-2e.

⁷⁵⁶ *Price Waterhouse v. Hopkins* 825 F2d 458 (DC Cir 1987), rev'd 490 US 228 (1989) 243

⁷⁵⁷ See Chapters 3 and 4 for a discussion of EU antidiscrimination law.

workers.⁷⁵⁸ Baer's criticisms are not without merit, as the discussion in Part VI will show. It will also be shown that the transformative potential of the concept of disparate impact, as previously discussed in Chapter 3, has been limited in the US by the touchstone defence of 'business necessity,' as well as by an overall lack of USSC direction to the lower federal courts. This is to say, that while the concept of 'disparate impact' was intended to close the loophole, and remove 'built in headwinds,' a lack of direction by the Supreme Court and the lack of any national measure mandating the workplace accommodation of pregnancy, or publically supported paid leave, have enabled employer policies to freely operate to the disadvantage of pregnant workers.⁷⁵⁹

V Affirmative action—a derogation from equal treatment.

*It is not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates.*⁷⁶⁰

As affirmative action forms an intrinsic part of US antidiscrimination legislation, it is worth briefly drawing attention to this similarity between the EU and US models of equality. A similarity that is highlighted by the fact that the US derogation also does not directly benefit pregnant workers, but can be said to indirectly help to overcome the disadvantage that childbearing and childrearing have on women's careers.⁷⁶¹ Notwithstanding this similarity, there are clear distinctions between the EU and the US derogations. As the discussion in Chapter 3 revealed, EU positive action is applied in a broader manner than US affirmative action, and is a more generally accepted tool for advancing equality of opportunity, as revealed by the fact that every member state had enacted some form of positive action as far back as 1995.⁷⁶² In contrast, there is a wealth of evidence to support a finding that despite executive and congressional support for the

⁷⁵⁸ Judith Baer, 'Women and the Law' in *Exploring Judicial Politics* (Mark C. Miller ed, OUP 2009) 253.

⁷⁵⁹ *Griggs* (n 15) 432.

⁷⁶⁰ President Lyndon B. Johnson's Commencement Address at Howard University: "To Fulfil These Rights." (June 4 1965) <<http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>> accessed 12/3/2014.

⁷⁶¹ See Chapter 4, and for example, Eurofound, *Caring for children and dependants: effects on careers of young workers (Background Paper)*, Waldfogel, 'The effect of children on women's wages' (n 433), Daniel L. Millimet, 'The Impact of Children on Wages, Job Tenure, and the Division of Household Labour' (2000) 110 *Econ J* 139, Kahn, Garia-Manglano and Bianchi (n 614).

⁷⁶² Commission, *Report from the Commission on the Implementation of the Council Recommendation of 13 December 1984 on the Promotion of Positive Action for Women (84/635/EEC)* 3.

derogation, the confused boundaries, the legal challenges, its temporal quality, and the divisive debate surrounding its use have made it less attractive to private employers in the US. And, perhaps most importantly, have placed it on a different trajectory to its counterpart in the EU. These findings are evident from the discussion below.

a Executive and Congressional support.

US affirmative action has been defined as:

*Any measure beyond simple termination of a discriminatory practice, that permits consideration of race, national origin, sex, or disability, along with other criteria, and which is adopted to provide opportunities to a class of qualified individuals who have either historically or actually been denied those opportunities and/or to prevent the recurrence of discrimination in the future.*⁷⁶³

Research reveals that the US has been at the forefront in utilizing affirmative action to address past discrimination.⁷⁶⁴ This should not be surprising, in light of the racism in which the Civil Rights Act of 1964 arose. As stated by the USSC in *Albemarle v. Moody*, Title VII was intended to spur:

*Employers and unions to self-examine and to self-evaluate their employer practices and to endeavour to eliminate, so far as is possible, the last vestiges of an unfortunate and ignominious page in this country's history.*⁷⁶⁵

While affirmative action has historically been used to address race discrimination in the US, it can be and has been used to address gender discrimination. Its use can also be mandatory or voluntary. There are two situations in which private employers are *required* to utilize gender-based affirmative action in the hiring and promotion of female employees. The first is pursuant to a court order, In a legal action for discrimination, the remedial provisions of §706(g) of Title VII authorize courts to use any equitable relief deemed appropriate, including affirmative action. As observed

⁷⁶³ EEOC, *U.S. Commission on Civil Rights, Office of the General Counsel. Briefing Paper for the U.S. Commission on Civil Rights: Legislative, Executive and Judicial Development on Affirmative Action, Washington D.C. Mar .1995* (1995).

⁷⁶⁴ See the Opinion of Advocate General Tesaurò in *Kalanke v. Freie Hansestadt Bremen* (n 98), paras 8-10.

⁷⁶⁵ *Albemarle Paper Co. v. Moody* 422 US 405 (1975) 422.

by USSC Justice Brennan in *Sheet Metal Workers v. EEOC*, ‘in some circumstances, such relief may be the only effective means available to ensure the full enjoyment of the rights protected by Title VII.’⁷⁶⁶The majority also concluded that ‘Congress did not intend to prohibit a court from ordering affirmative action in appropriate circumstances as a remedy for past discrimination.’⁷⁶⁷

The second situation in which affirmative action is required is where the private employer is the recipient of a governmental contract or subcontract. Several federal laws, and many state and local laws *require* private employers in receipt of federal (or state) governmental and municipal contracts or subcontracts, to have an affirmative action program. Additionally, Presidential Executive Order 11246 mandates affirmative action by government contractors.⁷⁶⁸The use of Executive Order to require affirmative action is important for two reasons. First, as the US Department of Labor (DOL) estimates that as many as 26 million people or 22% of the US civilian workforce were employed by covered contractors in 2002, this data suggests that an executive mandate is an important tool for advancing equality of opportunity.⁷⁶⁹

Secondly, this controversial executive strategy is not unique to the US. As McCrudden’s research has found, ‘governments the world over use their contracting power to produce social justice results.’⁷⁷⁰Indeed, many EU member states use government procurement contracts to tackle the gender pay gap, and have given an advantaged position in public procurement competition to those companies that follow a quota system to increase the number of women on company boards.⁷⁷¹All of which suggests that the use of government contracting power is an important tool for advancing substantive equality.

In addition to mandated affirmative action, Title VII, permits private employers to *voluntarily* undertake an affirmative action plan to address sex segregation, provided

⁷⁶⁶ *Local 28 of the Sheet Metal Workers’ International Association et al. v. EEOC et al.* 478 US 421 (1986), 423

⁷⁶⁷ *ibid.*

⁷⁶⁸ Executive Order 11246- Equal Employment Opportunity, 30 FR 12319, 12935, 3 CFR, 1964-1965.

⁷⁶⁹ DOL, ‘Facts on Executive Order 11246-Affirmative Action’ (*US DOL* 4/1/02).

<<http://www.dol.gov/ofccp/regs/compliance/aa.htm>> accessed 1/2/15

⁷⁷⁰ C McCrudden, ‘*Buying Equality?*’ (2007) 1 *NLJ* 1216, 1216.

⁷⁷¹ See: Petra Foubert, *The Gender Pay Gap in Europe from a Legal Perspective* (EU Commission, 2010) 16 and Selanec and Senden (n 440).

their plans comply with three the criteria laid down by the USSC in *United Steelworkers of America v. Weber*, and reaffirmed in *Johnson v Transportation Agency*. Under this test, there must be a ‘manifest imbalance’ in the relevant workforce. Secondly, the plan must be temporary, seeking to ‘eradicate traditional patterns of segregation.’ Finally, the plan cannot ‘unnecessarily trammel the rights,’ or create an ‘absolute bar’ to the hiring or advancement of non-beneficiaries. As the Court stated in *Weber*, in enacting Title VII, ‘Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race [and gender]-conscious affirmative action.’⁷⁷² Applying this criteria in *Johnson*, the USSC found that private affirmative action plans aid in ‘eliminating the vestiges of discrimination in the workplace,’⁷⁷³ and upheld the employer’s selection of a woman for a road-dispatcher position, where the job category was traditionally regarded as ‘male,’ and where gender was only ‘one of numerous factors’ considered.⁷⁷⁴ Moreover, the Court said that employers are not required to justify an affirmative action plan with their own prior discriminatory practices; rather they may rely ‘upon a conspicuous imbalance in traditionally segregated job categories.’⁷⁷⁵

Voluntary employer plans are also supported by the provisions of the Civil Rights Act of 1991, which states that nothing in the Act ‘shall be construed to affect...affirmative action or conciliation agreements that are in accordance with the law.’⁷⁷⁶ As the USSC has yet to outline ‘the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups,’⁷⁷⁷ the EEOC has promulgated guidelines for employers taking action, ‘to improve employment opportunities of minorities and women.’⁷⁷⁸ The importance of these guidelines lay in the ability of the EEOC to give safe harbour to employers who have enacted plans pursuant to them, as ‘those taking such action should be afforded protection against Title VII liability which the Commission is authorized to provide under Section 713(b) (1).’⁷⁷⁹ The

⁷⁷² *United Steelworkers of America v. Weber* 433 US 193 (1979) 197 and 207- 208; *Johnson v. Transportation Agency, Santa Clara Cty* 480 US 616 (1987) 630.

⁷⁷³ *ibid*, *Johnson* 642.

⁷⁷⁴ *ibid* 634.

⁷⁷⁵ *ibid* 630.

⁷⁷⁶ CRA 1991 (n 15).

⁷⁷⁷ *Johnson* (n 793) 642 (Stevens J, concurring opinion).

⁷⁷⁸ 29 CFR 1608.1 (a). Affirmative Action Appropriate under Title VII of the Civil Rights Act of 1964, as amended.

⁷⁷⁹ *ibid*, ss 1608.1 (3) (c).

provision of a safe harbour is clearly intended to encourage employers to adopt affirmative action plans.

Notwithstanding strong congressional and executive branch support for affirmative action, the research of Appel, Gray, and Loy found that private employers are generally reluctant to adopt voluntary plans. They suggest three reasons for this reluctance. First, the lack of USSC clarification of the line between what is permissible affirmative action, and what is not. Secondly, the persistent threat of ‘reverse discrimination’ litigation. Finally, the adoption of an affirmative action plan can give rise to negative repercussions for employee relations.⁷⁸⁰ As the following discussion will show, these reasons are supported by the findings of this research.

b Confused boundaries and ‘reverse’ discrimination.

The author’s review of federal case law found that while hostility towards and litigation against affirmative action is generally focused on governmental plans, private employer’s voluntary plans have also been challenged.⁷⁸¹ These challenges generally emanate from white males, claiming ‘reverse discrimination’ where they have been unsuccessful in seeking selection, promotion, or training where an affirmative action plan has been adopted.⁷⁸² Even where these challenges have failed, employers have incurred costs defending them, which arguably act as a disincentive to their adoption. A brief discussion of the litigation and USSC judgments relating to affirmative action plans will help to explain this disincentive more clearly.

The basis for any claim seeking to enjoin implementation of an affirmative action plan depends upon whether the plan’s creator is a government actor, or a public or private employer, and as observed by Justice O’Connor with regard to the landmark case of *Adarand III*, these cases involve ‘fairly straightforward facts, [but] implicate a

⁷⁸⁰ Appel, Gray and Loy (n 445) 374.

⁷⁸¹ For Supreme Court rulings on point, see the discussion in *Wygant v. Jackson Bd. of Ed* 476 US 267(1986) and *Johnson* (n 793) (fn 161).

⁷⁸² For example, *Michael W. Ulrich v. Exxon Company, USA*. 824 FSupp 677 (SD Tex 1993); *Lee Yeager v. General Motors Corp.* 266 F3d 389 (2001) (Certiorari Denied March 18, 2002, Reported at 2002 US LEXIS 1564).

complex scheme of federal statutes and regulations.’⁷⁸³The approach taken by the USSC to *governmental* affirmative action plans is that:

*A group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.*⁷⁸⁴

This inquiry requires any gender classification imposed by a governmental actor to be analysed by a reviewing court using ‘intermediate scrutiny.’ This is to say that:

*To withstand constitutional challenge...classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.*⁷⁸⁵

This level of scrutiny was restated by the USSC in *United States v. Virginia*, as requiring sex-based classifications to be supported by an ‘exceedingly persuasive justification’ and ‘substantially related to the achievement of that underlying objective.’⁷⁸⁶However, confusion surrounds the evidentiary standard that must be met. While the Supreme Court in, *Richard v. Croson* said that ‘a significant statistical disparity’ could justify *race*-conscious affirmative action programs, the lower federal courts acknowledge that they ‘work without an analogous evidentiary label from the United States Supreme Court’ when considering gender-based plans.’⁷⁸⁷In the absence of any specific direction from the USSC for analysing constitutional challenges to gender-based affirmative action plans, the 4th, 9th, 10th and 11th Circuit Courts of Appeal⁷⁸⁸have followed the approach taken by the Supreme Court in *Mississippi v. Hogan*, which holds that statutes classifying on the basis of gender must be based upon reasoned analysis’ rather than ‘the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.’⁷⁸⁹This is to say that

⁷⁸³ *Adarand Constructors, Inc. v. Federico Pena, Secretary of Transportation, et.al.* 515 US 200 (1995) 206.

⁷⁸⁴ *ibid* 227.

⁷⁸⁵ *Craig v. Boren* 429 US 190 (1976) 197.

⁷⁸⁶ *United States v Virginia* 518 US 515 (1996) 524.

⁷⁸⁷ *Richard v. J.A. Croson Co.* 488 US 469 (1989) 509 [9]. See also, *Concrete Works of Colo.v. City & County of Denver* 321 F3d 950 (2003) (US Supreme Court certiorari denied, 2003 US LEXIS 8457 (US, Nov 17, 2003)) 960.

⁷⁸⁸ *H.B. Rowe Company Inc. v. Tippett, et. al.* 615 F3d 233 (4th Cir 2010), *Concrete Works* (n 808) 959

⁷⁸⁹ *Mississippi Univ. for Women et al. v. Hogan* 458 US 718 (1982) 726.

a government's rationale for a gender preference 'must be sufficient to show that the preference rests on evidence of informed analysis rather than on stereotypical generalizations.'⁷⁹⁰In light of the foregoing, it may be deduced that a state entity implementing a mandated affirmative action program may rely upon the federal government's compelling interest in implementing the local plan, but a voluntary plan will be struck down if it is based upon oversimplified methodology, or lacking narrow tailoring.⁷⁹¹

The employer must also bear in mind that the USSC has suggested a 25-year sunset for governmental affirmative action programs, on the basis that 'all governmental use of race [and gender] must have a logical end point.'⁷⁹²The idea being that by that time affirmative action will have achieved its goal of greater equality of opportunity. Notably, for a number of states, including Oklahoma, New Hampshire, Arizona, Nebraska, Michigan, Washington, California, Florida, and Texas, the logical endpoint appears to have arrived, for their legislatures have enacted measures expressly *prohibiting* preferential treatment to anyone on the basis of race, or sex. In the case of California, Proposition 209 amended the State Constitution to expressly provide that:

The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. (Cal.Const. art. I, §31)

While it is true that these amendments only apply to state actors, there is a significant amount of research to suggest that these prohibitions indirectly impact private employers' willingness to adopt affirmative action measures, and have 'added another chapter to the long and tortuous history' of affirmative action.'⁷⁹³And, although these measures are most clearly directed at public university 'race based' admission

⁷⁹⁰ *H.B. Rowe Company Inc. v. Tippett, et. al.* (n 809).

⁷⁹¹ See: *N. Cont., Inc. v Illinois* 2007 US App LEXIS 320 (7th Cir Ill, Jan 8, 2007), *Western States Paving Co., Inc., v. Washington State Dept. of Transportation*; *City of Vancouver, Washington, Clark County; Washington*; *Douglas MacDonald*. 407 F3d 983 (9th Cir 2005); *Engineering Contractors Assoc. of South Florida Inc. v. Metropolitan Dade County* 122 F3d 895 (11th Cir 1997). Also, see related proceedings at *Hershell Gill Consulting Eng'Rs, Inc. v. Miami-Dade County* 333 F Supp 2d 13052004 US Dist LEXIS 17197 (SD Fla, Aug 24, 2004). See also: *Wygant v Jackson*. (n 802).

⁷⁹² *Barbara yngat v Lee Bollinger et al* 539 US 306 (2003) 342.

⁷⁹³ *Hi-Voltage Wire Works, Inc., et al., v. City of San Jose, et al.* 24 Ca 4th 537 (Supreme Court of California) (2000) 656.

programmes, there is some evidence they are hindering public contracting and hiring initiatives intended to address the structural inequalities faced by minorities and women.⁷⁹⁴ Furthermore, while it is true that only a few US states have passed these ballot initiatives, they suggest a clear disconnect between public opinion and the reality of women's lives. This is to say that while statistics reveal the pay gap between women and men continues, with women more likely than men to be in poverty, public opinion in some US states appears to believe that equality has been achieved.⁷⁹⁵

c Negative repercussions.

Also, instead of being viewed as an antidiscrimination programme, research reveals that affirmative action has been 'painted as a policy of institutionalized discrimination against white men.'⁷⁹⁶ This has resulted in negative repercussions for private employers who have adopted affirmative action plans, notwithstanding that it is not a requirement for quotas, preferential hiring, or promotion and is *only* a requirement of a good faith effort in recruitment, training, and outreach.⁷⁹⁷ Nevertheless, negative repercussions and a divisive public debate surrounding their use are intense. Much of this intensity arises from the fact that affirmative action requires cognizance of demographic characteristics, and as Crosby observes, 'Americans prefer not to.'⁷⁹⁸ Indeed, in contrast to the individual rights discussed in Part II above, which operate as a passive policy of equal opportunity, affirmative action is an active policy for addressing discrimination in the US. As an active policy, these measures ask employers to do more than merely act passively neutral in their recruitment, training, and outreach to women and minorities, in order to secure true equality of opportunity. The problem is however, the US prefers to resolve discrimination via individual action,

⁷⁹⁴ See: Y L C Heron and B A Williams, 'Government Contracting Preference Programmes After Schuette: What's Next? Achieving Parity Through Race-Neutral Methods.'
<<http://namcwi.com/Governmentca.pdf>> accessed 4/3/15.

⁷⁹⁵ See: Dept. Commerce, *Women in America: Indicator of Economic and Social Well-being* (March, 2011)

⁷⁹⁶ Jonathan S. Leonard, 'Women and Affirmative Action' (1989) 3 J Econ Perspectives 61, 61.

⁷⁹⁷ OFCCP, 'Technical Assistance Guide for Federal Construction Contractors' (2002) 11
<<http://www.dol.gov/ofccp/regs/compliance/aa.htm>> accessed 30/09/2013.

⁷⁹⁸ Faye J. Crosby and others, 'Affirmative Action: Psychological Data and Policy Debates' (2003) 58 American Psychologist 93, 138.

rather than through group change. As Kang and Banaji observe, American ‘society tends to view discrimination as a species of individual tort.’⁷⁹⁹Consequently, as Linda Nicholson notes ‘the public remains very dubious about supporting programmes that might respond’ to difference.⁸⁰⁰This dubiousness has translated into heated debates as to the meaning of, and the need for affirmative action in the various areas of American life, including education, employment, political office, and the award of federal government contracts. As Clayton and Crosby observe, ‘The issues are complex, they stir strong feelings.’⁸⁰¹These strong feelings have translated into ‘extreme positions.’⁸⁰²These positions are illustrated by the comments of those in favour of affirmative action, who assert that such programs are not ‘preferential treatment’ but ‘an opportunity for more accurate measures [of merit]’⁸⁰³and are really ‘fair measures.’⁸⁰⁴In contrast, opponents contend that affirmative action programs are anti-meritocratic, reinforce inferiority, and undermine the principles of ‘fairness and equity,’ as the cornerstones of democracy.⁸⁰⁵As Reyna, et al., perceptively write:

*Both supporters and opponents seem perpetually to contradict each other when it comes to how they define affirmative action: Does it, in reality, promote racial and gender equality and minority representation, or is it a policy that promotes reverse discrimination and quotas?*⁸⁰⁶

In addition to the entrenched public debate, private employers considering voluntary affirmative action are faced with an array of scholarly research seeking to either question, or explain the social and economic value of private plans.⁸⁰⁷For

⁷⁹⁹ Jerry Kang and Mahzarin R. Banaji, ‘Fair Measures: A Behavioral Realist Revision of "Affirmative Action"' (2006) 94 Cal L Rev 1063, 1068.

⁸⁰⁰ Linda Nicholson, ‘Identity and Identity Politics’ (2010) 33 Wash UJL & Pol’y 43, 62.

⁸⁰¹ Susan Clayton and Faye J. Crosby, *Critical Perspectives on Women and Gender: Justice, Gender and Affirmative Action* (University of Michigan 1992) 1.

⁸⁰² Corey A. Ciocchetti & John Holcomb, ‘The Frontier of Affirmative Action: Employment Preferences & Diversity in the Private Workplace’ (2010) 12 U Pa J Bus L 283, 284.

⁸⁰³ Kang and Banaji (n 820) 1066.

⁸⁰⁴ *ibid* 1067.

⁸⁰⁵ C Reyna and others, ‘Searching for Common Ground between Supporters and Opponents of Affirmative Action’ (2005) 26 Political Psychology 667, 669.

⁸⁰⁶ *ibid*.

⁸⁰⁷ See: Kellough (n 55); Kalev, Dobbin and Kelly (n 674); R.B. Levinson, ‘Gender-based affirmative action and reverse gender bias: Beyond Gratz, Parents Involved, and Ricci’ (2010) 34 Harv JL& Gender 1; Beauchamp (n 55); Muriel Niederle, Carmit Segal and Lise Vesterlund, ‘How costly is diversity? Affirmative action in light of gender differences in competitiveness’ (2013) 59 Management Science 1.

instance, whereas Herring's empirical research supports a business case for affirmative action and diversity, finding that it leads to increased sales revenue, more customers, greater market share, and relative profits,⁸⁰⁸ contrasting literature suggests an unintended negative consequence of affirmative action is that it stigmatizes the recipient and decreases their performance outcomes.⁸⁰⁹ Yet more studies of voluntary affirmative action by private employers suggest that many of the measures adopted are merely 'window dressing, to inoculate themselves against liability, or to improve morale rather than to increase managerial diversity.'⁸¹⁰ Additionally, the USSC has muddied the waters with its observation that classifications based upon group membership 'carry a danger of stigmatic harm.'⁸¹¹ While the Court's observation concerned race-based affirmative action in university admission programs, the opinion of Justice Powell may be extrapolated to apply to the gender-based voluntary plans of private employers. This is to say that:

*Preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protections based on a factor having no relation to individual worth.*⁸¹²

In sum, the results of this research suggest the confused boundaries of affirmative action, the attendant litigation, and potential negative repercussions for private employers limit its potential as an equal opportunity tool. It has also placed it on a different trajectory to its counterpart in the EU where there is an active discussion to move beyond a permissible derogation to actively require gender quotas in the appointment of women to the boards of public companies.⁸¹³

⁸⁰⁸ C. Herring, 'Does diversity pay? Race, gender, and the business case for diversity' (2009) 74 Am Soc Rev 208, 210.

⁸⁰⁹ Lisa Leslie, David Mayer and David Kravitz, 'The Stigma of Affirmative Action: A Stereotyping-Based Theory and Meta-Analytic Test of the Consequences for Performance' (2014) 57 (4) Academy of Management J. 964

⁸¹⁰ Kalev, Dobbin and Kelly (n 674) 610.

⁸¹¹ *Bakke* (n 97) 298.

⁸¹² *ibid.*

⁸¹³ See the discussion in Chapter 3.

VI Equality in practice.

In Chapter 4, a critical examination of the case law of the Court of Justice of the European Union (CJEU) was undertaken, the results of which revealed the conflict inherent in legislation providing for formal equality *and* requiring treatment that respects difference. Here, US federal case law is critically examined, illustrating the problems inherent in adopting a purely ‘equal rights’ based approach to equality that views the workplace in a vacuum, requires a comparator in assessing pregnancy discrimination, and results in conflicting judicial determinations as to which workplace practices are discriminatory. This examination will divide the case law into two categories—those in which the courts have considered constitutional protection and those in which they have considered statutory protection from discrimination. This examination will serve to show that discrimination persists in the US, despite the two-fold rights and protections afforded against discrimination contained in the Fourteenth Amendment to the Constitution and in the Pregnancy Discrimination Act of 1978 (PDA).⁸¹⁴ Discrimination is apparent in the fact that employers have withdrawn offers of employment upon discovering that the applicant was pregnant, maintained policies that unlawfully require female workers to report any pregnancy immediately to the company, to provide certification of ability to work, or to take one month mandated leave upon giving birth. Additionally, employers in the US have terminated the employment of female employees within hours of disclosing pregnancy and have denied female workers the right to return to work after childbirth.⁸¹⁵

a Equal protection under the Constitution.

In the initial cases that came before it alleging a constitutional violation, the USSC held that sex differences supported different treatment in matters where sex was determined to be a material factor, and discrimination was determined to be benignly in women’s favour. As a result, an Oregon statute forbidding women to work more than

⁸¹⁴ PDA (n 117).

⁸¹⁵ See press releases for EEOC v. Muskegon River Youth Home, dated 11/7/12; EEOC v Capri Home Care, dated 10/31/12; EEOC v. Bayou City Wings, dated 9/26/12; EEOC v Quest Intelligence Group, dated 9/20/12 in EEOC, ‘EEOC Press Releases’ (*us.gov*, 11/9/2012).

<<http://www.eeoc.gov/eeoc/newsroom/release/index.cfm>> accessed 11/12/2012

ten hours per day, a Michigan statute preventing most women from becoming licensed bartenders, and a Florida statute excluding women from jury duty unless they affirmatively volunteered to serve, were all upheld by the USSC as Constitutional.⁸¹⁶ Ergo, sex was found to be a reasonable basis for legislative classification. Indeed, as stated in Part II above, the application of the Fourteenth Amendment to enable the invalidation of statutory provisions providing for different treatment of men and women in the same circumstances was not successfully argued before the USSC until over one hundred years after its enactment. In the ground-breaking case of *Reed v Reed*, the unanimous view of the court was that the statutory provision giving a mandatory preference for appointment as administrator to a male applicant over a female applicant under the Probate Code violated the equal protection guarantee of the Fourteenth Amendment.⁸¹⁷ In light of this determination, the Equal Protection Clause (EPC) offered a basis upon which to invalidate state laws limiting women's employment opportunities in the US, including the right to practice law, and to work the same hours as, or to receive the same pay as men.⁸¹⁸

However, as important as the EPC has become for advancing sex equality in the US, it has failed to provide a basis upon which to invalidate state laws discriminating against pregnant workers, as the USSC decision in *Geduldig v. Aiello*, illustrates. In that case, the court held that excluding pregnancy from a disability programme established under state law did not constitute gender-based discrimination in violation of the EPC. Instead, the Court found that:

*The California insurance program does not exclude anyone from benefit eligibility because of gender, but merely removes one physical condition, pregnancy, from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification...*⁸¹⁹

⁸¹⁶ See: *Lindsley v. Natural Carbonic Gas Co* 220 US 661 (1911); *Muller v. Oregon* 208 US 412 (1905); *Goesaert v. Cleary* 335 US 464 (1948); *Hoyt v. Florida* 368 US 57(1961); *McDonald v. Board of Election Comm'rs of Chicago* 394 US 802 (1969).

⁸¹⁷ *Reed* (n 703).

⁸¹⁸ See: *Hibbs* (n 775) 729, for the history of Supreme Court decisions that sanctioned state laws, limiting women's opportunities, and then overturned those laws.

⁸¹⁹ *Geduldig v. Aiello* 417 US 484 (1974) 497. See footnote 20.

The court extended this reasoning two years later, when it considered Title VII's statutory prohibition of discrimination in *General Electric Co. v. Gilbert*, where the employer's disability plan excluded coverage for disabilities related to normal pregnancy.⁸²⁰ Despite the fact that every Federal Appeals Court presented with this question had determined that pregnancy discrimination violated Title VII, the USSC majority found that Title VII analysis should parallel that for equal protection under the Fourteenth Amendment, and that, consequently, the plan was not discriminatory.⁸²¹ It was only with the passage of the PDA in 1978, that it became discriminatory to treat pregnancy-related medical conditions less favourably than other medical conditions.

b Statutory 'pregnancy blindness.'

It is undeniable that the effect of Title VII, as amended by the PDA, has been to end the most abhorrent private employer regulations and policies that have often forced women to choose between having a child and having a job. The statute has resulted in elimination of sex specific 'foetal protection' policies, and automatic dismissal from employment upon becoming pregnant.⁸²² Because of the PDA, a US employer can generally take into account *only* the woman's ability to get her job done. As the Supreme Court stated in *Johnson*, 'the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant is reserved for each individual woman to make for herself.'⁸²³ Notwithstanding these achievements, a close review of federal case law reveals that because formal equality is the statutory standard chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children, the workplace status quo of the male norm has

⁸²⁰ *Gilbert* (n 37).

⁸²¹ For a list of these cases see: *AT&T Corporation v. Noreen Hulteen et al.* 556 US 701 (1962) 718 (fn 2).

⁸²² See: *Automobile Workers v Johnson Controls, Inc.* 499 US 187 (1991); *Hayes v. Shelby Memorial Hospital* 726 F 2d 15431984 (CA11 1984); *Harriss v Pan American World Airways, Inc.* 649 F2d 670 (9th Cir 1980). See also: *US EEOC v. Catholic Healthcare West.* 530 FSupp 2d 1096 (CA 2008); *Peralta v. Chromium Plating & Polishing Corp. and Mario Fichera, Jr.* 2000 US Dist LEXIS 17416 (2000) unpubopinion, where employer could not require employee to stop working because of concerns of a potential miscarriage.

⁸²³ *Automobile Workers v Johnson Controls, Inc.* (n 843) 206 (fn 47).

remained unchallenged. Commentary taken from the legislative history of the PDA will serve to illustrate this point more clearly:

*Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone, but on the actual effects of those conditions on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees...*⁸²⁴

Implicit in the provisions of the PDA is the concept of ‘pregnancy blindness,’ as reflected in the defining statement of Posner, CJ in the case of *Troupe v May Dep’t Stores Co.*, wherein he observed that the PDA requires ‘the employer to ignore the employee’s pregnancy, but not ...her absences from work.....’⁸²⁵This concept of ‘pregnancy blindness’ is firmly embedded in federal judicial analysis of pregnancy discrimination claims based upon discharge from employment for absences from work. This means therefore, that, ‘The PDA is not violated by an employer who fires a pregnant employee for excessive absences, unless the employer overlooks the comparable absences of similarly situated non-pregnant employees.’⁸²⁶It also means that it is irrelevant if the worker’s absences are for the purposes of pumping breast milk. As lactation is not a ‘condition related to pregnancy’ under the PDA, but is a condition related to breastfeeding, termination of employment for unauthorised absence does *not* constitute gender discrimination.⁸²⁷As stated by the US District Court for Colorado in *Falk v. The City of Glendale*, termination in this context is ‘about workplace conditions, not about discrimination.’⁸²⁸Notably, this finding was made notwithstanding the fact that only women are affected and that medical necessity may require a newborn to be breastfed. As Judge Pitman observed in *McNill v. NYC Dept. of Correction*, ‘The PDA only provides protection based on the condition of the mother—not the condition of the child.’⁸²⁹

⁸²⁴ *S. Rep. No. 95-331, 95th Cong., 1st Sess. 41* (1977).

⁸²⁵ *Troupe* (n 121) 738.

⁸²⁶ See: *Armando* (n 123); *Stout* (n 337), quoting *Dormeyer* (n 39) 583.

⁸²⁷ *Martinez* (n 148) 311.

⁸²⁸ *Katie Falk v. City of Glendale* No12-cv-00925-JLK, 2012 US LEXIS 87278 (D Col Jun 25, 2012) 15.

⁸²⁹ *Michele McNill v. The New York City Department of Corrections, Catherine Abate, Correctional Commissioner, and The City of New York* 93 Civ 7217(SHS) (HBP), 950 F Supp 564 (1996) 571.

Juxtaposed to EU antidiscrimination law discussed in Chapters 3 and 4, under which pregnancy is treated as *sui generis*, and pregnant and breastfeeding workers are entitled to workplace accommodations, or, if unavailable or unfeasible, are entitled to paid leave, formal equality in the US may result in the lawful dismissal from employment. As stated in *Coney v. Dallas Housing Authority*, the PDA ‘does not require employers to give pregnant employees special treatment.’⁸³⁰It only mandates that employers treat pregnant employees the same as non-pregnant employees who are *similarly situated with respect to their ability to work*. But, the fact is, as many academics observe, pregnant employees can never truly be alike non-pregnant employees, and it is only through the artifice of ‘pregnancy blindness’ that they are rendered identically situated.⁸³¹This artifice perpetuates discrimination in the workplace and fails to address inequality in circumstances. It also fails to address what Travis views as an ‘over attribution of poor performance to employee shortcomings.’⁸³²This is to say that courts tend to defer to employer’s decisions to terminate a pregnant employee, where performance is deemed ‘deficient’ compared to non-pregnant employees. This umbrella concept of deficient or poor performance justifies dismissal where a pregnant employee does not meet sales or revenue quotas, and so performs poorly in comparison to non-pregnant employees, or where there is tardiness, or calling in sick to work while pregnant, as in the cases of *Miles v. Dell, Inc.*, *Smith v. Alternative Resources*, and *Dormeyer*.⁸³³The judgment in *Riddick v. MAIC*, also makes clear that the dismissal of a pregnant employee for ‘performance related’ issues is lawful, even if it occurs the day of return from a period of medically-imposed bed rest, and where the ‘performance related’ issues were mostly detected during the pregnant employees absence.⁸³⁴Even where an employee is able to show that male employees have been treated differently, as in *Stanley v. Abacus*, dismissal may be upheld on the basis that the

⁸³⁰ *Coney v Dallas Housing Authority* Civil Action No 3-01-CV-2337-L, 2003 US Dist LEXIS 1803, 12

⁸³¹ See the discussion of feminist legal theorists in Chapters 2 and 6.

⁸³² Travis (n 344)17.

⁸³³ *Miles v Dell, Inc.* 429 F3d 480 (4th Cir 2005); *Smith v. Alternative Resources Corporation* 128 Fed Appx 614 (9th Cir 2005); *Dormeyer* (n 39).

⁸³⁴ *Riddick v MAIC* 445 Fed Appx 686 (2011).

evidence is either ‘vague and conclusory,’⁸³⁵ or as in *Grace v. Adtran*, on the basis that the employees at issue were not ‘similarly situated’ in all relevant respects.⁸³⁶

It may be concluded therefore, that although the proponents of the PDA felt assured that the legislation would ‘end employment discrimination against pregnant workers,’ this Congressional effort has been woefully inadequate in addressing the role that reproduction plays in continuing sex inequality. As eloquently observed by Justice Brennan in his dissenting opinion in *Gilbert*:

*[Discrimination] 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.*⁸³⁷

The results of this research suggest the ‘unique’ disadvantage of pregnant workers is beginning to be recognized by US Courts, as the following discussion of the application of the concept of ‘disparate impact’ reveals.

c Disparate impact.

The EU variant of the US paradigm of disparate impact discrimination was discussed in Chapter 3, wherein it was observed that in the absence of nationally mandated workplace accommodations and job-protected paid leave, US pregnant workers have sought to rely upon the concept of disparate impact in their efforts to dismantle employer workplace policies that disproportionately affect them. These workplace policies generally pertain to the provision of sick leave, light duty assignments, flexible work, and part-time work. However, the results of this study found that the reach of the concept is limited and that it has been largely ineffective in addressing these workplace policies. Three reasons are suggested for this limitation. The first is that employers can claim a statutory defence for their workplace practices. This is to say that when it codified the judicially created concept of disparate impact into the Civil Rights Act of 1991, Congress had the opportunity to expand its application. Instead, it retained the defence that, ‘the practice is job-related for the position in

⁸³⁵ *Stanley* (n 148) 931 (fn 4).

⁸³⁶ See: *Grace* (n 130); *Elam v. Regions Financial Corporation et al.* 602 F3d 873 (8th Cir 2010)

⁸³⁷ *Gilbert* (n 37) 159.

question and consistent with business necessity.’ This defence is only defeated if an employee can show a refusal by the employer to adopt an available alternative practice with less disparate impact, and which serves the employer’s needs.⁸³⁸The result of this exception, as discussed further below, is that cases alleging disparate impact/indirect discrimination against pregnant workers have been less successful, and disparate treatment cases have been ‘less hard to prove or win.’⁸³⁹This is to say that although there is a less stringent standard of proof required for ‘business necessity’ than for the defence of BFOQ, the 1991 codification provided that the motive of the employer is irrelevant, as is the fact that an employer used the same practice in the past.

A second reason for the concept’s limitation is the requirement of statistical proof, which was also discussed in Chapter 3, in the context of a comparison with EU proof requirements. Case law reveals that in the US, the need for sophisticated statistical analysis and expert testimony setting forth competing explanations for the disparities has made disparate impact cases extremely difficult to prove and win. Michael Selmi’s research also reveals that a strong reliance upon statistical proof makes US cases very expensive to pursue.⁸⁴⁰The recent cases of *EEOC v Bloomberg* and *Wal-Mart Stores, Inc. v Betty Dukes*, serve to illustrate the challenges posed in pursuing a claim of sex discrimination via a claim of disparate impact. In the former case, the Court found the statistics presented by the plaintiffs to ‘be inadequate.’ In *Wal-Mart*, which was one of the most expansive class actions in the US, the USSC majority stated that the plaintiffs’ statistical proof was ‘insufficient’ for creating a prima facie case.⁸⁴¹

Finally, the greatest limitation upon the reach of disparate impact has arisen because the USSC has *not* decided a case on the issue since the codification of the concept in 1991. As a result, there are conflicting interpretations among the lower federal courts regarding the application of the concept to pregnancy discrimination. The reality is that a majority of lower courts are unwilling to view workplace requirements

⁸³⁸ Civil Rights Act of 1991 §109, 42 U.S.C. §2000e et seq. Section 703e, § 2000-2e . Specifically 2000e-2(k) (1) (A) (i), (ii), and (c).

⁸³⁹ Julie C Suk, ‘Procedural Path Dependence: Discrimination and the Civil-Criminal Divide’ (2008) 85 Wash U L Rev 1315, 1321.

⁸⁴⁰ Michael Selmi, ‘Was the Disparate Impact Theory a Mistake?’ (2006) 53 UCLA L Rev 701

⁸⁴¹ *EEOC v Bloomberg LP* 778 F Supp 2d 458; 2011 US Dist 92677Lexis (SDNY2011); *Wal-Mart Stores, Inc. v. Betty Dukes, et al.* 131 SCt 2541; 180 LEd 2d 374 (2011).

as ‘practices’ which disproportionately affect pregnant women. To do otherwise, they claim, would be to allow the disparate impact theory to justify what they perceive to be a request for ‘preferential treatment’ for pregnant workers.⁸⁴²The basis for this view, as stated in *Stout v Baxter* is that, ‘all job requirements, regardless of their nature, affect ‘all or substantially all pregnant women,’ for a limited period of time.⁸⁴³In contrast, a minority of lower federal courts accept that certain workplace policies are discriminatory *per se*, including those, for example, that treat pregnant workers less favourably than workers who have sustained a work-related injury. Indeed, several juries have accepted the argument that *any* distinction made by an employer policy between occupational and non-occupational injuries for ‘light duty’ work eligibility, necessarily excludes pregnant women, and is a prima facie showing of disparate impact on pregnant women.⁸⁴⁴

It is suggested that the minority approach of taking a broad interpretation of the disparate impact theory is not only accurate, it is consistent with the goals of the PDA, as ‘Congress did not intend the *same* treatment of pregnancy and other disabilities to mean *identical* treatment.’⁸⁴⁵Nevertheless, the response of the majority of courts, reflected in the judgment in *Dormeyer v. Comerica Bank-Illinois*, is that the ‘concept of disparate impact does not stretch that far; ‘and that the majority courts are performing a service to women, by failing to find disparate impact.’⁸⁴⁶In *Dormeyer*, the Court declared that:

*Nor would pregnant women or women in general, benefit from such a stretch. Firms would be deterred from employing women of childbearing age if required to overlook the inability of a particular woman, because of complications of pregnancy, to do the work for which she had been hired.*⁸⁴⁷

⁸⁴² See: *Stout* (n 337), and generally, see: E.L. Ngov, ‘War and Peace Between Title VII’s Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest’ (2010) 42 Loy U Chi LJ 1.

⁸⁴³ *Stout* (n 337) 860.

⁸⁴⁴ See: *Germain v The County of Suffolk, Commissioner Ronald F. Foley* 07-CV-2523, 2009 US Dist 1514513 (EDNY May 29, 2009); *Lochren* (n 96).

⁸⁴⁵ *Scherr v Woodland School Community Consolidated District No. 50* 867 F2d 974 (7th Cir 1988) 978 (emphasis added).

⁸⁴⁶ *Dormeyer* (n 39) 584.

⁸⁴⁷ *ibid.*

The consequence of the majority interpretation is that employers have used the PDA to deny pregnant employees workplace accommodations. This is to say that pregnant employees can be denied ‘modified,’ ‘limited duty,’ or ‘light duty’ assignments, as long as the employer’s basis for the denial is non-discriminatory.⁸⁴⁸The majority of lower courts have found that a non-discriminatory basis includes situations where employers reserve these types of assignments for employees suffering from occupational-related injuries or illnesses, or where they are not an accommodation offered to any temporarily disabled worker in the workplace.⁸⁴⁹This was the case in *Reeves v. Swift Transportation Co., Inc.*, where the Court held an employer may lawfully dismiss a pregnant employee pursuant to a pregnancy-blind policy denying light duty work to employees not injured on the job, or unable to perform heavy lifting.⁸⁵⁰ Furthermore, as the Court in *Tysinger v. Police Dept. of City of Zainsville*, emphasized, any request for accommodation by a pregnant worker may be deemed a request for ‘more favourable’ treatment, rather than of equal treatment.⁸⁵¹The result, as in the case of *Freppon v. City of Chandler*, is that employers may lawfully discriminate against their female employees, denying them paid work and placing them on unpaid leave.⁸⁵²The PDA is not violated when an employer places a pregnant employee on involuntary leave, so long as they treat pregnant workers no differently than any other temporarily disabled employee. This is because a workplace policy that does not have pregnancy as a determining factor in the decision, but applies to any employee suffering from a temporary medical restriction which interferes with their job duties does not run afoul of the PDA.⁸⁵³Indeed, pregnancy discrimination will only be found to occur in situations of different treatment. Thus, ‘an employer violates the PDA when it denies a pregnant employee a benefit available to temporarily disabled workers holding similar

⁸⁴⁸See: *Guarino v. Potter* 102 Fed Appx 865; 2004 USApp LEXIS 13258 (5th Cir 2004); *Chapter 7 Trustee v. Gate Gourmet, Inc.* 683 F3d 1249 (11th Cir 2012).

⁸⁴⁹ See: *Adams v. Nolan* 962 F2d 791 (8th Cir 1992) *Sumner et al. v. Wayne County, et al.* 94 F Supp 2d 822 (2000).

⁸⁵⁰ *Reeves v Swift Transp. Co., Inc* 446 F 3d 637 (6th Cir 2006). See also *Seiter v. DHL Worldwide Express* 2006 US Dist LEXIS 59546 (EDKY).

⁸⁵¹ *Tysinger v Police Dept.* 463 F 3d 625 (6th Cir 2006) 574.

⁸⁵² *Sabrina Marie Freppon v. City of Chandler* 2013 US App LEXIS 13424.

⁸⁵³ See: *EEOC v Detroit-Macomb Hospital Corp.* 952 F2d 403 (6th Cir 1992)

job positions.⁸⁵⁴As observed in *Garcia v. Woman's Hosp. of Texas*, discrimination occurs where 'a facially neutral policy may be selectively applied to pregnant workers,'⁸⁵⁵as where a pregnant employee is denied 'lifting assistance' given to non-pregnant female employee.⁸⁵⁶

Unfortunately, as Herald astutely observes, the majority interpretation reflects not only a 'predilection to maintain the status quo' in the workplace, it also reinforces 'workplace essentialism;' meaning, the continuance of those organizational structures which disproportionately exclude women.⁸⁵⁷It is suggested that the majority interpretation also signifies judicial acceptance of the employers' argument of an 'economic benefit' to limiting certain workers to performing employment duties.⁸⁵⁸This argument is based upon the fact that workers who have sustained a job-related injury are entitled to 'worker's compensation,' whether or not they work, Therefore, allowing employees eligible for workers' compensation to perform some light-duty work has a clear economic benefit for the employer. The problem with this reasoning, from the point of view of women, is that as the majority of pregnant workers in the US have no access to paid leave, there will rarely be any 'economic benefit' in providing them with light duty work.

In light of the foregoing, one could easily conclude that the application of the US Constitution and Title VII to pregnancy reveals a dismal trajectory for US antidiscrimination law, and one that is completely different to that of the EU. In response, it is offered that while such a conclusion is not necessarily erroneous, the results of this research suggest that it is imprecise. The fact is they are not the sole source of protections afforded pregnant workers. There is significant evidence of a growing number of national, state, and local measures that seek to offer practical solutions to the inequality, disadvantage, and exclusion suffered by this segment of the workforce. This last part will present evidence of the growing number of national laws

⁸⁵⁴ *Spivey v Beverly Enterprises, Inc.* 196 F3d 1309 (11th Cir 1999) 1313 (citing *Byrd v. Lakeshore Hospital*, 30 F.3d, 1380, 1383-1384 (11th Cir. 1994).

⁸⁵⁵ See: *Garcia v Woman's Hosp. of Texas* 143 F3d 227(5th Cir 1998) 231.

⁸⁵⁶ See: *Stansfield v. O'Reilly Automotive, Inc.* Civil Action NoH-04-4141, 2006 US Dist LEXIS 31640(SDTex, April 19, 2006).

⁸⁵⁷ M. Herald, 'Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes' (2007) 41 USFL Rev 1, 310.

⁸⁵⁸ See: *Seiter* (n 871).

that help advance equality for pregnant workers. Evidence of state and local measures will be presented in Chapter 6.

VII Patchwork protections.

The results of this research reveal an increasing number of US measures providing for protection against discrimination for pregnant and breastfeeding workers, job protected paid leave, workplace accommodations, and gender mainstreaming, which taken together suggest the trajectory of US antidiscrimination law is shifting. This shift should be of no surprise, in light of the fact that 73% of American voters support paid sick leave, paid family leave, equal pay for equal work, and affordable child and elder care.⁸⁵⁹ Research conducted by Joan Williams has also found that these family supportive policies are the single most important factor in attracting and retaining employees.⁸⁶⁰ Added to this, a recent Working Paper, issued by the National Bureau of Economic Research reveals that a lack of leave and other ‘family friendly’ measures negatively impacts female labour participation, finding that:

In 1990, the US had the sixth highest female labor participation rate among 22 OECD countries. By 2010, its rank had fallen to 17th. We find that the expansion of “family-friendly” policies including parental leave and part-time work entitlements in other OECD countries explains 28-29% of the decrease in US women’s labor force participation relative to these other countries...⁸⁶¹

These are interesting findings, in light of the discussion in Chapter 4, wherein it was observed that gender equality is only one of a number of goals that family friendly policies seek to address in the EU, and that increasing labour supply is another important goal. In response to this problem in the US, several Congressional Bills have been proposed, which are intended to expand the provisions of the FMLA, provide employees with paid sick leave, and a right to request a change in workplace

⁸⁵⁹ Brigid ‘Schulte, ‘Voters want paid leave, paid sick days, poll shows. Obama, too. Will Congress oblige?’ *The Washington Post* (DC, 21/1/15) local.
<<http://www.washingtonpost.com/news/local/wp/2015/01/21/voters-want-paid-leave-paid-sick-days-poll-shows-obama-too-will-congress-oblige/>> accessed 8/2/15.

⁸⁶⁰ Joan C. Williams, *Unbending Gender: Why Family and Work Conflict* (OUP 2001).

⁸⁶¹ Blau and Kahn (n 605) 1. See the discussion of EU family friendly measures in Chapter 4.

conditions.⁸⁶²These proposals are matched by a number of state and local initiatives, as the discussion in Chapter 6 will reveal. As many of these proposals have yet to be adopted, it is worth drawing attention to three national laws that already offer some accommodation and unpaid leave to eligible pregnant workers.

a ‘Reasonable accommodation’ under the ADA.

Notwithstanding the PDA does not require an employer to provide a workplace accommodation for a pregnant employee unless she or he does so for other employees with a non-work related illness or injury, a worker with a pregnancy-related impairment may be able to claim that they have a *disability* for which they are entitled to a ‘reasonable accommodation’ under the ADAAA. Because the act has relaxed the duration and severity requirements for qualified disabilities under the ADA and expanded the class of persons entitled to protection, it is now easier to prove that a ‘pregnancy-related’ medical condition, which limits a ‘major life activity,’ is a covered disability. Indeed, when Congress enacted the ADAAA in 2008, it expressly stated that it intended to reverse several decisions of the USSC interpreting the application of the ADA, as well as the interpretive regulations of the EEOC.⁸⁶³In part, the changes wrought are intended to address the situation wherein an employer dismisses a woman who is unable to perform her job duties, owing to medical complications that are a result of pregnancy.⁸⁶⁴However, the extent to which this intent becomes reality is yet to be seen, as the federal courts have only just begun to consider the application of the ADAAA to pregnant workers. Some indication is given by the 2013 case of *Young v UPS*, in which the 11th Circuit Court of Appeals noted that although ‘Congress amended the ADA in 2008 in order to expand the category of individuals who fall

⁸⁶² See H.R.532, providing six of 12 weeks parental leave made available to a federal employees shall be paid leave. H.R. 5849 Paid Sick Leave Act; S 1626 Family Friendly and Workplace Flexibility Act. See too: Chapter 7.

⁸⁶³ See the ADA Amendments Act of 2008 (n 141), sec. 2 ‘Findings and Purposes.’

⁸⁶⁴ See cases interpreting the ADA prior to the Amendments of 2008: *Leahy v Gap Inc.* Civ Action No 07-2008, 2008 US Dist LEXIS 58812 (EDNY July 29, 2008) 15, *Appel v Inspire Pharmaceuticals, Inc.* 428 Fed Appx 279 (5th Cir 2011), *Cooke v Berkshire Farm Center and Services for Youth* 2012 US Dist LEXIS 26435; *Young* (n 137).

within its ambit,' it is *not* retroactive.⁸⁶⁵ Thus, the Amendment leaves unaddressed pregnancy discrimination arising prior to 2008.

For its part, in its new policy guidance, the EEOC suggests that impairments *resulting* from pregnancy, including gestational diabetes/preeclampsia may be disabilities requiring employers to provide 'reasonable' accommodation to an employee, but correctly stops short of stating that pregnancy itself is a disabling condition.⁸⁶⁶ It is promising that several federal district courts addressing accommodations under the new amendments have expressly deferred to the EEOC regulations on the matter. In *Wannamaker v. Westport*, the US District Court for Connecticut noted that while the regulations have no binding effect, they are 'useful to understanding the intended meaning of the amendments.'⁸⁶⁷ That being said, the regulations were relied upon to dismiss the plaintiff's claim that 'transverse myelitis' rendered her disabled and entitled to an accommodation, rather than to uphold it, on the basis that, 'even under the ADAAA's broad definition of disability, short-term impairments would still not render a person disabled within the meaning of the statute.'⁸⁶⁸ A more recent decision offers some promise. Distinguishing cases decided before the 2008 amendments, the District court in *Nayak v. St. Vincent Hospital*, observed that the ADAAA is 'more lenient,' and that the EEOC regulations provide that effects of an impairment lasting, or expected to last fewer than six months *are* included.⁸⁶⁹ However, while giving some hope, the ruling in *Nayak* also gives rise to concern regarding the issue of causation. This is because the Court rejected the argument that disability discrimination may be proved by showing that the employer had a mixed motive for terminating the employee's employment and

⁸⁶⁵ *Young* (n 137) 443 (fn7).

⁸⁶⁶ See: EEOC, 'Policy Guidance Related to Pregnancy Discrimination' (*USA.Gov*) <<http://www.eeoc.gov/policy/docs/fmlaada.html>> accessed 2/17/2012.

⁸⁶⁷ *Sally J. Wannamaker v. Westport Board of Education, and Elliot Landon* Civ No 3:11-cv-1791 (VLB), 2012 USDist LEXIS 136947 (D Conn 2012) 42 (quoting *Hutchinson v Ecolab, Inc.*, No. 3.09 cv 1848 (JBA), 2011 U.S. Dist. LEXIS 110641, 2011 WL 4542957, at *8 n.6 (D. Conn Sept 28, 2011).

⁸⁶⁸ *ibid.* See also: *Sam-Sekur v. Witmore Group, Ltd* 2012 US Dist LEXIS 83586, 2012 WL 2244325 (EDNY June 15, 2012) *8, where the plaintiff was also granted the opportunity to replead with regard to post-pregnancy physiological disorders relating to pregnancy.

⁸⁶⁹ *Seema Nayak, M.D., vs. St. Vincent Hospital and Health Care Center, Inc.* No1:12-cv-0817-RLY-MJD 2013 US Dist LEXIS 3273 (SD Ind Jan 9, 2013).

held that a Plaintiff was required to show that the employer would not have fired her ‘but for’ her actual or perceived disability.⁸⁷⁰

In light of the foregoing, it is fair to say that a pregnant worker must meet a heavy burden before being afforded the protections of the ADAAA. As one District Court has observed, ‘pregnancy, absent unusual circumstances, is not considered a disability under the ADA.’⁸⁷¹ But, as another observed, ‘a pregnancy-related impairment may be considered a disability, if it substantially limits a major life activity.’⁸⁷² However, even if the ADAAA is found to apply, there is no guarantee of an accommodation. And, even where an accommodation is required, as observed in *Heatherly v. Portillo’s Hot Dogs*, the employer only has to provide, ‘a reasonable accommodation, not the accommodation [the employee] would prefer.’⁸⁷³ Furthermore, the employer has the right to *refuse* a request if they can show that it would cause an ‘undue hardship.’ This means that an accommodation may be denied if it is either too difficult or too expensive to provide, in light of the employer’s size, financial resources, and the needs of the business. The consequence being that the pregnant worker is then left without paid employment, or entitlement to paid leave for the duration of her pregnancy. She may however be entitled to take unpaid leave under the FMLA, if she is an ‘eligible’ employee.

b Leave under the FMLA.

Eligibility for unpaid leave under the FMLA requires the pregnant worker to have worked for the covered employer for at least 12 months, and had a least 1,250 hours of service during the 12 months immediately preceding the leave, and work at a location where the employer employs 50 or more employees within a 50 mile radius.⁸⁷⁴ These eligibility requirements are strict, and stand in stark contrast to the EU right to pregnancy and maternity leave, which as the discussion in Chapter 3 revealed,

⁸⁷⁰ *ibid.*

⁸⁷¹ *Mayorga v. Alorica, Inc.* 12-21578-CIV, 2012 US Dist LEXIS 103766 (SD Fla July 25, 2012), at *5.

⁸⁷² *Randi A. Abbott v. Elwood Staffing Services, Inc., and Honda Manufacturing* Case No: 1:12-CV-2244-VEH; 2014 USDistLEXIS 104343 (ND Ala 2014), 98, citing 29 C.F.R. pt 1630, App. §1630.2 (h).

⁸⁷³ *Cynthia Heatherly v. Portillo’s Hot Dogs, Inc.* No 11C8480, 2013 US Dist LEXIS 100965 (ND Ill July 19, 2013) 19, quoting *Hoppe v Lewis University*, 692 F.3d 833 (7th Cir. 2012) at 840.

⁸⁷⁴ Family and Medical Leave Act 1993, 29 USCS 28, Sec 101 (2).

applies to all workers, full and part-time, and on a permanent or temporary contract of employment. This contrast is further highlighted by statistics showing that about half of all US workers are in firms that are not covered by the FMLA and millions more workers may work for employers covered by the FMLA, but they are not qualified as individuals for its protections.⁸⁷⁵ As the discussion in Chapter 7 will reveal, this lack of coverage is an ongoing policy concern of President Obama, who has consistently included funding in his government budget for a ‘State Leave Fund,’ to help states with the start-up costs of establishing a paid leave programme. The President also supports Congressional expansion of the FMLA and passage of legislation enabling private employees to accumulate paid sick leave.⁸⁷⁶

c Breastfeeding accommodation under the FLSA.

In contrast to the ADAAA and the FMLA, which offer practical solutions to some workers for the workplace disadvantages created by pregnancy and maternity, the changes wrought by the ACA to the FLSA require workplace accommodation for breastfeeding workers. This national measure is included in the discussion of pregnancy discrimination because statistics indicate that after childbirth, women are returning to work earlier than ever before. According to a 2011 ‘current population report’ by the Census Bureau:

More women are working within a year of giving birth (64 percent in 2005–2007 compared with 39 percent in 1976–1980 and 17 percent in 1961–1965.⁸⁷⁷

As 43% of women return to work within three months of giving birth in the US, there is a need for consistency and clarity in the employment rights afforded to workers who wish to continue to breastfeed their children.⁸⁷⁸ The problem is, however, there has been a historical conflict between the federal courts as to whether or not discrimination against lactating workers is sex discrimination. In contrast to the EU, which expressly

⁸⁷⁵ See: COEA, *The Economics of Paid and Unpaid Leave* (2014) 21.

⁸⁷⁶ *ibid* 21.

⁸⁷⁷ US Census, *Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008. Household Economics Studies* (October 2011).

⁸⁷⁸ *ibid*.

includes breastfeeding within the ambit of its Pregnant Workers Directive, nothing in the PDA references breastfeeding, and until recently, state and federal courts have been unwilling to find that dismissal of a breastfeeding employee is sex discrimination.⁸⁷⁹This was the case in *Wallace v. Pyro Mining Co.*, where the court stated that:

*While it may be that breast-feeding and weaning are natural concomitants of pregnancy and childbirth, they are not 'medical conditions' related thereto.*⁸⁸⁰

Likewise, in the 2009 case of *Allen v. Totes.*, the Supreme Court of Ohio, relying upon the federal district court ruling in *Derungs v. Wal-Mart Stores*,⁸⁸¹ held that the termination of the employment of a worker who takes extra breaks to pump breast milk is not unlawful, as 'breastfeeding discrimination does not constitute gender discrimination.'⁸⁸² Although Justice Kane noted in the case of *Falk v. City of Glendale* that:

A plaintiff could potentially succeed on a claim if she alleged and was able to prove that lactation was a medical condition related to pregnancy, and that this condition, and not a desire to breastfeed, was the reason for the discriminatory action(s) that she suffered,

He dismissed the plaintiff's complaint in part.⁸⁸³ In contrast, more recent federal judicial opinion has found that breastfeeding per se is a medical condition related to pregnancy. In *EEOC v Houston Funding II*, the 5th Circuit Court of Appeals held that discharging an employee because she was breastfeeding was sex discrimination. Ruling that:

*Lactation, the physiological process of secreting milk from mammary glands and directly caused by hormonal changes associated with pregnancy and childbirth, was a related medical condition of pregnancy for the purposes of [discrimination under Title VII].*⁸⁸⁴

⁸⁷⁹ Pregnant Workers Directive (n 112). See also the discussion in Chapter 3.

⁸⁸⁰ *Martha R. Wallace v. Pyro Mining Company*. Civil Action No 89-0016-0(CS), 789 FSupp 867(WD Ky1990) 870. Also on the issue of breastfeeding in the workplace, see: *Martinez* (n 148).

⁸⁸¹ *Allen* (n 148) [**22].

⁸⁸² *Derungs v. Wal-Mart Stores, Inc.* 374 F3d 428, 439 (6th Cir 2004).

⁸⁸³ *Katie Falk v. City of Glendale* (n 849) [*14].

⁸⁸⁴ *EEOC v. Houston Funding II Ltd; Houston Funding Corp.*, 717 F3d 425 (5th Cir 2013) 428.

This ruling was followed by the US District Court for Colorado, in *Signe Martin v. Cannon Business Solutions, Inc.*⁸⁸⁵ Additionally, the US District Court for Kansas declared that ‘even where the failure to provide breastfeeding accommodations does not violate Title VII,’ an argument could be made that a complaint of inadequate accommodation is protected from retaliation under Title VII.⁸⁸⁶

While conflicting interpretations render it impossible to state definitively that lactating workers can rely upon Title VII to protect them against discrimination in the guise of neutral workplace policies, the 2010 amendment to Section 7 of the FLSA may make reliance unnecessary, at least for some workers.⁸⁸⁷ Because of changes wrought by the ACA, Section 7 now requires employers of 50 or more employees covered by the Act, to provide unpaid reasonable break time and a place for employees to express breast milk for one year after a child’s birth. Notwithstanding these changes, critics will likely observe that the FLSA, the FMLA, and the ADAAA only offer *some* women relief from workplace disadvantage. Such criticism is not without merit, as the discussion below acknowledges.

d Criticisms of national measures

It is true that a US employer must have a certain number of employees to be covered by federal legislation, and the number varies, depending on the statute and the type of employer, public or private. For private employers, Title VII/the PDA and the ADA require 15 employees, whereas the FMLA and the FLSA require 50. It is also true that limited coverage is not the only critical observation that can be levied at these national measures. Unlike the EU, where accommodation for pregnant workers is rooted in the ‘uniqueness’ of pregnancy, accommodation of pregnancy in the US is rooted in its potential to give rise to a ‘disabling’ condition. This difference is illustrated by the fact that the national requirement for workplace accommodation is contained in the ADA,

⁸⁸⁵ *Signe Martin v. Canon Business Solutions, Inc.* Civil Action No 11-cv-025665-WJM-KMT, 2013 US. Dist LEXIS 129008, 119 Fair Empl Prac Cas (BNA) 1798; 21 Wages & Hour Cas 2d (BNA) 413 (DColo 2013) [*20].

⁸⁸⁶ *Krystal L. Boxum-Debolt, et. al. v. Office of the District Attorney, 3rd Judicial District of Kansas, et. al.* Civil Action No 12-2641-KHV, 2013 US Dist LEXIS 140081 (D Kan 2013).

⁸⁸⁷ ACA (n 120).

rather than the PDA.⁸⁸⁸ There is also no private cause of action for a violation of the breastfeeding accommodation provisions of the FLSA. Rather, enforcement is achieved through a complaint to the DOL, which *may* seek injunctive relief in federal district court, with an award of back pay.⁸⁸⁹ This means that while a lactating employee may be entitled to special accommodations, the failure of an employer to comply with the statute does not amount to discrimination. This means that intentional discrimination will not give rise to an award of compensatory and/or punitive damages against an employer.

Notwithstanding the criticisms, this study found ample evidence to suggest that these national measures help advance substantive equality. Research reveals that the PDA has ended the most blatant discrimination against pregnant workers, and the FMLA has provided a leave right for 60% of workers for the birth of a child.⁸⁹⁰ That leave right includes prenatal care, and can be used for severe morning sickness.⁸⁹¹ Added to this, the ADAAA and the FLSA require workplace accommodation for some pregnant and breastfeeding workers.

Still, critics may proffer that these laws provide weak evidence that the trajectory of the US model of equality is shifting. Indeed, an entire symposium issue of the 2012 *American Journal of Comparative Law* contained a number of excellent thought provoking essays, which, in the words of Gráinne de Búrca, presented ‘an apparently sharp contrast in the respective state of antidiscrimination law in Europe and the United States at present.’⁸⁹² It is fair to say that several of the articles addressing substantive areas of US antidiscrimination law were not very encouraging. The article by Ruth Rubio Marin, for instance, argued that in the US, ‘gender inequalities are the same as, or worse than in Europe,’ and that EU and US norms concerning gender and age discrimination follow distinct paths, and suggested that a combination of legal, historical, cultural, ideological, and political factors make it unlikely that these paths

⁸⁸⁸ See: ADA Amendments Act of 2008 (n 141).

⁸⁸⁹ Commission, *The social situation in the European Union* (n 599), para IV.

⁸⁹⁰ COEA, *The Economics of Paid and Unpaid Leave*, (n 897) 1.

⁸⁹¹ Family and Medical Leave Act 1993, 29 USCS 28, §825.1113(b).

⁸⁹² de Búrca (n 6) 2.

will develop similarly.⁸⁹³ More specifically, Rubio Marin's essay sought to emphasize that the EU, in contrast to the US, is concerned with the unequal distribution in roles, tasks, and powers between women and men, and is supporting 'gender quotas.'⁸⁹⁴ Rubio Marin argued that this support suggests a move from an equal rights and opportunities approach in the EU to what she calls a 'parity democracy model.'⁸⁹⁵ While asserting that the core objective of this EU model is 'to unsettle the separate spheres tradition...' she concluded that this new model 'won't fly in the United States.'⁸⁹⁶

Julie Suk's essay on mandatory maternity leave and retirement in the EU and the US contained further stark contrasts. She observed that in the US, mandatory equality measures are prohibited as being discriminatory, whereas in the EU, they are accepted, as part of what she calls 'collectively imposed norms about the role of work in a person's life cycle.'⁸⁹⁷ While asserting that a policy of mandatory maternity leave, or for that matter, mandatory paternity leave, is 'a form of labour market regulation that can promote gender equality if properly designed,' Suk recognized that such mandates 'could not plausibly be entertained in the United States.'⁸⁹⁸ Suk is correct. In the US, a provision for mandatory leave violates the Due Process Clause of the Fourteenth Amendment to the US Constitution.⁸⁹⁹

Mark Bell presented a slightly less sombre picture of the different trajectories of EU and US law in his essay considering gender identity and sexual orientation.⁹⁰⁰ While showing that the EU has gone further to prevent discrimination on these grounds than US federal law and highlighting some significant differences, he also found similar problems and tensions, and a rare, but similar approach taken by a US court on the issue of gender reassignment.⁹⁰¹ This more positive outlook on US antidiscrimination law was

⁸⁹³ Ruth Rubio Marin, 'New European Parity-Democracy Sex Equality Model and Why it Won't Fly in the United States' (2012) 60 Am J Comp L 99, 116.

⁸⁹⁴ See the discussion of gender quotas in Chapter 3.

⁸⁹⁵ Rubio Marin (n 916) 100.

⁸⁹⁶ *ibid*, 99.

⁸⁹⁷ Julie C Suk, 'From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe' (2012) 60 Am J Comp L 75, 76.

⁸⁹⁸ *ibid* 84.

⁸⁹⁹ See: *Cleveland Board of Education et al. v LaFleur et al.* 414 US 643 (1974). See also, the discussion in Chapter 6.

⁹⁰⁰ Mark Bell, 'Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law: Evolutions in Antidiscrimination law in Europe and North America' (2012) 60 Am J Comp L 127

⁹⁰¹ *ibid* 128, 131.

continued in Elizabeth Emens' essay, which considered the 2008 Amendments Act to the Americans with Disabilities Act (ADAAA), which, as she observed, 'attempts to restore a broader vision of the original ADA.'⁹⁰² While highlighting the limitations of the Amendments, and raising a concern that US federal courts will find ways to limit the new law, Emens observed that this is a 'fascinating and uncertain time for U.S. disability law.'⁹⁰³ The results of this research suggest that it is also a fascinating and uncertain time for US pregnancy discrimination law. A closer review of the ADAAA has revealed that the statute holds great promise for some pregnant workers, aided in part by the interpretative regulations issued by the US Equal Employment Opportunity Commission (EEOC). These regulations seek to ensure that employers and the federal courts adhere to the broadest application possible of the amended statute.⁹⁰⁴

It is notable that in her commentary on the essays in the symposium, de Búrca acknowledges that the academics cannot agree and that in the EU and the US 'there are similarities in the way problems of entrenched discrimination are being addressed and in some of the solutions being tested...'⁹⁰⁵ Considering the reasons offered by the academics for the different trajectories of EU and US law, de Búrca also argues that the cultural and ideological, political, and institutional differences are not entirely convincing. She suggests a 'temporal' reason for their differences.⁹⁰⁶ More specifically, de Búrca observes that the US is several decades ahead of the EU in its antidiscrimination regime and has suffered both a political and social backlash that has yet to be experienced in the EU. She concludes that as some pushback to equality initiatives is already occurring in the EU:

*'It would seem both premature and unconvincing to argue that the prospects for European antidiscrimination law are much brighter and more secure than the trajectory of the United States would predict.'*⁹⁰⁷

⁹⁰² Elizabeth Emens, 'Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act: Evolutions in Antidiscrimination Law in Europe and North America' (2012) 60 Am J Comp L 205, 206.

⁹⁰³ *ibid.*

⁹⁰⁴ Regulations to Implement the Equal Employment Provisions of the American With Disabilities Act, 29 C.F.R. Part 1630 (2011).

⁹⁰⁵ de Búrca (n 6) 1.

⁹⁰⁶ *ibid* 21.

⁹⁰⁷ *ibid.*

The results of this in-depth study of antidiscrimination law in relation to pregnancy suggests that it is also premature and unconvincing to argue that the US trajectory is completely dismal. This is to say that while the US Constitution and national laws are characterized by a ‘pregnancy blind’ approach to addressing discrimination, there are important developments on the national, state and local level, which suggest the US trajectory is shifting away from a purely equal treatment rights-based approach to pregnancy discrimination, and towards a more holistic approach that seeks greater substantive equality, and imposes a duty to promote or achieve equality. As the discussion in the following Chapters will reveal, national laws do not present the complete picture of the US model of equality as it applies to pregnancy discrimination in the twenty first century. Instead, there are additional hard and soft law equality measures, adopted and proposed, on the national, state, and local level through which the US formal equality rights-based approach to tackling pregnancy discrimination is being reconsidered, and redirected, albeit exceedingly slowly.⁹⁰⁸

VIII Conclusion

This Chapter has set out to do two things. First, to critically and comparatively map the way in which the US model of equality has addressed pregnancy discrimination. Secondly, to present initial evidence the trajectory of US antidiscrimination law is shifting from an ‘equal treatment’ approach, towards one that seeks greater substantive equality for pregnant workers.

It was argued above that US law expressly prohibits pregnancy discrimination, which is essentially the treatment of a woman in a less favourable manner simply because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. This less favourable treatment is a consequence of commonly held beliefs that are often attached to women. For example, women who become pregnant are less reliable workers, or will leave the workplace upon giving birth. As these beliefs have no rational basis, and ought not to be taken into account in the labour market, US

⁹⁰⁸ See Chapter 1 for a discussion of the difference between ‘hard’ and ‘soft’ law.

antidiscrimination law mandates equal treatment of a pregnant employee with other employees.

The discussion above also revealed two similarities and one clear difference between the EU and US models of equality. First, the US requirement of ‘equal treatment,’ is also not absolute. Title VII contains exceptions and defences to employer’s discriminatory practices. Secondly, US law also contains a derogation, which permits employers to adopt voluntary affirmative action plans, giving some gender-based preference in recruitment, training, and outreach. However, unlike EU antidiscrimination law, there is no derogation in US law for ‘special protection’ from the beginning of pregnancy until the end of maternity leave.

The discussion of federal case law highlighted the damaging effects of a purely equal treatment approach to tackling the problem of pregnancy discrimination, where there is no national provision of job protected paid leave or workplace accommodation of pregnancy or breastfeeding. These damages are wide ranging, and include unpaid leave, loss of health benefits, and loss of employment. It is for this very reason that the trajectory of US antidiscrimination law has appeared dismal, at least when compared with EU antidiscrimination law, which treats pregnancy as *sui generis*, and mandates the provision of job protected paid leave and workplace accommodations.

In response to the limitations of US antidiscrimination law, it was shown that Congress has adopted several measures, which as the discussion above revealed, provide some pregnant and breastfeeding workers with a right to a workplace accommodation and, or a job protected unpaid leave of absence. While it is acknowledged that these measures do not expressly recognize the difference that pregnancy makes, nor do they provide protections as expansive as those afforded by EU law, they do suggest a shift in the trajectory of US antidiscrimination law, away from a purely ‘equal treatment’ approach to pregnancy discrimination, towards one that seeks greater substantive equality. In the next two Chapters, further evidence will be presented to support the suggestion of a shift in the trajectory of US antidiscrimination law.

Chapter 6: State legislatures—shifting the trajectory

*The Pregnant Workers Fairness Act... would ensure that expectant mothers are not forced out of their jobs simply because they need minor adjustments to their duties to continue working during pregnancy.*⁹⁰⁹

I Introduction

In Chapter 5, initial evidence was offered to suggest that there are important developments on the national, state, and local level, which reveal that the trajectory of US antidiscrimination law is shifting away from a purely equal treatment approach to tackling the problem of pregnancy discrimination, towards a more holistic one that seeks greater substantive equality, and imposes a duty to promote or achieve equality. This Chapter seeks to explain, justify, and elaborate upon these developments, focusing on the state and local measures that have been adopted and proposed to address the problem. It also follows on from the discussion of the differences between EU and US antidiscrimination law outlined in earlier Chapters, revealing why, even with these practical measures, US antidiscrimination law will never completely emulate that of the EU, even if it were desired. Recognizing and considering what Rudolf Schlesinger terms the, ‘structural divergences’ between common law and civil law legal systems and institutions, part of the role of this Chapter is to assess the disparities created by the legal and conceptual elements of the US environment, and to consider the particular barriers they create to the adoption of substantive equality measures.⁹¹⁰ This consideration is made with the acknowledgement that while other historical, cultural, and political disparities exist that may be worthy of further research, the focus of this research is upon two disparities deemed to pose the greatest difficulties.

This Chapter is divided into four Parts. Parts II and III discuss the barriers imposed by the US Constitution and the conceptual objections of ‘equal treatment’ (liberal) feminists to the adoption of substantive equality measures for pregnant

⁹⁰⁹ Taken from a personal email communication with co-sponsor to the proposed Act, US Senator for New Hampshire, Jeanne Shaheen (August 9, 2013.)

⁹¹⁰ Rudolf B. Schlesinger, ‘The Past and Future of Comparative Law’ (1995) 43 Am J Comp L 477, 481. See Chapter 2 for a discussion of comparative law.

workers.⁹¹¹In this discussion, it will be shown that the US Constitution presents a legal barrier to the adoption of mandatory leave, but not to job-protected paid leave, workplace accommodations, or gender mainstreaming. It will also be shown that conceptual adherence to formal equality presents a significant barrier to the adoption of substantive equality measures, but more so at the national, than at the state and local level. Part III concludes with the suggestion that having overcome both barriers to some degree, the US state legislatures are acting as laboratories of democracy in their adoption of measures designed to advance substantive equality.

In support of this suggestion, Part IV considers, compares, and contrasts the equality measures enacted and proposed by the fifty US states and Washington D.C. These measures are considered for their ability to broaden the rights and protections afforded by national law and for their limitations compared to the EU's PWD.⁹¹²While finding state measures are not as expansive as their EU cousin, this Chapter concludes that they reveal an emerging shift in the trajectory of US antidiscrimination law. This is to say that with these measures, the US is slowly moving to the next stage, beyond a single vision, rights-based model of equality, and towards a truly holistic, and transformative model. This conclusion is bolstered by the bold and novel assertion in Chapter 7, that gender mainstreaming is now a US domestic equality strategy.

II Legal barriers to substantive equality measures.

That pregnancy discrimination continues in the US, despite Constitutional and statutory efforts to end it was made clear in Chapter 5. Furthermore, as the previous discussion regarding the EU model of equality has revealed, pregnancy discrimination and a correlative legal response are not unique to the US. It was also revealed that whereas the only limit upon the adoption of equality measures in the EU is the ability of the member states to agree, the US Constitutional mandate of formal equality places specific parameters on the adoption of *all* national, state, and local legislation.⁹¹³ Furthermore, unlike the Court of Justice of the European Union (CJEU), which cannot

⁹¹¹ See Chapter 5 for a discussion of the US Constitution, and Chapter 2 for a discussion of the division between feminist legal theorists.

⁹¹² Pregnant Workers Directive. (n 112).

⁹¹³ See the discussions in Chapters 3, 4, and 5.

declare member state laws invalid, the US Supreme Court (USSC), through its power of judicial review, as cemented in the cases of *Marbury v Madison*, and *Fletcher v. Peck*, may declare a statute of either Congress or a state void, if it exceeds their authority under the Constitution. This includes sex-based equality legislation.⁹¹⁴

In light of the foregoing, by evaluating specific EU legislation providing for maternity leave, workplace accommodations, and gender mainstreaming, against US Constitutional parameters, it is possible to determine whether or not these measures would be declared void if enacted in the US. By doing so, it is also possible to hypothesize how far the trajectory of US antidiscrimination law may shift, and legally converge with that of the EU.⁹¹⁵

a Maternity leave.

In reviewing legislation having *any* gender-based classification, the USSC will subject it to what is called an ‘intermediate level’ of judicial scrutiny. This means that to be constitutionally valid, an equality measure must be found to ‘serve important governmental objectives’ and ‘the discriminatory means employed [must be] substantially related to the achievement of those objectives.’⁹¹⁶ Thus, should Congress or the state legislatures enact equality laws similar to those contained in the EU model of equality, as discussed in Chapters 3 and 4, including paid mandatory maternity leave, workplace accommodations, and the strategy of gender mainstreaming, these measures would have to comply with the unique parameters established by the US Constitution, in order not to be struck down.

Beginning with ‘maternity leave,’ if Congress were to enact a statute with provisions identical to those contained in the EU’s Pregnant Worker’s Directive 92/85/EEC (PWD), it would be open to a constitutional challenge via judicial review. Under the ‘intermediate level’ of scrutiny set forth in the case of the *University of Alabama v. Garrett*, Congress would be required to justify its new Act as a valid exercise of congressional power to enact a prophylactic measure, to ‘both to remedy and to deter

⁹¹⁴ *Marbury v Madison* 5 US 137 (1803) and *Fletcher v Peck* 6 Cranch 87 (1810).

⁹¹⁵ See Chapter 2 for a discussion of legal convergence.

⁹¹⁶ *United States v Virginia* (n 807) 533.

violation of rights guaranteed.⁹¹⁷That is, the right to be free from gender discrimination in the workplace. In order to be successful, Congress would be required to show that the measure was both, ‘congruent and proportional to the targeted violation,’ and that previously enacted sex discrimination measures have been unsuccessful in redressing the problem.⁹¹⁸The previously enacted legislation Congress would likely rely upon are The Civil Rights Act of 1964 (Title VII), the Pregnancy Discrimination Act of 1978 (PDA), and the Family and Medical Leave Act of 1993.⁹¹⁹

The reasoning in the review would be the same as that applied by the USSC to the Congressional enactment of the FMLA, which, as discussed in previous Chapters, entitles eligible employees to take up to twelve weeks of unpaid leave. In considering the ability of Congress to enact the FMLA, the USSC declared in *Nevada v. Hibbs*, that its authority to remedy and deter unconstitutional conduct meant that it could rely on and take account of the effectiveness of existing laws.⁹²⁰Consequently, in any challenge to its enactment of a ‘paid maternity leave’ statute, Congress would want to claim that the three existing laws relating to discrimination and leave are insufficient and not fit for purpose. In light of the clear limitations of Title VII and the PDA, as revealed in the discussion of federal case law in Chapter 5, it is suggested that it would not be a difficult task for Congress to argue ‘legislative ineffectiveness.’ At least to the extent that any proposed statute would follow the PWD, by seeking to prohibit the termination of pregnant employees, provide for paid leave, and mandate accommodation.

In addition to providing testimonial, statistical, and other data that pregnancy discrimination continues in the US, despite the enactment of Title VII and the PDA, Congress would be able to rely on the fact that the FMLA also falls short of its target. That is to say, while the leave provisions of the FMLA were intended to make it, ‘feasible for women to work while sustaining family life,’ Congress can argue that the statute has been unsuccessful for the vast majority of pregnant workers.⁹²¹This is because the FMLA provides only unpaid leave and has very stringent eligibility

⁹¹⁷ *Board of Trustees of Univ. of Ala. v. Garrett* 531 US 356 (2001) 365.

⁹¹⁸ See the discussion in *Daniel Coleman v. Court of Appeals of Maryland et al.*, (n 162) at 1329, citing *City of Boerne v. Flores* 521 US 507 (1997) 520.

⁹¹⁹ Title VII (n 171); PDA (n 117); Family and Medical Leave Act 1993, 29 USCS 28.

⁹²⁰ *Hibbs* (n 775) 740 (fn 12).

⁹²¹ See the dissent of Ginsburg, J. in *Daniel Coleman v. Court of Appeals of Maryland et al.* (n 162)1349.

requirements.⁹²²To justify its claim, Congress could rely on Department of Labor (DOL) survey reports indicating that despite the twenty-two years that FMLA leave has been available, the percentage of workers covered by its provisions have remained almost static, only increasing from 54.9% of eligible employees in 2000, to 60% in 2012, including less than one fifth of all new mothers.⁹²³Accordingly, Congress could argue that only by lowering the workplace minimum employee requirements from 50 to 20 employees would eligibility be able to increase to a more significant level of 67%.⁹²⁴Congress could also observe that until such a law is enacted, the US will be the *only* developed country that does not offer government sponsored paid maternity leave.⁹²⁵Moreover, Congress could rely on research indicating the significant economic benefits to women and US society with the provision of maternity leave. For not only does paid maternity leave increase women's labour force attachment, it protects women's wages; potentially limiting recourse to public assistance.⁹²⁶A large body of research also reveals a business case for paid leave, suggesting that it enables employers to attract and retain talent, lowering recruitment costs, and improving productivity.⁹²⁷

Finally, as the USSC in *California Fed. Sav. & Loan Assn. v. Guerra*, has already upheld the right of state legislatures to enact maternity leave laws, Congress could assert that it is now merely exercising its authority 'to occupy the field' and is seeking to enforce the substantive provisions of the Equal Protection Clause of the Fourteenth Amendment (EPC).⁹²⁸This argument would be supported with evidence that the need for maternity leave had been the initial thrust behind the enactment of the FMLA, prior to the lobbying by equal treatment feminists for a 'gender neutral' measure for self-care and family leave.⁹²⁹

⁹²² See the discussion in Chapter 5.

⁹²³ COEA, *The Economics of Paid and Unpaid Leave* (n 897) 3.

⁹²⁴ Abt, *Family and Medical Leave in 2012: Technical Report* (2012) 163.

⁹²⁵ COEA, *The Economics of Paid and Unpaid Leave* (n 897) 3.

⁹²⁶ See: Linda Houser, *Pay Matters: The Positive Impacts of Paid Family Leave on Families, Businesses and the Public, A Report of the Center for Women and Work* (Rutgers, Vartanian, Thomas); CEPR, *Family-Friendly Policies: Boosting Mother's Wages* (2005).

⁹²⁷ See, for example R Baugman, D DiNardi and D Holtz-Eakin, 'Productivity and wage effects of "family-friendly" fringe benefits' (2003) 23 *Int J of Manpower* 247; Rossin-Slater, Ruhm and Waldfogel (n 9).

⁹²⁸ See the discussion of federal pre-emption in *Guerra* (n 693) 280.

⁹²⁹ See the Supreme Court discussion in *Daniel Coleman v. Court of Appeals of Maryland et al.* (n 162).

In response, those seeking to challenge the law would argue that maternity leave, without a parallel provision for paternity leave, not only violates the EPC, but reinforces the pervasive sex role stereotype that caring for family members is women's work, as discussed by the USSC in *Hibbs*.⁹³⁰ In light of the dissenting commentary of USSC Justice Ginsburg, in *Coleman v. Court of Appeals of Maryland*, referring to California's law requiring leave only for disability in pregnancy, which was challenged in *Guerra*, and to which Justice Ginsburg stated that she would have 'preferred the interpretation urged by the equal treatment feminists,' it is thought that an EPC challenge would be extremely strong.⁹³¹ There is also the problem that a narrowly drawn maternity leave law runs the risk of being unable to respond to societal changes and technological advances. Recalling from the discussion in Chapter 4, the CJEU interpreted the EU right to maternity leave narrowly, thereby excluding men, adoptive parents, and surrogate mothers from the provisions of the PWD. In an effort to avoid similar limitations, it is suggested that if Congress were to enact a publically supported maternity leave law, it would be wise to provide for paternity leave, and address the rights of other workers, including surrogates and adoptive parents.⁹³²

b Mandatory leave.

Notwithstanding the foregoing, if the Congressional enactment of a 'paid maternity leave' law followed Article 8(2) of the PWD, and *mandated* a two week period of leave, it can definitively be said that this provision would be struck down as unconstitutional. The USSC decision in *Cleveland Board of Education v Fleur* makes clear that mandated leave violates the Due Process Clause of the Fourteenth Amendment to the US Constitution.⁹³³ This is because, 'freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause,' and 'the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter.'⁹³⁴ Consequently, while a US statute

⁹³⁰ *Hibbs* (n 775) 731.

⁹³¹ *Daniel Coleman v. Court of Appeals of Maryland et al.* (n 162) 1341. NB: this dissent was joined by Justices Breyer, Sotomayor, and Kagan.

⁹³² See Chapters 3 and 4.

⁹³³ *LaFleur* (n 922).

⁹³⁴ *ibid* 639.

could not require a woman to take maternity leave, or for that matter, require a man to take paternity leave, an employer could be required to provide leave to women and men alike.

Finally, for any maternity leave measure to pass Constitutional muster, Congress must clearly articulate that its objective in the enactment, as stated by the USSC in *Griggs v. Duke Power Co.*, is ‘to achieve equality of employment opportunities...’ for pregnant workers.⁹³⁵ In this regard, it is suggested that a constitutional challenge to nationally provided maternity leave is less likely to be successful if Congress engages in careful drafting, taking into account Constitutional requirements *and* the conceptual barriers discussed below. It is suggested that this is most easily achieved through an amendment to the existing FMLA, providing publically funded, gender-neutral, longer, job-protected, paid leave to all workers.

c Workplace accommodations and gender mainstreaming.

The foregoing constitutional analysis also applies to the enactment by Congress of laws pertaining to workplace accommodations, including the right of transfer to a less physically arduous position for the duration of pregnancy, the right to breastfeeding accommodations, *and* to a Congressional enactment of the strategy of gender mainstreaming.⁹³⁶ The assertion relating to gender mainstreaming is made with the caveat that if Congress were to statutorily provide for such a transformative measure, it would be well advised to enact the broader strategy of ‘diversity mainstreaming,’ discussed in previous Chapters. This is because a broader provision would help protect the strategy against an EPC challenge, and would be in keeping with the broader categories of protection from discrimination afforded by Title VII. A more detailed discussion of the US strategy of gender mainstreaming is otherwise deferred until Chapter 7.

With regard to workplace accommodations for pregnant workers, as Congress has already sought to address discrimination arising from workplace leave and

⁹³⁵ *Griggs* (n 15) 429-430.

⁹³⁶ See Chapters 3 and 4 for a discussion of the workplace accommodation mandates of the PWD. See Chapters 1, 3, 4 and 7 for a definition and discussion of equality concepts, gender mainstreaming and its use in the EU.

accommodation policies, via the FMLA, the American's with Disabilities Act Amendments Act of 2008 (ADAAA), and the Patient Protection and Affordable Care Act (ACA), these laws show that the US Constitution does not pose an insurmountable barrier to the adoption of substantive equality measures in this area.⁹³⁷ Nevertheless, legislation expressly providing for paid leave and accommodation for pregnancy is yet to be adopted on a national level. Legislation was proposed in both houses of Congress in 2012 declaring it an unlawful practice 'not to make reasonable accommodations to known limitations related to pregnancy, childbirth or related medical conditions of job applicants and employees,' but neither measure was enacted. These Bills were re-introduced in 113th Congressional Session, 2013-2014, but they too were never enacted.⁹³⁸

The crux of the problem for women in the US is that Congress has consistently taken a reactive and piecemeal response to Supreme Court decisions highlighting the shortcomings of national equality laws, in contrast to the historically proactive and holistic approach taken by the EU institutions to the need to address the disadvantage that pregnancy creates for women's careers. The results of this research suggest that one reason for this piecemeal approach is the adherence by Congress to particular equality concepts, as defined in Chapter 1, and as discussed further below. This suggestion does not ignore the fact that there is also reluctance by many members of Congress to expand what they view to be the public 'safety net' in the US. The debate surrounding the recent adoption of the ACA, which contains several provisions benefitting pregnant and lactating workers, highlights the challenge in expanding welfare provisions, even where they are contained in health and safety measures.⁹³⁹ The reality is that in comparison to the EU, where there are strong social supports, the US is defined by its 'anti-welfarism.'⁹⁴⁰ This is to say that whereas the EU mandates paid vacation time, maternity leave, and sick leave, among other social rights, the US does not yet mandate these

⁹³⁷ Amendments Act of 2008 (n 141), ACA (n 120).

⁹³⁸ See: H.R. 5647 Pregnant Workers Fairness Act, S.3565 Pregnant Workers Fairness Act.

⁹³⁹ See Chapter 5. Also, John Cannan, 'A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History' (2013) 105 Law Libr J 131. More generally, see: Tito Boeri, Michael Burda and Francis Kramarz (eds), *Working Hours and Job Sharing in the EU and USA: Are Europeans Lazy? Or Americans Crazy?* (OUP 2008), and Zeitlin and Trubek (n 263).

⁹⁴⁰ See: Hiroto Tsukada, *Economic globalization and the citizen's welfare state: Sweden, UK, Japan, US* (Ashgate 2002), for a discussion of the differences among welfare states.

leaves nationally. While there are calls by President Obama to enact these laws, Congress has yet to do so; leaving the state legislatures to fill the vacuum, as discussed in Part IV.⁹⁴¹

III Conceptual barriers to substantive equality measures.

*Different treatment 'requires employers to grant pregnant employees 'most favoured nation status.'*⁹⁴²

This research found that in addition to legal barriers, there are strong conceptual barriers to the adoption of substantive equality measures specific to pregnant workers. However, whereas legal barriers may render equality legislation void after its enactment, conceptual barriers have tended to preclude its enactment in the first place. This section considers these conceptual barriers, and assesses how and where they may be overcome.

a Formal v. substantive equality.

Recalling from the discussion in Chapter 2, the American feminist movement has a long and well-developed history, characterized by the development of two diametrically opposed philosophies regarding the adoption of measures intended to secure equality in pregnancy and maternity.⁹⁴³ These two philosophies distil to result in a difference of support for 'equal' versus 'special' treatment. This is to say that conceptual and philosophical differences exist between support for equality measures that require employers to treat pregnant workers the same as any other employee, (formal equality-equal treatment adherents/liberal feminists) versus support for measures, which require employers to treat pregnant workers differently, in order that they may be treated equally (substantive equality/special treatment adherents). Recalling the discussion in Chapter 5 of employer policies limiting 'light duty' work to those injured on the job will help to make this distinction more clearly. Formal equality adherents accept such limitations as legitimate employer policy, and ignore the disproportionate impact on

⁹⁴¹ OPS, 'Remarks by President Obama at the White House Summit on Working Families | June 23, 2014'

⁹⁴² *Young* (n 137) 446. Note: the US Supreme Court accepted a petition for writ of certiorari on July 1, 2014. See: 134 S.Ct. 2898 (2014).

⁹⁴³ See also, Ellis, 'Women's Rights and Positive Action through Legislation: The American 'Experience' (n 726).

pregnant employees. In contrast, substantive equality adherents argue that specific accommodation measures for pregnant workers are required in order to end the structural inequality that exists in the workplace. Viewed narrowly, formal equality feminists *oppose* the enactment of legislation providing protective rights for pregnant workers, in favour of ‘gender neutral’ legislation designed to protect all workers.⁹⁴⁴ They assert that to do otherwise would operate to reinforce and reproduce social inequality. For these US feminists, the enactment of what they view to be ‘special treatment’ measures would also run counter to efforts that achieved success in ending the types of female protective legislation that historically disadvantaged women in the workplace, including women only ‘foetal protection’ policies and automatic dismissal upon becoming pregnant, as discussed in Chapter 5.⁹⁴⁵ Their concern lies with the fact that the biological differences of women have historically been used to exclude and subordinate them. Therefore, ‘special treatment’ is considered damaging to equality efforts, serving to reinforce ‘ancient notions about women’s place in the family and under the Constitution.’⁹⁴⁶ Consequently, these feminists object to taking pregnancy into account in drafting workplace legislation. They object on the basis that ‘special treatment’ reinforces broader stereotypical notions of women as child bearers and carers.⁹⁴⁷

The results of a closer review of national legislation reveals that the arguments of ‘equal treatment’ feminists, including those of Wendy Williams and Susan Deller Ross, have garnered significant Congressional support, as reflected in the comments of the drafters of the first FMLA bill, who ‘agreed that any national bill would focus not only on pregnancy, but on equal treatment for all workers.’⁹⁴⁸ Their arguments have also historically received support from American Civil Liberties Union (ACLU), economic theorists, and many US business leaders. This support was made evident in the numerous briefs filed in the landmark case of *Guerra*, and the suggestion that special

⁹⁴⁴ For a discussion of the disagreement see: W.W. Williams, ‘Equality’s Riddle: Pregnancy and the Equal Treatment/ Treatment Debate’ (n 8).

⁹⁴⁵ See: *Automobile Workers v Johnson Controls, Inc* (n 843); *Harriss* (n 843).

⁹⁴⁶ See comments of Ginsburg, J., in *Gonzales v. Carhart et al.* 550 US 124 (2007) 185.

⁹⁴⁷ See the discussion in Chapters 3 and 4; and Judith Baer, ‘Women and the Law’ in Superson and Cudd (n 195) 253.

⁹⁴⁸ *Daniel Coleman v. Court of Appeals of Maryland et al.* (n 162) 1341.

protections would encourage employers to employ fewer women,⁹⁴⁹ on the basis that, ‘pregnancy renders women less reliable, less productive employees, absent more often, more expensive; that is to say fundamentally different and handicapped.’⁹⁵⁰

While the concerns raised by ‘equal treatment’ feminists are not without merit, as the discussion in Chapters 3 and 4 of the unintended negative consequences of EU protective measures revealed, they fail to acknowledge that the formal equality model adhered to thus far, has only partly ended the inequality, disadvantage, and exclusion suffered by pregnant workers in the US. As the discussion in Chapter 5 showed, in the more than two decades since *Guerra* was decided, pregnancy discrimination continues under the guise of gender-neutral employer policies. As substantive equality/‘special treatment’ feminists observe, including Professor Herma Hill Kay, pregnant workers have not achieved equality under the US model. These feminists correctly emphasise that ‘assimilation is not equality,’ and that as it is not possible to ‘gender neutralize’ pregnancy, formal equality can never bring about radical change in US society.⁹⁵¹ Rather, they claim, quite rightly that:

*In order to maintain a woman’s equality of opportunity during her pregnancy, we should modify as far as is reasonably possible those aspects of her work where her job performance is adversely affected by her pregnancy. Unless we do, she will experience employment disadvantages arising from her reproductive activity that are not encountered by her male co-worker.*⁹⁵²

Nevertheless, as Conaghan states, adherence to formal equality in the US has resulted in, ‘entrapment in theoretical and ideological straightjackets.’⁹⁵³ This entrapment has historically resulted in a quagmire, particularly as regards the national provision of publically paid maternity leave and the workplace accommodation of pregnancy.⁹⁵⁴ I use the term historically, as the results of this research suggest a resolution to this quagmire is slowly emerging on the national, state, and local level. There is also evidence to

⁹⁴⁹ See Supreme Court briefs in *Guerra* (n 693), MacKinnon, *Sex Equality* (n 8), and R.A. Posner, ‘An economic analysis of sex discrimination laws’ (1989) 56 U Chi L Rev 1311.

⁹⁵⁰ See footnote 30 on page 24 in brief of ACLU in *Guerra* (n 693).

⁹⁵¹ Kay (n 32).

⁹⁵² *ibid* 27.

⁹⁵³ Joanne Conaghan, ‘Pregnancy and the Workplace: A Question of Strategy’ (1993) 20 JL & Soc 71, 85.

⁹⁵⁴ See Justice Ginsburg’s discussion of the debate following California’s enactment of paid maternity leave and its impact on the FMLA, in *Daniel Coleman v. Court of Appeals of Maryland et al.* (n 162).

suggest that the failure of formal equality to adequately address pregnancy discrimination is providing impetus to calls for a more expansive interpretation of the PDA by the US Supreme Court, as revealed in the *amicus curiae* brief filed by ACLU in the 2013 case of *Young v. UPS*. In their brief, the ACLU argued that the statute requires parity in employer's treatment of pregnant workers, for the purpose of providing light-duty work, even though an employer does *not* provide parity for all non-pregnant employees.⁹⁵⁵ While this is a promising development, the response of the US Supreme Court in its judgment issued on 25 March 2015, was to reject this argument, with the statement that 'We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status.'⁹⁵⁶

b Insurmountable barriers?

The results of this research suggest that, as with most Constitutional barriers, conceptual barriers are not insurmountable, and may be overcome to some degree, through choice of legislative form and/or legislative forum. This assertion is based on two observations. First, Congress may use health and safety legislation rather than antidiscrimination law to regulate the workplace in a manner that advances gender equality. Recalling from the discussion in Chapter 5, the ACA contains several provisions that benefit pregnant workers, including banning health insurers from requiring that women pay more for the same insurance coverage as men; requiring that all insurance plans provide maternity health coverage; and requiring break time for nursing mothers in workplaces with fifty or more employees.⁹⁵⁷ Although the ACA has been the subject of an extensive and divisive debate and Constitutional challenge, much of the criticism has been focused on the public and private cost of expanding healthcare provision and the public funding of abortion.⁹⁵⁸ In contrast, the private workplace

⁹⁵⁵ *Young* (n 137) 446 (fn 4), and 575 U. S. ____ (2015) 13. NB: The matter was ultimately remanded to the District Court for trial on the issue of direct discrimination.

⁹⁵⁶ Note: arguments in this appeal were heard by the USSC in December 2014. On April 27, 2015, the USSC vacated summary judgment in favour of the employer.

⁹⁵⁷ Fair Labor Standards Act of 1938 (29 U.S.C. 207) Patient Protection and Affordable Care Act, Public Law 111-148, Section 4207. As of March 23, 2010 amended section 7.

⁹⁵⁸ See the concerns raised by Caterpillar, Verizon, and Deere—that the new law could adversely affect their company's ability to provide health insurance to their employees: House of Representatives, 'Energy & Commerce Subcommittee to Hold Hearing on Impact of Health Care Reform Law on Large

accommodation for lactating workers failed to give rise to the feminist objections seen with the adoption of the PDA and the FMLA.⁹⁵⁹ Instead, over 360 organizations expressed support for the health reform bill.⁹⁶⁰ This suggests that the use of health and safety legislation is a less controversial, albeit limited means by which Congress may advance substantive equality in the US.

Secondly, as this study of state enacted antidiscrimination law reveals a variety of measures, some of which provide ‘special treatment’ for pregnant workers, these findings suggest that conceptual barriers to substantive equality laws operate differently at the national and state level in the US. The reason for this difference is rooted in the US system of ‘dual sovereignty,’ between the fifty states and the federal government. As explained in Chapter 5, by virtue of the Tenth Amendment to the US Constitution, all state legislatures are free to adopt *broader* equality laws than those provided by Congress, as long as they do not conflict with Constitutional guarantees and are not pre-empted by federal law, under the Supremacy Clause of the Constitution (Article VI, Clause 2).⁹⁶¹ Therefore, as Congress is not the *sole* source of equality laws, the fifty US states and Washington D.C. may elect to enact measures that go beyond the congressionally mandated *minimums* of the PDA. Importantly, this legislative prerogative of the states has been affirmed by the USSC, with its observation that the PDA does not prohibit *all* favourable treatment of pregnancy, as Congress intended it to be, ‘a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.’⁹⁶²

As the discussion in Part IV will show, this blessing of state enacted measures by the highest Court in the US cannot be overstated, as it offers a ‘green light’ for the

Employers’ (*Committee on Energy & Commerce*, 2010).
<<http://democrats.energycommerce.house.gov/index.php?q=news/energy-commerce-subcommittee-to-hold-hearing-on-impact-of-health-care-reform-law-on-large-emplo>> accessed 13/2/15. See also: *Burwell v. Hobby Lobby Stores, Inc., et al.* 134 SCt 2751(2014), wherein the majority of the Supreme Court held that for profit corporations are not required to provide certain forms of birth control mandated by the ACA (n 120).

⁹⁵⁹ See the history of the passage of the FMLA in Elving (n 162).

⁹⁶⁰ Office of Speaker Nancy Pelosi, *Supporters of Health Reform* (2011).

⁹⁶¹ See: *Guerra* (n 693). See also: Brennan Jr., ‘State Constitutions and the Protection of Individual Rights.’ (n 693)

⁹⁶² *ibid Guerra* (n 693) 691 (quoting the Court of Appeals decision 758 F.2d, at 396).

adoption of a variety of substantive equality measures, including job-protected paid leave, workplace accommodations, and gender mainstreaming.

Having established the prerogative of the US state legislatures to adopt measures seeking substantive equality for pregnant workers, the next section addresses their motivation for doing so.

c Why states enact ‘special treatment’ measures.

The results of this study suggest three clear motivations for the US states, Washington D.C., and local municipalities within the states to enact equality measures providing ‘special treatment’ for pregnant workers.

The first motivation was the enactment of an Equal Rights Amendment (ERA) to the state’s Constitution. It was observed in Chapter 5, that although the federal ERA never obtained the necessary number of ratifications for it to be enacted after Congress adopted a joint resolution proposing it in 1972, it did encourage the enactment of similar amendments to state Constitutions.⁹⁶³ While the specific terms of the state ERAs did not always follow that of the federal proposal, they had the same intent, of ending sex discrimination.⁹⁶⁴ This is to say that as the state ERAs reflected ‘a fundamental *public policy* against discrimination in employment,’⁹⁶⁵ they required their state legislatures to consider the extent to which *existing* laws provided equality of opportunity for pregnant workers, and to make adjustments accordingly.⁹⁶⁶ The result of this consideration was that several states amended their antidiscrimination laws to *expressly* prohibit discrimination against pregnant employees. Importantly, not only did many of these pregnancy discrimination laws actually precede the PDA, they often went further, not

⁹⁶³ Equal Rights Amendment to the Constitution, H.R.J. Res. 208, 92d Cong., 1st Sess. (1972), 86 Stat. 1523. See also the discussion in Kay (n 32) 113, and Chapter 5.

⁹⁶⁴ For the text of the amendments to the Constitutions of twenty states, see: Gladstone, Leslie W., *CRS Report for Congress: Equal Rights Amendments: State Provisions* (2004). See also: L.J. Wharton, ‘State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination’ (2004) 36 Rutgers LJ 1201.

⁹⁶⁵ *Roberts v Dudley* 140 Wn2d 58 (2000) at 78 (Alexander, J. concurring) (quoting *Rojo v Klinger*, 52 Cal 3d 801(1990)).

⁹⁶⁶ See the discussion of substantive equality in Chapter 1. See also: P.L. Proebsting, ‘Washington’s Equal Rights Amendment: It Says What It Means and It Means What It Says’ (1985) 8 U Puget Sound L Rev 461, for a discussion of the efforts of the Washington State legislators to conform state statutes to the ERA. For a discussion of Montana’s efforts, see: Kay (n 32) 10.

merely providing for formal equality, but providing job-protected maternity leave and the right to compensation through the use of accumulated leave time. This was the case in Massachusetts, where its ‘Maternity Leave Act,’ enacted in 1972, mandated the provision of eight weeks, unpaid maternity leave, with a qualified right to return to the same or similar position.⁹⁶⁷This was followed by the Connecticut legislature in 1973, which adopted Bill No. 1565, ‘An Act Concerning Maternity Leave,’ prohibiting employers from terminating a pregnant worker, who was entitled to a maximum of nine months job-protected leave and compensation via accumulated sick and/or other leave benefits.⁹⁶⁸Then, in Montana, House Bill 9 was introduced in January 1975, and adopted by the legislature as ‘An Act to Provide Maternity Leave to Public and Private Employees,’ using the language and provisions adapted from Connecticut.⁹⁶⁹House Bill 9 was expressly stated to be a ‘result of the Interim Committee on equal rights of the sexes,’ and rendered it unlawful to terminate a woman’s employment because of pregnancy, entitled pregnant workers to a ‘reasonable leave of absence,’ to compensation for disability because of pregnancy, and a right to reinstatement.⁹⁷⁰

A second motivation for states to legislatively address pregnancy discrimination was in response to the limitations of national equality law. These limitations were made evident to both Congress and the state legislatures with several Supreme Court judgments, culminating in *General Electric Co. v. Gilbert*, in which the Court declared that a private employer’s comprehensive disability insurance plan did not violate Title VII, because it failed to cover pregnancy-related disabilities.⁹⁷¹While Congress effectively overturned *Gilbert*, through its enactment of the PDA in 1978, the initial responses of several state legislatures again went beyond equal treatment. This included the California law, which provided a right to four months unpaid, job-protected leave to California’s pregnant workers.⁹⁷²As Shu and Wildman observe, the California law was,

⁹⁶⁷ Massachusetts Maternity Leave Act (MMLA), Mass. Gen. Laws ch.149, § 105D.

⁹⁶⁸ State of Connecticut, Bill No. 1565: An Act Concerning Maternity Leave, January Session, A.D., 1973. (Connecticut State Library Legislative Reference Section).

⁹⁶⁹ Montana State Senate, *Minutes of the Meeting, Labor and Employment Relations, HR (Jan 10, 1975)* (Montana Hist Society, Collection RS44 Bx/Fd No 3/17, 1975).

⁹⁷⁰ *ibid.*

⁹⁷¹ *Gilbert* (n 37).

⁹⁷² 1978 Cal. Stat. 4320 § 1, adding CAL. LAB. CODE § 1420.35 to the California Fair Employment

‘a proactive measure designed to provide an affirmative accommodation to pregnant employees.’⁹⁷³

A third motivation for state action was the adoption of the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW), by the United Nations (UN) General Assembly in 1979. CEDAW is arguably an international bill of rights for women. It defines discrimination in Part 1, Article 1 as ‘any distinction, exclusion, or restriction made on the basis of sex...’⁹⁷⁴It also provides not only for anti-discrimination measures to be adopted nationally, but also, ‘temporary special measures aimed at accelerating de facto equality...’ and ‘special measures aimed at protecting maternity.’ Although CEDAW was signed without reservation, by President Carter on 17 July 1980, it was never ratified by the US Senate.⁹⁷⁵Had it been, it would have required the US to nationally adopt some form of maternity leave law, as signatories are bound to put its provisions into practice and are required to submit four-year reports on their progress, pursuant to Article 18.

Inspired by the Convention, and in response to the lack of national ratification, sixteen US states, eighteen counties, and forty-four US cities have legislatively implemented the standards of CEDAW within their boundaries.⁹⁷⁶In point of fact, in 1998, San Francisco was the first city in the world to adopt an ordinance reflecting the principles of CEDAW, including gender mainstreaming, after it was:⁹⁷⁷

Inspired by the 1995 United Nations Fourth World Conference on Women in Beijing, and frustrated by the continued inability to get the United Nations Convention on the Elimination of All Forms of

Practice Act, former CAL. LAB. CODE §§ 1410-33. Subsequently re-chaptered and re-titled, see: Fair Employment and Housing Act, Cal. Gov’t. Code § 12945 (2013). For a discussion of the history of the California law, see: Shu and Wildman (n 53).

⁹⁷³ Shu and Wildman (n 53) 127.

⁹⁷⁴ See: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article1>

⁹⁷⁵ UNDAW, ‘CEDAW: Declarations, Reservations and Objections to CEDAW’ (UN) <<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>> accessed 23/04/2012, for a list of reservations by Country. While the Obama Administration supports the Convention, calling it ‘an important priority,’ policy decisions and issues continue to prohibit its ratification. See: Luisa Blanchfield, *The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Issues in the U.S. Ratification Debate* (CSR: 7-5700, R40750, 2013)

⁹⁷⁶ See: Judith Resnick, ‘The Internationalism of American Federalism: Missouri and Holland’ (2008) [2008] 73 Mo L Rev 1105. See also: New York City HRI <http://nychri.org/documents/CEDAWRes_000.pdf> accessed 11/09/2014

⁹⁷⁷ The City refers to the strategy as ‘gender analysis’ See: Dept on the Status of Women, ‘Gender Analysis Guidelines’ (*City & County of San Francisco*, July 2008) accessed 09/11/2014

*Discrimination Against Women (CEDAW) ratified in the U.S. Congress...*⁹⁷⁸

It is important to note that there is great potential for the enactment of similar measures in other Cities, as San Francisco is spearheading a campaign to encourage one hundred other US cities to adopt a CEDAW measure by December 2015.⁹⁷⁹

Overall, the results of this study found all three motivations were strong enough for US state legislatures to overcome conceptual (and other) challenges to their proposals. This is not to say that these challenges failed to impact the measures proposed, or that they ceased to exist once the laws were enacted. Indeed, a review of the legislative record reveals that prior to enacting the Montana Leave Law, arguments and amendments were considered and then rejected regarding a potential negative financial impact upon small employers.⁹⁸⁰ The Pregnancy Disability Leave Law (PDLL) was also a ‘hotly debated law’ in California, and the provisions originally proposed were amended in response to employer opposition.⁹⁸¹ Despite these concerns, the California legislature believed the law was necessary to overcome:

*The current [Supreme] court rulings by naming pregnant employees as a preferential treatment of pregnancy, so long as it is consistent with the goal of achieving equality of employment opportunities.*⁹⁸²

This is also not to say that state enacted substantive equality measures have been free from constitutional or pre-emptive challenge.⁹⁸³ These challenges have given US equal treatment feminists and business lobbyists alike the opportunity to reiterate their

⁹⁷⁸ See: Chapter 12 K: Local Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Ord. 128-98, App. 4/13/98, amended by Ord. 325-00, File No. 001920, App. 12/28/2000). Also, Dept on the Status of Women, *CEDAW in Action: Local implementation in the City and County of San Francisco* (2010) 2; Adopting the Operative Principles of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. ORDINANCE NO. 7,224–N.S. Chapter 13.20.

⁹⁷⁹ City of San Francisco, ‘Cities for CEDAW’ (*City & County of San Francisco*, 2014) <<http://sfgov.org/dosw/cities-cedaw>> accessed 11/09/2014.

⁹⁸⁰ Montana State Senate, *Senate Committee of the Whole, Amendments to House Bill No. 9* (1975)

⁹⁸¹ California Senate Office of Research and Kate Sproul, *Women and Equality: A California Review of Women’s Equity Issues in Civil Rights, Education and the Workplace* (Senate Publications, 1999) 45, *Guerra* (n 693) [fn1].

⁹⁸² *Guerra* (n 693) 292 (Stevens, J.)

⁹⁸³ This was the case with *Miller-Wohl Co.v. Comm’r of Labor & Industry* 515 F Supp 1264 (DMont 1981), *vacated*, 685 F2d 1088 (9th Cir1982), *remanded* 479 US 1050; 107 SCt 919 (1987), and *Guerra*. (n 693).

arguments against ‘special treatment’ measures, most notably in the *amicus curiae* briefs filed in the landmark *Guerra* case.⁹⁸⁴ However, as their arguments were ultimately rejected by the Supreme Court majority, it is fair to say state legislatures remain free to enact legislation providing some ‘preferential treatment of pregnancy, so long as it is consistent with the goal of achieving equality of employment opportunities.’⁹⁸⁵ These state measures will now be critically reviewed for their ability to advance substantive equality for US pregnant workers.

IV State law in review.

In an effort to answer the central question posed by this research, an in-depth and systematic review of the antidiscrimination laws, leave laws, and workplace accommodation measures of the fifty US states and Washington D.C. was undertaken. This review required using a variety of legislative resources, as there is no single collective repository for US state law. There are however, two resources where some collective information may be obtained. Unfortunately, neither is comprehensive or current enough to be reliable without further research. First, there is the website of the US Department of Labor, which lists some state labour laws.⁹⁸⁶ A second useful resource is the website of the National Conference of State Legislatures (NCLS).⁹⁸⁷ NCLS conducts research in a variety of policy areas, including paid leave. It also offers access to state information and other legislative resources, which includes a searchable database containing the full text of state legislation for the current session. Together, these two websites offered good starting points for this research, but more comprehensive information was found using the state libraries and websites of the 50 individual states and Washington D.C., where current and archived material were obtained.

⁹⁸⁴ NB: Cal Fed was joined in bringing the action by the Merchants & Manufacturers Association and the California Chamber of Commerce. For a list of briefs, see: *Guerra* (n 693).

⁹⁸⁵ *ibid* 292. For a listing of listing of legislation relating to leave in California, from 1946-2004, see Milkman and Appelbaum, *Paid Family Leave in California* (n 9); Applebaum and Milkman *Leaves that Pay*. (n 9).

⁹⁸⁶ ‘State-level Provisions for Pregnancy Accommodation and Pregnancy-Related Disability.’ (DOL, 2015) <<http://www.dol.gov/wb/maps/3.htm>> accessed 3/8/15

⁹⁸⁷ National Conference of State Legislatures <<http://www.ncsl.org/>> accessed 20/8/15

Additionally, the search engine LEXIS NEXIS was useful for searching federal and state case law using specific search terms including, ‘discrimination,’ ‘Title VII/PDA,’ ‘pregnancy, maternity, breastfeeding, and leave.’ The website of the US Supreme Court also provided access to the legal briefs filed in recent cases, as well as transcripts of oral hearings.

The information gathered from this review was subsequently recorded onto separate Excel worksheets. The title of each Excel worksheet was dictated by the state laws that were recorded on them: ‘antidiscrimination measures,’ ‘breastfeeding accommodation measures,’ and ‘pregnancy, disability, family, medical and/or maternity leave measures.’ Additionally, each Excel worksheet contained separate headings reflecting such distinctions as the size of employer covered, the number of workers covered, eligibility requirements, and the name and reference of the state statute.⁹⁸⁸

The results of this review, as discussed below, reveal three specific findings. First, where state (and local) legislatures have sought to address the problem of pregnancy discrimination, they have generally offered broader protections than the minimums mandated by federal law. Nevertheless, these protections remain limited in comparison to the protections afforded by the EU’s PWD and the national laws of the EU member states.

Secondly, the protections afforded to pregnant workers by the state legislatures and Washington D.C. vary considerably, both in the number of workers covered and in the rights, they afford. In addition, because state laws are limited geographically, they can never offer the broad protections that national laws can.

Finally, state equality laws play a vital role in addressing the problem of pregnancy discrimination in the US, and filling the lacuna left by Congressional adherence to formal equality. State measures also act as a bridge to the national adoption of job-protected paid leave and workplace accommodations. This is to say that the increasing number of state measures challenge Congress to do more and to do better in terms of the laws it proposes and enacts for workers and the families they support. Furthermore, as the Supreme Court has yet to consider the ‘exact line of demarcation between permissible and impermissible preferential treatment under Title VII,’ state

⁹⁸⁸ See Appendices 2-4 in this thesis.

legislatures remain in a unique position to act as laboratories of democracy in adopting practical measures that advance substantive equality for pregnant workers.⁹⁸⁹

a State antidiscrimination law.

To restate, the Civil Rights Act of 1964 (Title VII), as amended by the PDA, prohibits employment discrimination based on race, colour, religion, national origin, sex, pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. A close review of legislation in the US states and Washington D.C. reveals that all but two states (Alabama and Mississippi) have enacted anti-discrimination laws embodying the sex discrimination policies contained in Title VII.⁹⁹⁰ Furthermore, 37 states have measures that are more *expansive* in application, solely by virtue of the number of employees they protect. Specifically, while Title VII only applies to private workplaces having 15 or more employees, state statutes vary, applying to private workplaces having between 1 and 25 employees, and may apply to part-time and casual employees.⁹⁹¹ Moreover, the majority of state anti-discrimination measures extend to public arenas beyond employment, to include education, housing, public accommodations and credit transactions. Additionally, many state statutes prohibit discrimination on varying additional grounds beyond those listed in Title VII, including ancestry, sexual orientation, gender identity or expression, domestic violence victim status, marital status, family responsibilities, military status, citizenship status (in employment), the receipt of public assistance, political affiliation, personal appearance, disability, age, or on the basis of height, or weight, or lactation, and the equal pay requirement contained in separate federal statutes.⁹⁹²

⁹⁸⁹ *Guerra* (n 693) 293 [fn 4]. Note: local laws are not discussed separately, but within the context of state legislation. See Appendix 2.

⁹⁹⁰ Note: Mississippi does have a legislative equivalent to the ADA, and prohibits against discrimination in housing and by housing authorities: 'Rights and Liabilities of Individuals with 'Disabilities.' Miss. Code Ann. § 43-6-5 (2013); Title 43. Public Welfare. Chapter 33. 'Housing and Housing 'Authorities.' Miss. Code Ann. § 43-33-723.

⁹⁹¹ Called 'atypical workers' in the EU.

⁹⁹² The Age Discrimination in Employment Act of 1967, (Pub. L. 90-202) 29 USC, section. 621(as amended by section 115 of the Civil Rights Act of 1991 (P.L. 102-166); ADA (n 141), ADA Amendments Act of 2008 (n 141); EPA (n 171).

With regard to pregnancy, Connecticut has more broadly defined discrimination ‘based upon sex’ to include ‘discrimination related to pregnancy, childbearing capacity, sterilization, fertility, or related medical conditions.’⁹⁹³Likewise, in 2013, Illinois amended its Human Rights Act to prohibit discrimination based upon pregnancy, childbirth, and conditions relating to pregnancy and childbirth.⁹⁹⁴The Virginia Human Rights Act and the Delaware Code also include ‘lactation’ as a protected ground.⁹⁹⁵Of note, is the fact that even though nineteen state statutes have not been amended to expressly provide that pregnancy discrimination is sex discrimination, as Title VII was so amended, it has not prevented their state courts from declaring that where a state statute is patterned after the relevant federal statute, it is to be construed in the same manner as the federal statute is construed. That is, to include pregnancy discrimination.⁹⁹⁶Nevertheless, a specific limitation of many of the state antidiscrimination laws is that despite covering *more* pregnant employees than their federal counterpart, the majority follow the federal judicial interpretation of PDA. This is to say that they require formal equality, in that a pregnant employee ‘shall be treated the same for all employment-related purposes... as other persons not so affected but similar in their ability or inability to work.’⁹⁹⁷

Notably, in 2013, only six states in the Union mandated that a private employer provide some type of workplace accommodation for a pregnant employee, if requested. These are Louisiana, Connecticut, California, Hawaii, Maryland, and Washington. The Louisiana law expressly provides that it shall be an unlawful employment practice to refuse a pregnant employee a ‘reasonable period of leave,’ (not to exceed four months) or ‘to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy.’ Moreover, if an employer does not provide disability leave under a health, sickness, or temporary disability insurance

⁹⁹³ Connecticut Human Rights Act, Conn. Gen. Stat. § 46a-51 (17) (2013).

⁹⁹⁴ The Illinois Human Rights Act, 775 ILCS 5/2-102 (I) (2013).

⁹⁹⁵ Va. Code Ann. § 2.2-3903B (2013). Del.C. Title 19 Chapter 7, § 710.

⁹⁹⁶ For example, *Amy Carsillo v. City of Lake Worth* 995 So2d 1118 (Fla 4th DCA 2008); *Carol Self v. Midwest Orthopedics Foot & Ankle, P.C.* 272 SW3d 364 (Mo2008); *Lavalley v E.B. Whiting Co.*, 166 Vt 205 (1997).

⁹⁹⁷As illustrated by the Kentucky Civil Rights Act: Ky. Rev. Stat. 344.030 (8).

plan, an employer ‘shall not refuse’ an employee disabled by pregnancy, childbirth or related medical conditions a leave of absence for up to eight weeks.⁹⁹⁸

Additionally, the Connecticut legislature has amended its Human Rights Act to prohibit an employer from terminating the employment of a pregnant employee, from refusing to grant a reasonable leave of absence for disability as a result of pregnancy, for failing or refusing to make a reasonable effort to transfer a pregnant employee to any suitable temporary position which may be available, or for failing to reinstate a pregnant employee to her original job or equivalent position.⁹⁹⁹ A reasonable leave of absence has been interpreted to mean 6-8 weeks for a normal pregnancy, but can be as long as is medically necessary.¹⁰⁰⁰

Similar measures are contained in the California Fair Employment Housing Act (FEHA), generally applying to employers of five, or more full or part-time employees;¹⁰⁰¹ the Hawaii Administrative Rules, applicable to employers of one or more employees;¹⁰⁰² the Washington State law against discrimination, applicable to employers with eight or more employees (Rev. Code Wash. (ARCW) § 49.60.040 (7)(b) (2013), and the Maryland State Government Code, which repealed and re-enacted §20–601(a)-(d) and 20-606(a)(4)) requiring reasonable accommodation in workplaces with fifteen, or more employees.¹⁰⁰³ Notably, in the period 2014-2015, the number of these state ‘accommodation’ laws, almost doubled, as Delaware, Washington D.C., Illinois, Minnesota and West Virginia adopted laws expressly requiring private employers

⁹⁹⁸ Louisiana Pregnancy Discrimination Law, Acts 1997, No. 1409, §1, eff. Aug. 1, 1997, La. R.S. 23:342.

⁹⁹⁹ See: Section 46a-60 (7) of the Connecticut Human Rights Act, Conn. Gen. Stat. § 46a-51 (17) (2013), the employer must have three or more employees.

¹⁰⁰⁰ PCSW, *Connecticut General Assembly: Permanent Commission on the Status of Women. About Your Rights.*

¹⁰⁰¹ Additionally, employers of 50 or more full or part-time employees are required to provide 12 additional weeks under the Moore-Brown-Roberti Family Rights Act 2008, Gov. Code sections 12945.1, 12945.2.

¹⁰⁰² Hawaii Administrative Rules 4, §12-46-106 through 108 [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-8).

¹⁰⁰³ Employment Discrimination- Reasonable Accommodations for Disabilities Due to Pregnancy, (HB 0804) Chapter 548. Additionally, Maryland has a Bill pending to provide leave for pregnancy and childbirth: Employment Discrimination-Leave for Pregnancy and Childbirth HB1334.

provide an accommodation for employees who have ‘work-related limitations stemming from pregnancy, childbirth, or related medical conditions.’¹⁰⁰⁴

Additionally, while not expressly providing for different treatment of pregnant workers, twenty-four state statutes require that disabilities stemming from pregnancy and childbirth are treated the same as all other ‘temporary disabilities’ for all job-related purposes.¹⁰⁰⁵ This is a promising development in US antidiscrimination law, particularly as the majority of these enactments were in direct response to the lower federal court ruling in *Young v UPS, Inc.*, in which a pregnant worker with a lifting restriction was found ineligible for a light duty assignment under a Collective Bargaining Agreement that only provided temporary alternate work for employees, ‘unable to perform their normal work assignments due to an on-the-job injury.’ Instead, the pregnant worker was forced to take an extended unpaid leave of absence and lost her medical coverage until her return to employment, after giving birth.¹⁰⁰⁶

Despite the fact that UPS changed its policy, effective 1 January 2015, to include pregnancy related impairments, and the US Equal Employment Opportunity Commission issued new guidelines for employers regarding the situations in which a refusal to provide a workplace accommodation to a pregnant worker may constitute discrimination, six state legislatures have elected to amend their antidiscrimination laws to expressly require accommodation of pregnant workers, and large number of others prohibit employers from distinguishing between work and non-work related illness and injury for the purposes of providing light duty work. As the recent determination of the USSC in *Young*, rejected the argument that the PDA requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to

¹⁰⁰⁴ Del.C. Title 19 Chapter 7, § 710; D.C. Code § 2-1401.05 (b); 775 Ill. Comp. Stat. 5/2-102(I)-(J); Ill. Adm. Code tit. 56, § 5210.110; Minn. Stat. § 363A.08; Pregnant Workers’ Fairness Act, W.Va. Code § 5-11B-2.

¹⁰⁰⁵ ‘DOL, ‘State-level Provisions for Pregnancy Accommodation and Pregnancy-Related Disability.’ (DOL, 2015) <<http://www.dol.gov/wb/maps/3.htm>> accessed 8/3/15.

¹⁰⁰⁶ *Young* (n 137). See: Brigid Schulte, ‘States move to ensure pregnant workers get fair chance to stay on job’ (*The Washington Post*, 2014) <<http://www.washingtonpost.com/blogs/she-the-people/wp/2014/09/08/states-move-where-congress-wont-to-ensure-pregnant-workers-get-fair-shot-to-stay-on-job/>> accessed 7/3/15.

workplace disabilities that have other causes, but have a similar effect on the ability to work, it may be concluded that state legislators will continue to respond.¹⁰⁰⁷

b Critical observations.

A critic would argue that the state antidiscrimination laws outlined above do little to shift the trajectory of US antidiscrimination law as it applies to pregnancy. In response, it is suggested that as notable as the general lack of state measures mandating workplace accommodations for pregnant employees is, four factors mitigate against eschewing the US states as laboratories of democracy, and dismissing their role in shifting the US towards greater substantive equality.

First, this research found that two other states mandate workplace accommodations for pregnant workers, but limit their mandate to public employees (Alaska, and Texas).¹⁰⁰⁸ This suggests that workplace accommodations are on their legislative radar, and may be expanded to private workplaces in the future.

Secondly, the absence of a state mandate does not preclude voluntary employer policies. In light of the US Supreme Court denial of a petition for a writ of certiorari in *Harness v. Hartz*, private employers remain free to *voluntarily* provide an accommodation to pregnant employees, without being considered to have discriminated against male employees.¹⁰⁰⁹ Indeed, this research found that accommodations for pregnant and breastfeeding workers are often provided in the collective bargaining agreements negotiated between employers and unions.¹⁰¹⁰

Thirdly, while state law may not require private employers to provide workplace accommodations for pregnant employees, municipal law may. For example, in New York City (NYC) pregnancy is deemed a ‘disability’ under its Human Rights Law, requiring employers within city limits and with more than four employees to make

¹⁰⁰⁷ See: UPS, *No. 12-126 Young v. UPS, Brief for the Respondent* (2014), EEOC, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* (2014), and *Young v. United Parcel Service, Inc.* 575 U. S. ____ (2015)

¹⁰⁰⁸ Alaska Stat. § 39.20.500(a); 39.20.520; Tex. Loc. Gov’t Code Sec. 180.004.

¹⁰⁰⁹ *Harness v. Hartz Mountain Corp.* 877 F2d 1307 (6th Cir 1989).

¹⁰¹⁰ See the discussion in David A. Dilts and Hedayeh Samavati, ‘The Arbitration of Gender Discrimination Grievances in the United States’ (2997) 12 J Individual Employment Rights 209, 215.

‘reasonable accommodations’ for their pregnant employees.¹⁰¹¹ As with state laws, the value of municipal laws in achieving greater substantive equality for pregnant workers in the US cannot be overstated, because they often apply to a vast number of workers. This is the case in NYC, which is the most populous city in the US, consisting of more than eight million people, within a state of more than nineteen million people.¹⁰¹² Placing this data into perspective, NYC has a population that is higher than that found in each of fifteen of twenty-eight EU member states.¹⁰¹³ This suggests that the NYC measure will have a significant positive impact on the lives of pregnant workers and the families they support.

Finally, two states have enacted equality measures containing provisions intended to address *other* discriminatory actions by employers that affect pregnant workers; thereby showing an awareness of the lacuna in national laws. For instance, the Human Rights Acts of Idaho and Missouri explicitly address the issue of ‘associative’ discrimination, as discussed previously in Chapter 4. The Idaho Human Rights Act provides, ‘The prohibition to discriminate shall also apply to those individuals without disabilities who are associated with a person with a disability.’¹⁰¹⁴ This provision would undoubtedly cover a situation of the type that arose in the *Coleman* case, also discussed in Chapter 4, and involving a woman who was dismissed from her employment in the United Kingdom. In that case, the CJEU found the employer to have unlawfully discriminated against Mrs. Coleman because of her association with her disabled child.¹⁰¹⁵ It is suggested that there is nothing prohibiting the application of the Idaho statute to a person associated with a woman *disabled by pregnancy*, although any such case has yet to be decided by the Idaho state courts. In an aside, it is acknowledged that the pregnancy ‘disability’ would also have to meet the criteria of Americans with Disabilities Act, as amended, as the Idaho statute mirrors federal law.¹⁰¹⁶

¹⁰¹¹ NYC Human Rights Law, Title 8 of the Administrative Code of the City of New York.

¹⁰¹² ‘State & Country QuickFacts’ (*US Govt.*, 27 June 2013).

<<http://quickfacts.census.gov/qfd/states/36/3651000.html>> accessed 2/7/2013

¹⁰¹³ For data, see: Europa, *Member Countries of the European Union* (2013).

¹⁰¹⁴ Idaho Human Rights Act, Idaho Code §67-5090.

¹⁰¹⁵ *S. Coleman v Attridge Law and Steve Law* (n 578).

¹⁰¹⁶ ADA (n 141); ADA Amendments Act of 2008 (n 141).

Notably, the prohibition against ‘associative’ discrimination contained in the Missouri Human Rights Act (MHRA) is not only broader than the Idaho measure; it is also broader than the EU’s PWD and Equal Treatment Directive. (ETD)¹⁰¹⁷The MHRA provides that it is an *additional* unlawful discriminatory practice for employers with six or more employees, ‘to discriminate in any manner against any other person because of such person’s association with any person *protected* by this chapter.’¹⁰¹⁸The protected grounds explicitly listed in the chapter are ‘race, color religion, national origin, ancestry, and sex, and age as it relates to employment, disability, or familial status as it relates to housing.’¹⁰¹⁹As the Missouri Court of Appeals has restated in *Self v. Midwest Orthopaedics*, that pregnancy discrimination constitutes sex discrimination under the MHRA, it may be concluded that discrimination against a person because of their association with a pregnant partner, disabled *or otherwise*, would also be prohibited.¹⁰²⁰In particular, the language of the MHRA suggests that a situation of the type that arose in *Kulikaoskas v Macduff*, also discussed previously in Chapter 4, would be prohibited—that of an employer affording less favourable treatment to a man on the grounds of a woman’s pregnancy.¹⁰²¹This conclusion is supported by the fact that although the Missouri courts have yet to consider ‘associative’ discrimination in relation to pregnancy, they have considered it in relation to the protected ground of disability. This was the case in *Francin v Mosby*, where the court found evidence that an employee was discharged from employment shortly after discussing his wife’s illness during an interview with his new supervisor, and after having stated an intention to take leave under the FMLA and requesting to work part-time.¹⁰²²In its ruling, the court

¹⁰¹⁷ See: RSMO-Chapter 213 Human Rights. See: Pregnant Workers Directive (n 112), Recast Directive (n 15) Note: Neither EU Directive contains any provision relating to associative discrimination. However, the legislation of several member states do contain such provision, e.g. Ireland, Bulgaria, Austria, UK, as stated in, Commission, ‘Gender Equality Documents’ (*Commission, 2/5/2014*) 56.
<http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-4> accessed 15/2/2014

¹⁰¹⁸ Title 12. Public Health and Welfare. Chapter 213. Human Rights. Additional unlawful discriminatory practices. § 213.070(4) R.S.Mo. (2013) (emphasis added.).

¹⁰¹⁹ Title 12. Public Health and Welfare. Chapter 213. Human Rights. Additional unlawful discriminatory practices. § 213.010 R.S.Mo. (2013).

¹⁰²⁰ *Self* (n 1019) 369.

¹⁰²¹ *Kulikaoskas* (n 579).

¹⁰²² *Francin v. Mosby, Inc.* 248 SW3d 619 (Mo App ED2008).

expressly stated that the statute ‘provides a cause of action where an employee is discriminated against for his association with a person protected by the MHRA.’¹⁰²³

Nevertheless, as potentially ground-breaking as the Missouri measure is, and reflective of substantive equality measures that are helpful to pregnant employees and their families, US state and municipal measures otherwise fall short in comparison with the provisions of the EU’s PWD.¹⁰²⁴ This is because even where workplace accommodations are mandated they are limited by a proviso that a request for accommodation is unreasonable if it imposes ‘an undue hardship’ on the employer, without any provision for paid leave in the alternative.¹⁰²⁵ In point of fact, only seven states in the Union provide paid family/and or sick leave in addition to, or in the absence of an employer provided accommodation. (California, Connecticut, Hawaii, New Jersey, New York, Rhode Island, Washington.) All of which underscores the observation by the National Partnership for Women and Families that in the US, ‘New and expecting parents need more—and expect better.’¹⁰²⁶

c Leave measures

Notably, the US state legislatures have not been as productive in enacting leave measures as they have been with regard to enacting antidiscrimination measures. This study found that only eighteen states have separately enacted measures, or amended their existing legislation to embody the leave provisions contained in the FMLA, compared with the forty-eight states that have adopted measures embodying the provisions of Title VII. Moreover, even where seven states have enacted paid leave legislation, their provisions are less generous than those found in most EU member states, with the one year maternity, paternal, and parental leave mandated in Denmark being the most generous in the EU, of which thirty-two weeks are paid at a rate that may amount to full pay. In contrast, the average number of weeks available to pregnant workers and women on maternity leave in the US states are fewer than the average

¹⁰²³ *ibid* 622.

¹⁰²⁴ Pregnant Workers Directive (n 112).

¹⁰²⁵ *ibid*, Article 5(3)

¹⁰²⁶ National Partnership for Women and Families, *Expecting Better: A State by State Analysis of Parental Leave Programmes* (2005) 5

fourteen weeks of paid leave available in the EU, under the PWD¹⁰²⁷ and in comparison to the fourteen weeks stipulated by the International Labour Organization (ILO) Convention on Maternity Leave.¹⁰²⁸ Paid leave in the US states is also certainly less than the average nineteen weeks of paid maternity leave estimated to exist across the thirty-eight countries in the international Organization for Cooperation and Economic Development (OECD).¹⁰²⁹

The foregoing observation suggests that it is somewhat more palatable for US states to enact measures that proscribe conduct than it is for them to enact measures imposing positive duties upon employers, and providing for paid leave. This suggestion is supported by academic research showing that the proposal for paid leave in California met with significant employer opposition intended to defeat the bill.¹⁰³⁰ The research of Appelbaum and Milken found that the California business community was concerned the enactment of the programme would impose ‘extensive new costs on employers,’ would be a ‘particularly serious burden for small businesses,’ and had ‘strong concerns’ about abuse of the program.¹⁰³¹ These concerns have largely proven to be unfounded, as the programme is 100% funded by a payroll tax on *employees*, with no evidence of widespread abuse. Furthermore, as regards increased administrative and personnel costs to employers, Appelbaum and Milken’s research found that, ‘After more than five years’ experience with [Paid Family Leave], the vast majority of employers report that it has had minimal impact on their business operations.’¹⁰³²

Similarly, the passage of the New Jersey paid leave programme in 2008 had to overcome twelve years of legislative battles to provide six weeks of paid leave, rather than the twelve weeks originally proposed. Even on its day of passage, it was strongly opposed by the Chamber of Commerce, alleging that it would make business in New

¹⁰²⁷ See discussion in Chapters 3 and 4. See Appendix 4.

¹⁰²⁸ ILO, *The TRAVAIL Database of Conditions of Work and Employment: Working Time-Minimum Wages-Maternity Protection* (2012). The US has not ratified C183- Maternity Protection Convention, 2000 (No.183), Geneva, 88th ILC session (15 Jun 2000).

¹⁰²⁹ OECD—*Social Policy Division—Directorate of Employment, Labour and Social Affairs. PF2.1: Key characteristics of parental leave systems* (2012).

¹⁰³⁰ See: *Senate Committee on Labor and Industrial Relations hearing on Bill No SB 1661, Disability Insurance: Family Members* (2001-2002).

¹⁰³¹ Appelbaum and Milkman *Leaves that Pay* (n 9) 4.

¹⁰³² *ibid.*

Jersey ‘more expensive, more challenging and less competitive...’¹⁰³³ Despite the economic concerns voiced against the provision of paid leave, sixteen US States currently have some form of paid leave legislation pending, modelled on the California program considered further below.¹⁰³⁴

Overall, state-enacted leave measures relating to pregnancy and maternity are more expansive than the federal leave statute (FMLA), solely virtue of the greater number of employees covered, and less stringent eligibility requirements imposed. As stated previously, the FMLA applies only to private workplaces with 50 or more employees, and requires employees to have worked 1250 hours in 12 months prior to the taking of leave. In contrast, state measures vary from applying to private workplaces having between 1, and 100 employees, and in the number of hours and months that an employee is required to have worked for a covered employer. Leave lengths also vary from a ‘reasonable’ period of absence due to pregnancy, childbirth or related medical condition, to between 6 and 12 weeks in a 12-month period, or 10 or 16 weeks in a 24-month period. Notably, in Tennessee, private employers with 100 or more employees are required to provide up to four months of gender-neutral leave for adoption, pregnancy, childbirth, and nursing.¹⁰³⁵ Whereas, public employers of 30 or more employees and private employers with 50 or more employees in Rhode Island are required to offer 13 weeks of maternity leave in 24 months.¹⁰³⁶

Several states also expressly provide leave for ‘pregnancy disability’. The Oregon provision for family leave includes ‘any period of disability due to pregnancy...’¹⁰³⁷ Furthermore, where an Iowa employer (of 4 or more employees) does not provide disability leave under a health, sickness or temporary disability insurance plan, state law mandates that they ‘shall not refuse’ an employee disabled by pregnancy, childbirth or related medical conditions a leave of absence for up to eight weeks.¹⁰³⁸

¹⁰³³ Southern NJ Chamber of Commerce, *Paid Family Leave Desk Letter-Full Senate*, April 7, 2008 (2008)

¹⁰³⁴ NCSL, *Employee Leave Legislation—2014 Year End Summary* (2014).

¹⁰³⁵ Leave for Adoption, pregnancy, childbirth and nursing and infant Tenn. Code. Ann. § 4-21-408.

¹⁰³⁶ Rhode Island Parental Family and Medical Leave Law, R.I. Gen. Laws § 28-48-1 *et seq.*

¹⁰³⁷ Family Leave, ORS § 659A.150 (6) (c) (2011).

¹⁰³⁸ Iowa Civil Rights Act of 1965, Iowa Code § 216.6 (2) (2013).

While leave without pay is clearly not the best solution for women with families dependent upon their income, it is far preferable to dismissal from employment.¹⁰³⁹

Importantly, even if a state measure does not mandate family and, or medical leave beyond federal provisions, it may expressly award unemployment insurance benefits to pregnant women, unable to work ‘due to disability.’¹⁰⁴⁰ And, as stated previously, a private employer may voluntarily elect to do so. Notably, US government statistics also show that paid leave, which includes pregnancy and maternity leave, was the most prevalent employee benefit provided by private employers throughout the US in 2012, with 84% of private industry workers receiving holiday or personal leave, and 61% covered by a sick leave plan.¹⁰⁴¹ However, statistics also indicate that the voluntary employer provision of maternity leave in the US is more generally available to the educated classes. Between 2006 and 2008, 66% of new mothers with a bachelor’s degree had access to paid leave, before or after the birth of their first child, compared to 19% of new mothers who had less than a high school education.¹⁰⁴² This suggests that for women without access to paid leave and workplace accommodations, an overriding concern by US liberal feminists of ‘paternal protectionism,’ and push for gender neutrality may appear somewhat elitist. It may also be that scholars who object to special measures, on the basis that ‘they don’t disrupt the gendered patterns of working and caring that reinforce the in egalitarian relationship at home and at work,’ tend to do so from a privileged vantage point.¹⁰⁴³ Suggesting, therefore that state and local equality measures help bridge an obvious socio-economic gap in the protection that exists in the US.

¹⁰³⁹ See: UN, *Children’s Rights and Business Principles* (2012). The survey reported that 5% of women were ‘let go’ from their employment during pregnancy or within 12 weeks of giving birth.

¹⁰⁴⁰ See: Colorado C.R.S. 8-73-108(4) (b) (I).

¹⁰⁴¹ BLS and Robert W. Van Giezen, *Beyond the Numbers: Paid leave in private industry over the past 20 years* (Aug 2013/Vol 2/No18, 2013).

¹⁰⁴² UN, *Children’s Rights and Business Principles* (n 1058) 12.

¹⁰⁴³ Julie C. Suk, ‘“A More Egalitarian Relationship at Home and at Work”: Justice Ginsburg’s Dissent in *Coleman v. Court of Appeals of Maryland*, in *Essays in Honour of Justice Ruth Bader Ginsburg*’ 79 (Feb 4, 2013) (on file with the Harvard Law School <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:10582562>> accessed 9/25/2013).

d California—the ‘gold standard.’

This research found the broadest equality measures are those contained in the family and medical leave and temporary disability insurance programs enacted in California, Hawaii, New Jersey, New York, and Rhode Island, which are intended to ensure that a woman unable to work due to disability during pregnancy, receives some monetary benefit. However, as laudable as these measures are, they are inadequate to address the lack of national public income support payments tied to leave. They also differ greatly in their provisions. For instance, New York has two state laws that combine with the FMLA to give 18 weeks partly paid, job-protected leave for a ‘normal’ pregnancy and childbirth, with a maximum of 26 weeks for a ‘complicated’ pregnancy and childbirth, such as one involving a caesarean section. In contrast, for a normal pregnancy and childbirth, leave consists of 2 weeks under New Jersey Family and Medical Leave Act and 16 weeks under the temporary disability leave law. The temporary disability leave is also not paid maternity leave—it covers pregnancy disability and childbirth. It is the state and federal FMLA, which provide *unpaid* leave for a New Jersey worker to care for a newborn infant.

Furthermore, in all five states, a pregnant worker must also meet the separate eligibility requirements for disability insurance coverage in order to receive benefits. And, an evident limitation is that they are a monetary benefit *only* and not a leave entitlement. Consequently, they do not provide for job protection, only the state and federal FMLAs do. In addition, while New York provides up to 26 weeks of disability benefits for pregnant workers and women who have given birth, that state lacks any leave measure, although a leave Bill is currently pending in the legislature.¹⁰⁴⁴ Instead, New York’s temporary cash benefits are available to most workers when they are disabled by an injury or sickness that is not work-related. This benefit amounts to fifty percent of the employee’s average weekly wage, to the maximum benefit of \$170 per week, and applies to ‘disability caused by or in connection with a pregnancy.’ (N.Y. Workers’ Comp. Law § 201(9) (B).)

¹⁰⁴⁴ See: New York State Assembly. Bill No. S04373 and AO3069.

It is generally acknowledged that the California measures mandating leave and benefits for private employees set the gold standard for state programmes in the US. Considered to be ‘a model of success,’¹⁰⁴⁵ receiving an ‘A grade’ from the National Partnership for Women and Families, research reveals that California has gone further than any other state (and Congress) in seeking to achieve substantive equality for pregnant workers.¹⁰⁴⁶ Enacted subsequent to the amendment of the California Fair Employment and Housing Act (FEHA) in 1978, to proscribe certain forms of employment discrimination on the basis of pregnancy, and requiring employers with five or more full or part-time employees to provide up to four months unpaid, job-protected disability leave,¹⁰⁴⁷ the measures was amended in 1992 to provide a woman up to 55% of salary to a maximum weekly cap of \$1104, in 2015, under the state disability plan.¹⁰⁴⁸ This provision was supplemented in 1993 by the California Family Rights Act (CFRA), under which workers were provided an additional 12 weeks of unpaid, job-protected leave to bond with a newborn, adopted child or foster child.¹⁰⁴⁹ Then, recognizing that many workers could not afford to take an extended leave without pay, in 2002, the California Paid Family Leave Insurance Programme (‘PFL’ - § 3300 (2013)) was enacted to provide up to 6 weeks of ‘partial’ wage replacement to eligible employees, financed through payroll taxes. Estimated to cover approximately thirteen million workers in California, the program is notable for being the first of its kind in the US, and is intended to make it easier for employees to balance the demands of the workplace and family care needs at home, by providing approximately 55% of lost income.

However, as groundbreaking as the California provisions are, a closer review reveals that they too are limited in comparison to the EU’s Pregnant Worker’s Directive. The academic discourse surrounding the enactment of the California laws strongly suggests that these limitations are partly due to stakeholder objections. Indeed, the PFL

¹⁰⁴⁵ ERA *Expecting a Baby*, (n 53)14.

¹⁰⁴⁶ NPWF, ‘Expecting Better: A State-by-State Analysis of Law That Help New Parents’ (2012) <www.NationalPartnership.org> accessed 6/8/2013.

¹⁰⁴⁷ 1978 Cal. Stat. 4320 § 1, adding CAL. LAB. CODE § 1420.35 to the California Fair Employment Practice Act, former CAL. LAB. CODE §§ 1410-33.

¹⁰⁴⁸ EDD, ‘DI and PFL Weekly Benefit Amounts’ (1 Jan 2015). <http://www.edd.ca.gov/pdf_pub_ctr/de2589.pdf> accessed 8/3/15

¹⁰⁴⁹ CFRA (n 1023).

was originally intended to provide for 12 weeks leave, but employer objections led to negotiations resulting in reduced the leave time, removing the employer contribution, and allowing an employer to require that an employee use up to two-weeks of employer provided vacation before applying for state benefits.¹⁰⁵⁰ Additionally, the PFL does not provide either job protection or return rights, and the wage replacement is lower than that found in most EU states. Nevertheless, this research found the PFL law to be a progressive and substantive equality law that applies equally to fathers and to mothers, helping to overcome the stereotype that ‘baby bonding time’ is an exclusive need of mothers. Its importance also lies in the fact that the California legislature made specific declarations in the Act that are analogous to the preamble of several EU social Directives, including the Parental Leave Directive, (2010/18/EU), relating to issues of flexibility and work life balance.¹⁰⁵¹ Specifically, the California legislature found and declared that:

(c) Developing systems that help families adapt to the competing interests of work and home not only benefits workers, but also benefits employers by increasing worker productivity and reducing employee turnover.

(f) The majority of workers in this state are unable to take family care leave because they are unable to afford leave without pay. When workers do not receive some form of wage replacement during family care leave, families suffer from the worker’s loss of income, increasing the demand on the state unemployment insurance system and dependence on the state’s welfare system.

*(g) It is the intent of the Legislature to create a family temporary disability insurance program to help reconcile the demands of work and family.*¹⁰⁵²

While the legislative history of the PFL law does not reference EU legislation, the comments listed in the third reading of its passage as Senate Bill 1661, indicate an awareness of the unenviable situation of the US, in comparison to other countries. This is to say that ‘the United States is one of the few developed countries in the world without a national paid parental leave program.’¹⁰⁵³

¹⁰⁵⁰ See: workingfamilies.org, *A Guide to Implementing Paid Family Leave: Lessons from California* (2011) < http://www.paidfamilyleave.org/pdf/pfl_guide.pdf > accessed 10/8/2015

¹⁰⁵¹ Parental Leave Directive 2010/18/EU (n 535). See also Chapters 3 and 4.

¹⁰⁵² California Unemployment Code Section 3300-3306.

¹⁰⁵³ Senate Third Reading SB 1661 (Kuehl), as Amended August 23, 2002. Majority Vote.

Importantly, research also suggests that the California programme has been an unequivocal success. Statistics produced by Rossin-Slater, Mayer, and Waldfogel show that the availability of partial wage replacement has increased leave use in California by 115- 140%.¹⁰⁵⁴ Prior to the adoption of the PFL, women in California took around 3-weeks of maternity leave. With the advent of the Act, not only has leave taking increased by an average of 3-4 weeks, it has had a positive labour market effect for women, with ‘an 6-9% increase in work hours, conditional on employment, 1-3 years after the birth, and possibly with similar growth in wage income.’¹⁰⁵⁵ Unsurprisingly, these statistics have been used to support President Obama’s call for Congressional passage of publically supported paid leave law.¹⁰⁵⁶

It is notable that in addition to guaranteed leave in California, pregnant employees are entitled to a ‘reasonable accommodation’ of pregnancy and related medical conditions. Under the FEHA, a pregnant employee may request transfer to less strenuous or hazardous position for the duration of her pregnancy. The Regulations contained in the California Government Code, Section 12926, state that accommodation includes ‘childbirth or medical conditions related to childbirth’ and ‘breastfeeding or medical conditions related to breastfeeding.’ Accommodations may include not only the provision of facilities for breastfeeding, but also ‘job restructuring, part-time, or modified work schedules.’ The reasoning behind these provisions is that accommodation of pregnant workers, rather than transfer, would be ‘less costly, and often more desirable and appropriate’ for both the employer and the employee.¹⁰⁵⁷

Collectively the California laws most closely resemble EU equality laws for this category of workers. However, as expansive as the California’s laws are, it is undeniable that they are too geographically limited in effect to be able to address the lacuna in federal law. The California laws are applicable to a population of only 38 million people in a nation of approximately 318 million people.¹⁰⁵⁸ Nevertheless, it is suggested that California, along with other US state (and local) legislatures are ‘testing the waters’ of

¹⁰⁵⁴ Rossin-Slater, Ruhm and Waldfogel (n 9) 12.

¹⁰⁵⁵ *ibid.*

¹⁰⁵⁶ See the discussion in Chapter 7.

¹⁰⁵⁷ Senate Judiciary Committee, *AB 1670, Assembly Judiciary Committee, Hearing August 17, 1999. DLM: cjt, Civil Rights: Employment and Housing* (1999) Comment 2(d).

¹⁰⁵⁸ US Census, *State and County Quick Facts* (2015).

paid parental leave and workplace accommodations.¹⁰⁵⁹The ripple effect of such enactments cannot be overstated. California’s measures have become the model for legislative proposals mandating paid leave and workplace accommodations for pregnant workers nationally,¹⁰⁶⁰ and as the National Conference of State Legislatures notes, the legislatures in thirty-five states and Washington D.C. considered bills related to employee leave in 2014.¹⁰⁶¹This number will likely increase in 2015, as the President’s Budget includes \$2.2 billion in funds to support the US states in developing paid family and medical leave programs.¹⁰⁶²

e Breast-feeding accommodation.¹⁰⁶³

In 2012, the US was listed last out of thirty-six developed countries on the ‘Save the Children’s *Breastfeeding Policy Scorecard*.’¹⁰⁶⁴ Attempting to fill the lacuna in national law, twenty-five US states and Washington D.C. have separately addressed breastfeeding in the workplace by prohibiting discrimination against breastfeeding workers, and/or by requiring workplace accommodations. Notably, all of these state breastfeeding measures were enacted prior to the 2010 amendment to Section 7 of the Fair Labor Standards Act (FLSA), which was discussed in Chapter 5. Section 7 now requires employers of fifty or more employees covered by the Act are to provide *unpaid reasonable* break time for employees to express breast milk for one year after a child’s birth, as well as ‘a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public,’ to be used by female employees to express milk.¹⁰⁶⁵

¹⁰⁵⁹ See: R Haygood and R Hensley, ‘Beyond the FMLA: A survey of state laws and legislation mandating paid family leave’ (2007) 34 *Empl Relats Today* 63, 73.

¹⁰⁶⁰ See: Pregnant Workers Fairness Act, S.942/ H.R.1975; Supporting Working Moms Act of 2013, S.934/ H.R.1941; Flexibility for Working Families Act, S.1406 /H.R. 2559.

¹⁰⁶¹ NCSL, ‘2014 Employee Leave Legislation’ (*NCSL*, 12/12/14) <<http://www.ncsl.org/research/labor-and-employment/2014-employee-leave-legislation.aspx>> accessed 8/3/15.

¹⁰⁶² OPS, *Fact Sheet: White House Unveils New Steps for Strengthening Working Families Across America* (*White House*, 14/10/15) <<http://www.whitehouse.gov/the-press-office/2015/01/14/fact-sheet-white-house-unveils-new-steps-strengthen-working-families-acr>> accessed 2/2/2015.

¹⁰⁶³ This section uses the terms ‘breastfeeding,’ ‘nursing,’ and ‘lactating’ interchangeably to describe the action of feeding a baby from a mother’s breast, and the secretion of milk from mammary glands.

¹⁰⁶⁴ Save the Children, *Nutrition in the First 1,000 Days: State of the World’s Mothers 2012* (2012) 39.

¹⁰⁶⁵ Including Texas—1995, Minnesota—1998, Tennessee—1999, New Mexico, New York, and Oregon—2007. Fair Labor Standards Act of 1938 (29 U.S.C. 207) Patient Protection and Affordable Care Act, Public Law 111-148, Section 4207. As of March 23, 2010 amended section 7. See Appendix 3.

However, as with state enacted antidiscrimination and leave measures, state breastfeeding measures vary greatly in the rights and protections they afford. For instance, Mississippi and Hawaii prohibit discrimination against the use of ‘lawful’ break time to express breast milk, but do not mandate any workplace accommodations.¹⁰⁶⁶In Connecticut, employers are prohibited from discriminating against an employee who has the right to use her meal or break period to express breast milk, but employers are not required to provide additional break time. The Connecticut statute also mandates that employers ‘shall make reasonable efforts’ to provide a private location.¹⁰⁶⁷

In contrast, the Washington D.C. Human Rights Act includes breastfeeding within the definition of sex discrimination, *and* requires employers to provide reasonable unpaid breaks and a sanitary location.¹⁰⁶⁸Additionally, Rule 4-518, setting forth the D.C. Breastfeeding Guidelines recommend employers offer breastfeeding employees a flexible schedule, job-sharing or telecommuting arrangements, and allow the employee to bring a small fridge or freezer for storage.¹⁰⁶⁹

The size of the workplaces covered by the state statutes also varies, from 1, 3, 4, 8, 25, or 50 employees, and with the majority of state measures limiting the length of accommodation from birth until 12 months. Only Vermont and New York require an accommodation to continue for three years. Additionally, while not expressly mandating that employers provide special accommodations to their breastfeeding employees, the legislatures of three states have adopted ‘joint resolutions’ recognizing breastfeeding’s value to the state and its citizens.¹⁰⁷⁰In the case of Virginia, while its antidiscrimination law expressly prohibits the discharge of an employee on the basis of lactation, it does not mandate any accommodation by employers. Rather, a 2002 House Joint Resolution (HJ145ER) ‘encourages’ employers to recognize the benefits of breast-feeding and to

¹⁰⁶⁶ Miss. Code Ann. § 71-1-55 (2013); HRS § 378-2 Discriminatory practices made unlawful; offenses defined; HRS §378-10.2 Breastfeeding; HRS §489-21 Discriminatory practices; breast feeding

¹⁰⁶⁷ Conn.Gen. Stat. §. 31-40w. Breastfeeding in the workplace.

¹⁰⁶⁸ Child’s Right to Nurse Human Rights Amendment Act of 2007 (Bill B17-0133). D.C. Code § 2-1402.82 (2013) et seq.

¹⁰⁶⁹ D.C. Municipal Regulations and D.C. Register. Rule: 4-518: Breastfeeding Guidelines.

¹⁰⁷⁰ As discussed in Chapter 5, joint resolutions are not law, but merely a vehicle for expressing the facts, principles, opinions, and purpose of the state legislature.

provide reasonable, unpaid break time and location to women.¹⁰⁷¹ Similarly, Wyoming adopted Bill No. 005 in 2003. Section 2 states that, ‘the Legislature encourages breastfeeding and commends employers, both in the public and the private sector, who make accommodations for breastfeeding mothers whenever feasible.’¹⁰⁷² Additionally, the 2012 Utah legislature adopted a ‘Joint Resolution on Breastfeeding’ to ‘encourage employers to make accommodations to meet the breast feeding needs of their employees.’¹⁰⁷³

In contrast, the legislatures of Washington State, North Dakota, Texas, and Rhode Island have adopted an alternative means of encouraging *voluntary* accommodation efforts by employers. These laws expressly permit an employer to use either an ‘infant-friendly’ or a ‘mother-friendly’ designation on its promotional materials, if the employer adopts an approved workplace breastfeeding policy. While all four statutes list the minimum policy requirements necessary to achieve the designation, including time, place and storage provisions,¹⁰⁷⁴ the Rhode Island law is supplemented by a \$1,000 ‘Breastfeeding support grant’ to businesses, ‘to establish or enhance’ a lactation program in the workplace.¹⁰⁷⁵

However, overall, the results of this research reveal three limitations in the state ‘breastfeeding laws,’ beyond a general lack of express mandate and paid time off. First, in comparison to the provisions of Section 7 of the FLSA, employers are exempt from the state law if they can show that ‘the practice unduly disrupts the operations of the employer’ or places an ‘undue hardship’ on the operation of the employer’s business. State statutes generally define disruption and hardship to mean any action that requires significant difficulty or expense, when considered in relation to factors, such as the size

¹⁰⁷¹ House Joint Resolution No.145: Encouraging employers to recognize the benefits of breast-feeding and set aside appropriate space for such activities.

¹⁰⁷² Original House Joint Resolution Bill No.005: Enrolled Joint Resolution No.1, House of Representatives, Fifty-Seventh Legislature of the State of Wyoming, 2003 General Session: A Joint Resolution recognizing breastfeeding’s value to the state and its citizens.

¹⁰⁷³ State of Utah 2012 General Session. H.J.R. 4 Enrolled. Joint Resolution on Breastfeeding.

¹⁰⁷⁴ Workplace breastfeeding policies-Infant friendly designation, Rev. Code Wash. (ARCW) § 43.70.640 (2013); Workplace breastfeeding policies- Infant friendly designation, N.D. Cent. Code, § 23-12-17 (2009); Business Designation as “Mother-Friendly,” Tex. Health & Safety Code § 165.003 (2013); RI Dept of Health, ‘RI Breastfeeding Coalition: Breastfeeding Support Grant’ (*State of RI*, 2013) <<http://www.health.ri.gov/partners/coalitions/breastfeeding/about/grants/index.php>> accessed 20/08/2013

¹⁰⁷⁵ *ibid*, RI Dept of Health.

of the business, the financial resources of the business, or the nature and structure of its operation, including consideration of the ‘special circumstances of public safety.’¹⁰⁷⁶

Secondly, the state measure may only apply to public employees. For instance, Montana requires all public employers to have written policy supporting the accommodation of breastfeeding workers and Indiana limits paid accommodation to state employees.¹⁰⁷⁷

Finally, only seven of the states with a legislative mandate of accommodation provide for private enforceability. Instead, the majority of states address breastfeeding accommodation as an issue of workplace conditions, rather than as discrimination.¹⁰⁷⁸ This means that where accommodation is mandated as part of a state’s health and safety, or labour laws, rather than as a human rights or antidiscrimination measure, the state’s Department of Labo[u]r enforces the law, and any fine accrues to the state, not to the employee. As most of the civil penalties are relatively small, the mandate appears somewhat toothless.¹⁰⁷⁹ Furthermore, even where a state statute permits a private cause of action, the results of this research reveal the financial consequences to an employer may be limited. This is the case in Hawaii, where the successful plaintiff is limited to an award of reasonable attorneys’ fees, the cost of suit, and \$100. (HRS §489- 22). Colorado also requires non-binding mediation between an employee and an employer prior to commencement of any litigation of a violation of the Statute¹⁰⁸⁰

f Shifting the trajectory.

Notwithstanding the limitations of state equality laws, the results of this research suggest that the state (and local) legislatures are acting as laboratories of democracy, helping to shift the trajectory of US antidiscrimination law from a purely formal equality approach to addressing the problem of pregnancy discrimination, towards one that seeks greater substantive equality between women and men. Furthermore, as the vast majority

¹⁰⁷⁶ See: the Workplace Accommodations for Nursing Mothers Act, C.R.S. 8-13.5-103 (2012).

¹⁰⁷⁷ Public Employer policy on support of women and breastfeeding-unlawful discrimination, Mont. Code Anno., § 39-2-215 (2012).

¹⁰⁷⁸ As does the FLSA (n 120), see the discussion in Chapter 5.

¹⁰⁷⁹ The author’s research found fines are levied at \$100 in California, \$100 per violation in Vermont, and \$500 in Maine.

¹⁰⁸⁰ Workplace Accommodations for Nursing Mothers Act, C.R.S. 8-13.5-103 (2012).

of US law is state law, these legislatures offer the largest *venue* for the enactment of practical measures, including job-protected paid leave, workplace accommodations, and the strategy of gender mainstreaming. Indeed, the results of this research reveal that since 2013, state legislative proposals pertaining to pregnancy and maternity have increased, with some having since become law. This was the case with Rhode Island House Bill 5889 and Senate Bill 0231, establishing a temporary caregiver insurance programme, which was signed into law on January 11, 2013. The resulting Act provides gender neutral ‘wage replacement benefits’ to workers taking time off to bond with a new child.¹⁰⁸¹ While the programme is limited in that it initially provides only four weeks of benefits, increasing to eight weeks in 2016, and the weekly rate varies between \$72 and \$752 per week, it serves to illustrate that the US State legislatures are continually proposing and enacting broader equality measures than Congress.¹⁰⁸² Indeed, Connecticut is acknowledged to be the first state in the Union to mandate that employers provide paid sick leave to eligible workers.¹⁰⁸³ In addition, on June 24, 2013, Special Act No. 13-13 was adopted by the Connecticut General Assembly, establishing a ‘Task Force on Family Medical Leave Insurance,’ to study the feasibility of creating an insurance program to provide short-term benefits to workers who are unable to work due to pregnancy, or the birth of a child, or a non-work-related illness or injury, or the need to care for a seriously ill child, spouse or parent.¹⁰⁸⁴ Added to this, in 2014, fourteen states and Washington D.C. passed a total of twenty-two employee leave measures, in which California became the second state to enact a paid sick leave law. Additionally, Massachusetts voters approved a paid sick leave law in a ballot measure.¹⁰⁸⁵

Notwithstanding the foregoing, it is incontrovertible that US state equality measures remain limited when compared to the EU’s Pregnant Workers Directive (92/85/EEC) and the national laws of the EU member states. Although inconsistencies also exist between the EU member state measures, the reality is that the presence of an

¹⁰⁸¹ RI Gen Laws. Ch. 28-41 Temporary Caregiver Insurance.

¹⁰⁸² RI Dept of Labor & Training, ‘Temporary Disability Insurance’ (*R.I. Govt.*, 2013).
<<http://www.dlt.ri.gov/tdi/>> accessed 9/8/2013

¹⁰⁸³ Paid Sick Leave Act 2011 Conn. Legis. Serv. P.A. 11-52 (S.B. 913) (West).

¹⁰⁸⁴ SB No. 6553/ HB065553LAB_031513: An Act Establishing A Task Force to Study Family Medical Leave Insurance.

¹⁰⁸⁵ NCSL, *Employee Leave Legislation-2014 Year End Summary*.

overriding Directive means that EU pregnant workers and women on maternity leave receive some level of job-protected paid leave, and the right to workplace accommodations.¹⁰⁸⁶ There is no comparative national measure in the US. Nevertheless, by recognizing the need to go further than merely prohibiting discrimination in order to advance equality, the state legislatures and Washington D.C. are moving US antidiscrimination law towards a substantive equality approach to addressing pregnancy discrimination, thereby enabling this category of workers to achieve what Grossman aptly calls, a full right to ‘social citizenship.’¹⁰⁸⁷ And, while criticism may fairly be levied at these state measures for an overriding and pervasive use of legislative terminology defining pregnancy in terms of ‘disability’ rather than *sui generis*, these measures seek to achieve the same goals as the Pregnant Workers Directive. That is, the advancement of equality of opportunity. Furthermore, it is also possible that most US pregnant workers seeking greater substantive equality care less about conceptual underpinnings and the terminology used in legislation to define their condition, or to ascribe rights, and more about the practical measures that are adopted to enable them to fully participate in the workplace.

V Conclusion

The goal of this Chapter was to present evidence of promising developments at the state level, which serve to suggest the trajectory of US antidiscrimination law is shifting away from a purely equal treatment approach to tackling pregnancy discrimination, towards one that seeks greater substantive equality. I approached this task by first discussing the Constitutional and conceptual barriers that exist to the adoption of the protective measures contained in the EU’s Pregnant Workers Directive 92/85/EEC. It was shown that although the parameters set by the US Constitution preclude an exact equivalent of the Directive, legislation providing for job-protected paid leave, workplace accommodations, and gender mainstreaming would survive a Constitutional challenge, if drafted in accordance with the parameters outlined. It was

¹⁰⁸⁶ See Chapters 3 and 4.

¹⁰⁸⁷ L.C. McClain and J.L. Grossman (eds), *Gender Equality: Dimensions of Women’s Equal Citizenship* (CUP 2009) 234.

also shown that although the objections of US equal treatment feminists has served to thwart the adoption of national legislation that treats pregnancy as *sui generis*, a different legislative forum, and, or legislative form can facilitate the passage of measures that provide some preferential treatment for pregnant workers.

Then, having explored how two specific barriers to the adoption of substantive equality measures may be overcome, it was instructive to examine the motivation for state legislatures to do so. A detailed survey of state and local laws indicated three strong motivations: (1) the adoption of an Equal Rights Amendment to the state Constitution; (2) awareness of the limited protections afforded by national antidiscrimination law; and (3) the failure of the US Senate to ratify CEDAW. These motivations, either separately or together were found to provide impetus to the enactment of a variety of equality measure benefitting pregnant workers, including protection against discrimination, job-protected leave, workplace accommodations, and the strategy of gender mainstreaming. Although a closer review revealed the vast majority of state laws are not as expansive as the PWD and likely never will be, these measures, yielded shared principles. That pregnant workers have a right to full participation in the workplace, and that states are entitled to assist in this.

Chapter 7: Gender Mainstreaming

*We must go beyond in an increasing effort to attain what in truth may be an unattainable summit.*¹⁰⁸⁸

I Introduction

Evidence was presented in the last two Chapters, which was intended to show that while there are profound differences of detail between EU and US antidiscrimination laws, there are important developments, which suggest the US is shifting away from a purely equal treatment approach to tackling the problem of pregnancy discrimination and towards one that seeks greater substantive equality. Advancing further evidence in support of this suggestion, this Chapter makes a bold and original claim, contrary to the assertions of Sylvia Walby,¹⁰⁸⁹ that the US has adopted the global strategy of gender mainstreaming domestically.¹⁰⁹⁰ Specifically, it is suggested that with President Obama's issuance of Executive Order No. 13506 in 2009, 'Establishing a Whitehouse Council on Women and Girls,'¹⁰⁹¹ gender equality in the US is moving from being merely a 'woman's issue,' to what Stratigaki correctly refers to as 'everybody's business.'¹⁰⁹²

In order to explain, justify, and elaborate upon this claim, the discussion in this Chapter is divided into five parts. Part II follows on from the initial consideration of gender mainstreaming undertaken in Chapter 3, and addresses the specific lessons that arise from EU experience with implementation at the supranational and national levels. Part II suggests that it is essential for the US to understand these lessons, and address certain conditions and factors, whose existence are deemed essential for its gender mainstreaming strategy to be implemented successfully; as well as those conditions operating to render it ineffective as a tool for achieving greater substantive equality.

¹⁰⁸⁸ William J. Brennan Jr., 'Improving the Administration of Justice Today' in Donald K. Carroll (ed), *Handbook for Judges* (1961) 139.

¹⁰⁸⁹ 'The US is noteworthy for the absence of gender mainstreaming among its gender equality policies,' Sylvia Walby, *The Future of Feminism* (Polity Press 2011) 80.

¹⁰⁹⁰ See Chapter 3.

¹⁰⁹¹ Executive Order No. 13506 (n 12).

¹⁰⁹² Stratigaki, 'Gender Mainstreaming vs Positive Action' (2005) (n 11).

Parts III and IV present evidence of the US venture into gender mainstreaming. Part III begins with a discussion of the unique vehicle chosen to adopt the strategy, revealing that while there is a history of Executive Orders designed to promote equal opportunities in the US, the use of ‘soft law’ rather than a Congressional Act renders gender mainstreaming much more fragile, and subject to continuing political good will.¹⁰⁹³ Then, considering the specific lessons suggested by EU experience with the strategy, Executive Order No. 13506 (Order) is carefully reviewed for its limitations and its transformative promise. Finally, in Part IV, an original assessment is made of US implementation efforts taken to date, and of the Order’s overall likelihood of success in moving the US towards greater substantive equality.

In Part V, it is appropriate for the discussion to pan out to consider the importance of gender mainstreaming for US equality efforts. Evidence will be offered, which is intended to show that the importance of the strategy lies in its ability to be complementary, holistic, and a less controversial tool for achieving greater substantive equality in a nation where ‘special treatment’ rights for pregnant workers, and affirmative action measures give rise to particularly emotive debates.¹⁰⁹⁴ The conclusion reached is that with the adoption of gender mainstreaming, the US is moving towards a broader and more holistic approach to addressing gender inequality that will benefit pregnant and breastfeeding workers, and women on maternity leave.

II Lessons from the EU

While the EU is arguably the international leader in the adoption of the strategy, it is generally observed that its foray into gender mainstreaming has not been an unqualified success. The results of Benschop and Verloo’s study of EU experience reveals that there were high expectations that gender mainstreaming would operate as a powerful and ‘transformative’ strategy. Indeed, it was intended to bring a, ‘new élan to the stale domain of gender equality politics.’¹⁰⁹⁵ This expectation was not wholly unreasonable for, as Jacqui True observes, gender mainstreaming represents ‘a powerful

¹⁰⁹³ See Chapter 1 for a discussion of the difference between ‘hard’ and ‘soft’ law.

¹⁰⁹⁴ See Chapters 5 and 6.

¹⁰⁹⁵ Y. Benschop and M. Verloo, ‘Sisyphus’ sisters: can gender mainstreaming escape the genderedness of organizations?’ (2006) 15 J Gen Studies 19, 20.

challenge to business-as-usual politics and policy making.’¹⁰⁹⁶This is because gender mainstreaming offers a different equal opportunity policy. In contrast to formal equality and special treatment, which focus upon the rights and needs of individuals, gender-mainstreaming focuses on the institutional structures that give rise to inequality, disadvantage, and exclusion.¹⁰⁹⁷These policy differences are best explained using the three innovative descriptions advanced by Rees:

- Equal treatment—a ‘tinkering’ approach, brings women’s rights into line with men.
- Special treatment/positive action—a ‘tailoring’ approach, designed to address women’s needs.
- Gender mainstreaming—a ‘transformative’ approach, designed to integrate gender into all, systems, structures, policies, processes, procedure, organization and culture.¹⁰⁹⁸

In short, gender mainstreaming requires policy-makers and implementers not to accept that existing policy or the policy being advanced or considered is in effect gender-neutral, or free of bias towards the male norm. As such, the strategy operates to complement existing equality laws, challenge the status quo, and end structural discrimination through its application to *all* policies—economic, social, and political. However, the discursive analysis surrounding the strategy’s adoption and implementation in the EU suggests that it has fallen short of its potential to date. One response to this often critical analysis is that as gender mainstreaming is a *long-term strategy* for dismantling structural inequalities, it is likely premature to conclusively judge its achievements, or failures. Nevertheless, the analysis is useful, as it serves to highlight the promise and the pitfalls of this equal opportunity strategy for the US. It also serves to highlight the various methods, tools, and best practices, that have evolved in the EU, which are intended to enhance its likelihood of success, while minimizing the

¹⁰⁹⁶ Jacqui True, ‘Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming’ (2001) 45 *Int Stud Quart* 27, 27

¹⁰⁹⁷ See Chapters 1 and 3.

¹⁰⁹⁸ Rees (n 11) 557

challenges posed to implementation. All of which, offers valuable lessons for US nascent efforts. A discussion of these lessons follows.

a Lessons regarding ‘adoption’ and ‘implementation.’

As observed previously in Chapter 3, the EU institutions have sought to give direction to the member states in their adoption and implementation of gender mainstreaming in their employment policies. For instance, in its ‘Manual for Gender Mainstreaming,’ the Commission emphasizes that in order to be successful; the strategy requires the completion of four steps.¹⁰⁹⁹The first step is related to implementation, ‘getting organized,’ ‘building ownership’ and getting the necessary stakeholders involved. The second stage involves knowledge building, requiring a specific understanding of gender inequalities in participation, resources, norms, values, and rights. The third and fourth stages involve assessing policy impacts and redesigning policies.¹¹⁰⁰

Arguably, successful implementation of gender mainstreaming will result in the adoption of reconciliation policies that include men in domestic labour, the right to fully paid, job-protected leave, workplace accommodations, and legislation to end the gender pay gap, gender balance on political and public corporate boards, and the recognition of a right to adequate, affordable childcare.¹¹⁰¹While it is undeniable that the EU has addressed most, if not all of these issues, the level to which gender mainstreaming has resulted in these policies being re-designed has been varied. Recalling the discussion from Chapters 3 and 4, the take up of parental leave among men in the EU remains low, childcare is a social right in some states, but not in others, the gender pay gap remains an unresolved problem and female participation in political life and on boards and committees remains limited. This variance has resulted in broad academic analysis, leading to conclusions of ‘inconsistent effectiveness in mainstreaming efforts,’^{1102a}

¹⁰⁹⁹ Commission, *Manual for Gender Mainstreaming: employment, social inclusion and social protection policies* (n 641); Council, *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practice, EG-S-MS (98) 2*. Strasbourg. Council of Europe. (n 101).

¹¹⁰⁰ Commission, *Gender mainstreaming of Employment policies: A comparative review of thirty countries* (Luxembourg: Office for Official Publications of the European Union) 5.

¹¹⁰¹ See the discussion in Chapter 4.

¹¹⁰² E.M. Hafner-Burton and M.A. Pollack, ‘Mainstreaming gender in the European Union: Getting the incentives right’ (2009) 7 *Comp Eur Politics* 114, 115.

‘considerable variation ‘ in implementation,’¹¹⁰³and ‘ uneven ‘ and ‘ambivalent outcomes’ in the EU.¹¹⁰⁴These conclusions are buttressed by the Commission’s own study of gender mainstreaming in thirty countries, which found large differences between them in their organization and implementation of the strategy.¹¹⁰⁵Of most concern was the Commission’s finding that despite the passage of more than a decade from its initial adoption in the EU:

*It is the general trend that gender differences are overall scarcely documented or taken into account in the design and implementation of policies.*¹¹⁰⁶

These inconsistencies are in large part attributable to the fact that the format for transposition of gender mainstreaming measures has been left to the discretion of the EU member states. As previously discussed in Chapter 3, the strategy relies mostly upon the Open Method of Coordination (OMC) with ‘soft law’ instruments, as the chief mode of adoption and implementation.¹¹⁰⁷This discretion has resulted in a variety of vehicles being utilized to adopt and implement gender mainstreaming, with some being more effective than others.¹¹⁰⁸And, while it is undeniable that the use of ‘soft law’ has enabled some member states to implement gender mainstreaming where public objections to governmental intrusion and economic considerations weigh heavily against the enactment of equality legislation, academic research reveals that the lack of ‘hard law’ implementation has limited the strategy’s effectiveness.¹¹⁰⁹

The Commission’s conclusions support the academic research, the results of which also suggest that the different manner in which the strategy has been adopted by

¹¹⁰³ Mark A. Pollack and Emilie Hafner-Burton, ‘Mainstreaming gender in the European Union’ (2000) 7(3) JEPP 432, 439.

¹¹⁰⁴ Stratigaki, ‘Gender Mainstreaming vs Positive Action’ (2005) (n 11)169.

¹¹⁰⁵ Commission, *Gender mainstreaming of Employment policies: A comparative review of thirty countries* (n 1123) 6; Commission, *Gender mainstreaming active inclusion policies—Final synthesis report* (Luxembourg: Publications Office of the European Union, 2009).

¹¹⁰⁶ *ibid.* Commission, *Gender mainstreaming active inclusion policies—Final synthesis report* 131.

¹¹⁰⁷ See Chapter 4 for a discussion of the OMC in the EU.

¹¹⁰⁸ Commission, *Gender mainstreaming of Employment policies: A comparative review of thirty countries* (n 1123)

¹¹⁰⁹ See: David M Trubek and Louise G Trubek, ‘Hard and soft law in the construction of Social Europe’ (presentation at the workshop “Opening the Open Method of Coordination,” Florence: July 2003), Rubery, ‘Gender mainstreaming and the open method of coordination: is the open method too open for gender equality policy?’(n 465)

the member states, affects the strategy in practice. As Rees observes, governments and organizations are not always committed to the strategy, ‘except where there is a statutory duty so to do and a political will.’¹¹¹⁰

In light of the foregoing, it is suggested that an initial lesson for the US is that without *both* a statutory obligation to mainstream gender and the political will to do so, there is a danger that gender mainstreaming will be weakly institutionalized; lessening the likelihood of policy redesign, particularly in light of the inequalities faced by pregnant workers. However, as discussed in Part III, there is not yet a national statutory obligation to mainstream gender in the US, only a political will to do so.¹¹¹¹

b Lessons regarding ‘approaches’ to gender mainstreaming.

There are also lessons to be learned from the EU regarding the approach to be taken in implementing gender mainstreaming.

The literature categorizes the varied approaches taken in the EU as either ‘integrationist,’ ‘agenda setting,’ or ‘transformative.’¹¹¹²Jahan established these approaches in 1995, and states that the difference between them is determined by the degree to which gender issues have become incorporated into existing policy paradigms, or have resulted in change in policymaking approaches and structures.¹¹¹³Where gender mainstreaming is ‘integrationist.’ gender is merely addressed within existing policy paradigms. With an ‘agenda setting’ approach, the policy agenda is reoriented. Only with a ‘transformative’ approach, is there a more complete change, involving:

*Decision-making structures and processes, in articulation of objectives, in prioritisation of strategies, in the positioning of gender issues amidst competing, emerging concerns, in building a mass base of support among both men and women.*¹¹¹⁴

¹¹¹⁰ Rees (n 11) 569. See also, Walby, ‘Gender mainstreaming: Productive tensions in theory and practice’ (n 11) 14.

¹¹¹¹ See Chapter 6, for a discussion of gender mainstreaming at the US local level.

¹¹¹² See: F. Beveridge and S. Nott, ‘Mainstreaming: A Case for Optimism and Cynicism’ (2002) 10 Fem LS 299, 300. Also: Walby, ‘Gender mainstreaming: Productive tensions in theory and practice’(n 11)

¹¹¹³ Rounaq Jahan, *The Elusive Agenda: Mainstreaming Women in Development* (Zed 1995).

¹¹¹⁴ *ibid* 126.

While accepting these distinctions, Beveridge et al., argue that for gender mainstreaming to be truly transformative, resulting in ‘engendering policy making,’ greater emphasis must be placed upon the ‘inclusion and participation of women in the decision-making processes of society.’¹¹¹⁵ This requires taking steps beyond encouraging women to participate, to include actively addressing the institutional configurations that support the current divisions of power.¹¹¹⁶ In discussing the matter, Lombardo and Meier helpfully distinguish five policymaking shifts that they argue must occur before it can be said that a ‘feminist model’ of gender mainstreaming has been put into practice. These distinctions offer valuable markers for the US in its approach to gender mainstreaming. They are as follows:

- Conceptual shift—targeting patriarchy through a focus on gender.
- Incorporation of a gender perspective into the mainstream political agenda.
- Power shift—equal political representation of women with men,
- Institutional and organizational culture shift in political decision making—requiring changes in policy process, mechanisms, and actors.
- A shift to mainstreaming diversity and greater involvement of civil society.¹¹¹⁷

This suggests that if mainstreaming is to be truly effective in the US, the approach taken must be carefully considered, chosen, and implemented. In this regard, the EU is categorized by the utilization of either the ‘*expert-bureaucratic*’ or a ‘*participatory-democratic*’ approach. The difference between these two approaches is defined by ‘who’ undertakes the assessment of gender impact.¹¹¹⁸ In the *expert-bureaucratic* approach, experts, bureaucrats, and specialists are tasked. In the *participatory-democratic* model, a broader section of civil society is included in the

¹¹¹⁵ Fiona Beveridge, Sue Nott, and Kylie Stephen, ‘Mainstreaming and the engendering of policy-making: a means to an end?’ [2000] 7 JEPP 385, 389.

¹¹¹⁶ *ibid* 403.

¹¹¹⁷ E. Lombardo and P. Meier, ‘Gender Mainstreaming in the EU: Incorporating a Feminist Reading?’ (2006) 13 EJWS 151.

¹¹¹⁸ Beveridge, Nott, and Stephen, ‘Mainstreaming and the engendering of policy-making: a means to an end?’ (n 1138).

assessment.¹¹¹⁹The existence of two approaches raises the question of which one is preferable. Research conducted by Beveridge, Knott, and Stephen suggests the second approach is preferable as it promotes participation and emphasizes official accountability.¹¹²⁰The results of Bibbings' research support this suggestion, with the conclusion that 'the broader the types of actors associated with the process of change, the more likely that gender mainstreaming will be a successful process.'¹¹²¹In effect, the *participatory-democratic* approach offers a cross-fertilization of ideas, and reflects the fifth shift in policy making required by Lombardo and Meier's feminist definition of gender mainstreaming, as discussed above. Indeed, although the two approaches are not mutually exclusive, research suggests a trend in reliance upon one or the other. This is unfortunate, as both approaches have limitations, and would work better if utilized together. A comparison of the limitations of these approaches will serve to make this last point more clearly.

Beveridge's research has found that the EU Commission at first utilized the *expert-bureaucratic* approach, and only later moved toward a more consultative *participatory-democratic* approach in the period from 1995-2006.¹¹²²The reason for the change was two-fold. The first was a finding that the expert-bureaucratic approach was characterized by a failure to incorporate broader views beyond the experts and bureaucrats. The second reason was a lack of accountability, which had the effect of resulting in very little change.¹¹²³However, the *participatory-democratic* approach to implementing mainstreaming has its own drawbacks, as Donaghy's research of Northern Ireland's experience indicates. He found that the *participatory-democratic* approach assumes, 'there are established groups and organizations with which to consult,' and concluded that in the absence of such groups, important interests are under-represented.¹¹²⁴He also found that difficulties in the ability of consultees to respond to

¹¹¹⁹ *ibid* 390.

¹¹²⁰ *ibid*.

¹¹²¹ Sharleene May Bibbings, *The politics of mainstreaming in critical perspective* (Cambridge Scholars Pub. 2012) 101.

¹¹²² Beveridge, 'Building against the past: The impact of mainstreaming on EU gender law and policy' (n 11)

¹¹²³ *ibid* 211.

¹¹²⁴ T. B. Donaghy, 'Mainstreaming: Northern Ireland's participative-democratic approach' (2004) 32 *Pol'y & Pol* 49, 56.

consultation requests, due to both time and resource limitations were also often underestimated. Furthermore, these difficulties were exacerbated where there was a lack of remuneration for the consultee's contribution of expertise.¹¹²⁵

In light of the foregoing, it is suggested that if the US intends for its implementation efforts to be successful, it ought to take a three-fold approach, seeking *transformation* by combining the '*expert-bureaucratic*' and the '*participatory-democratic*' approaches when implementing its strategy. This is to say that the US should consider mainstreaming beyond gender, utilize internal experts and specialists within the executive branch in its implementation efforts, while actively seeking external participation and consultation, where available. While a caveat is offered that the US should not assume that there are organized groups with which to consult, in light of the historic involvement of non-governmental organizations, academics, and other stakeholders in its legislative equality efforts, problems in consultation are not anticipated.¹¹²⁶ Nevertheless, every effort should be made to minimize the burdens that consultation and participation impose upon individuals and groups. This means that if participation is to be truly encompassing, the White House Council (Council), which is tasked with implementing the US strategy, should make provision for transportation, and day care, or other care costs. Otherwise, important interests may be under - represented.

c Lessons regarding 'challenges' to gender mainstreaming.

Academic research suggests that the greatest challenges and constraints to using gender mainstreaming to advance substantive equality in the EU have been four-fold.

They are:

- A lack of commitment by those charged with implementing the strategy;
- A lack of financial and human resources;
- A lack of institutional capacity;

¹¹²⁵ *ibid.*

¹¹²⁶ See the discussion in, F Strebeigh, *Equal: women reshape American law* (WW Norton & Company 2009).

- A failure to create the incentives necessary to ‘get it right.’¹¹²⁷

These challenges will now be considered for their potential to affect US implementation efforts.

i. Lack of commitment and failure of incentives.

Considering what I describe as the ‘human constraints’ first, it can be said that as gender mainstreaming is intended to challenge the existing power structure and result in behavioural change, it would be naive to expect that all those individuals administratively charged with implementation are committed to its goals. As Ravindran observes, gender mainstreaming, ‘is about taking on patriarchy, misogyny, and discrimination, and the structures that uphold them.’¹¹²⁸ Likewise, Benschop and Verloo discern, any assumption of cooperation is problematic, as gender mainstreaming is a ‘contestation rather than collaboration process.’¹¹²⁹ Consequently, where research has found that organizational resistance has hindered the implementation of gender mainstreaming in the EU, similar resistance to US efforts should be anticipated, with steps taken to overcome it. The steps highlighted by the research of Hafner-Burton and Pollack are helpful. The results of their research suggest that ‘hard law’ incentives are essential if implementation is to be carried out properly, and that resistance is best overcome through the mechanism of public accountability.¹¹³⁰ This accountability is secured through regular monitoring, reporting, and evaluation of implementation efforts, including annual evaluations with reports published, and supported where necessary by recommendations for further action when departments are found to be ‘underperforming.’¹¹³¹ As Rubery observes, a problem arises when a government is unwilling ‘to engage in the process of self-criticism and critical evaluation of policy programs.’¹¹³²

¹¹²⁷ Hafner-Burton and Pollack (n 1125).

¹¹²⁸ *ibid.* See: T.K.S Ravindran and A. Kelkar-Khambete, ‘Gender mainstreaming in health: looking back, looking forward’ (2008) 3 *Global Pub Hlth* 121, 139.

¹¹²⁹ Benschop and Verloo (n 1118) 30.

¹¹³⁰ Hafner-Burton and Pollack (n 1125) 130.

¹¹³¹ *ibid.*

¹¹³² Rubery, ‘Gender mainstreaming and gender equality in the EU: the impact of the EU employment strategy’ (n 11) 503.

Ultimately, the academic debate surrounding EU mainstreaming efforts suggests that a lack of commitment to implementation may prove even more dangerous than other challenges, which requires the US to be proactive and decisive in addressing it. This suggests that it is essential for the US to engage in a critical evaluation of its implementation efforts to date, preferably using the ‘transversal’ stocktaking exercise described by Alison Woodward in her evaluation of the success of EU efforts.¹¹³³ This exercise requires a broad range of stakeholders are given the opportunity to consider and comment on the progress that has been made, and the gaps that remain. Taking such bold action in the US necessitates the inclusion of pregnant and breastfeeding workers and women on maternity leave in a review of Council efforts taken to date. Arguably, this would help garner public support for the strategy, provide momentum to implementation efforts and policy changes, and help revive the role of the US as being at the forefront in understanding the role that gender plays in continuing inequality, disadvantage, and exclusion.

ii. Lack of resources and capacity.

An extensive body of academic literature has found that institutional incapacity and a lack of financial and/or human resources have created significant challenges to EU implementation efforts.¹¹³⁴ Furthermore, that resources and capacities vary greatly among the member states. This is to say that although there may be a desire to implement gender mainstreaming by the EU member states, their national institutions may lack the tools or the resources necessary to carry it out. Indeed, Walby’s research has found that the ‘absence of information, knowledge, and resources holds back gender mainstreaming by government officials.’¹¹³⁵ Arguably, the challenge that lack of capacity poses to implementation efforts is not insurmountable—at least in terms of information and knowledge. At a minimum, to be effective, research suggests the need

¹¹³³ Alison E. Woodward, ‘Too late for gender mainstreaming? Taking stock in Brussels’ (2008) 18 JESP 289, 290.

¹¹³⁴ For example: F. Beveridge, S. Nott and K. Stephen, ‘Addressing Gender in National and Community Law and Policy-making’ in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart 2000); Beveridge, ‘Building against the past: The impact of mainstreaming on EU gender law and policy’ (n 11); Mazey, *The European Union and Women’s Rights* (n 11).

¹¹³⁵ Walby, *The Future of Feminism* (n 1112) 95.

for particular tools, including a common definition, clear instruction manuals, guidelines, training, and disaggregated statistics. These tools are already available at the supranational level in the EU.¹¹³⁶ Consequently, if the EU institutions are serious in their efforts ensure the success of the strategy, to minimize financial costs, and harmonize member state efforts, they should do more to make these tools accepted, and utilized by the member states. As for the US, there is no need to ‘reinvent the wheel’ here. Instead, it should seek to minimize the challenge that any institutional incapacity poses by being proactive and providing government actors with the tools necessary to carry out implementation successfully. If these tools do not already exist, they can be created without difficulty, using as a model, the existing definitions, manuals, guidelines, training, and disaggregated statistics found in the EU and elsewhere.¹¹³⁷

The adequacy of human and financial resources is far trickier to address, mostly because ‘adequacy’ is difficult to quantify. What constitutes ‘adequacy’ will depend on context, with a great deal of room for disagreement when these yardsticks are applied in practice. However, EU experience with this challenge is informative. Since December 2011, the EU Commission has used a network of external experts and:

*This network undertakes an annual programme of policy-oriented research and reports to the unit ‘Gender Equality’ of the Directorate-General for Justice and Consumers. It is comprised of experts in statistics, econometrics, social protection, social inclusion, and labour market economists covering all 28 EU Member States....*¹¹³⁸

This inclusion of external experts suggests two important lessons for the US. First, because they come from all EU member states, their participation reflects a desire by the EU institutions to facilitate maximum support, ‘buy in,’ and the best outcome for

¹¹³⁶ See: Commission, *Manual for Gender Mainstreaming: employment, social inclusion, and social protection policies* (n 641).

¹¹³⁷ *ibid.* Also, GenderCoP.eu, ‘European Standard on Gender Mainstreaming in the ESF’ (EU, 2014) <<http://standard.gendercop.com/>> accessed 18/1/2015. The European Institute for Gender Equality (EIGE) also has documentation relating to gender mainstreaming, see: EIGE, *Towards Effective Gender Training: Mainstreaming Gender into the Policies and Programmes of the Institutions of the European Union and EU Member States* (ISBN 978-92-9218-019-5, 2011). Additionally, the UN Inter-Agency Network on Women and Gender Equality has a repository of mainstreaming policies, see: UN-IANWGE, ‘Implementation of Strategy on Gender Mainstreaming within the UN System’ (14/08/2012) <<http://www.un.org/womenwatch/ianwge/repository/>> accessed 18/1/15.

¹¹³⁸ Commission, ‘Tools for gender equality: Network of experts’ (Europa, 2014). <http://ec.europa.eu/justice/gender-equality/tools/experts/index_en.htm> accessed 11/1/2015

gender mainstreaming throughout the EU. This is to say that, in addition to providing research expertise to the Commission, this network of experts is uniquely placed to advance a dialogue with the member states, helping to garner governmental support for the strategy and harmonize their varied national efforts, where according to the research of Jill Rubery ‘the full implications of a commitment to promoting gender equality and gender mainstreaming have not been understood.’¹¹³⁹

Secondly, broad engagement with external experts helps to offset any lack of financial and/or human resources that EU policy implementers may encounter. In effect, by tasking non-governmental experts and groups to undertake the research, data collection and reporting that gender mainstreaming necessitates, policy implementers are sharing the burden that implementation imposes.

These are vital lessons for US gender mainstreaming efforts, especially as Executive Order No.13506 (Order) contains no express financial commitment for implementation of the strategy. Nor is the Order directly applicable to any US state. Consequently, EU experience suggests that the Whitehouse Council should proactively address a potential lack of human and/or financial resources by including experts from all fifty states and Washington D.C. in their research, data collection, and discussions of the policy changes they recommend. As it is not unusual for governmental actors in the US to commission and/or consider the external research reports and opinions of experts in the field of gender equality, it is concluded that outreach should not be a difficult task.¹¹⁴⁰

d Lessons regarding mainstreaming beyond gender.

To recall the discussion from earlier Chapters, some feminist scholars and other academics, including Fiona Beveridge, argue that to focus only on mainstreaming ‘gender’ ignores the differential impact of policies upon differently disadvantaged groups.¹¹⁴¹ For these critics, isolating gender equality from other forms of inequality is

¹¹³⁹ Rubery, ‘Gender mainstreaming and gender equality in the EU: the impact of the EU employment strategy’ (n 11) 517.

¹¹⁴⁰ See the discussion in Elving (n 162).

¹¹⁴¹ For a discussion of equality mainstreaming, see Beveridge, ‘*Building against the past: The impact of mainstreaming on EU gender law and policy*’ (n 11) 198.

irrational. These arguments build upon the work of Kimberle Crenshaw and the notion of intersectionality, which was discussed in Chapter 2, and in which she argued against ‘the tendency to treat race and gender as mutually exclusive categories of experience and analysis.’¹¹⁴² These limitations have led to a call for a broader approach to mainstreaming, one that reflects an understanding of intersectionalities and involves a move from gender mainstreaming to ‘diversity’ or ‘equality’ mainstreaming.¹¹⁴³ As Squires observes, ‘gender can no longer be understood in isolation from diversity.’¹¹⁴⁴ However, not all academics agree that mainstreaming beyond gender is the correct approach for addressing multiple areas of discrimination. The results of Mieke Verloo’s 2006 comparative study of specific sets of inequalities (class, race/ethnicity, sexual orientation, and gender) argues strongly against a ‘one size fits all’ approach to multiple discrimination.¹¹⁴⁵ Her study builds upon the research of other academics, which raised concerns regarding, ‘the assumed similarity of inequalities, the need for structural approaches, and the political competition between inequalities.’¹¹⁴⁶ Notwithstanding these concerns, the argument for mainstreaming ‘equality’ for all groups covered by existing antidiscrimination legislation has significant traction with governmental actors in the EU, resulting in a discursive shift from ‘gender mainstreaming’ to ‘equality mainstreaming’ as a strategy. This shift is more clearly illustrated through a short discussion of the UK’s Public Sector Equality Duty (PSED), contained in the Equality Act 2010.¹¹⁴⁷ Under the PSED, public bodies must have ‘due regard’ of the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities. Initially, the UK statutorily adopted gender mainstreaming as a ‘Gender Equality Duty’ (GED), in the Equality Act 2006, and included pregnancy and maternity as an *implicit* part of gender. Now, the UK’s legislative mandate is contained in Section 149 of the 2010 Equality Act and

¹¹⁴² Kimberle Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ [1989] U Chi Leg F 139, 139.

¹¹⁴³ See: Olena Hankivsky, ‘Gender vs. Diversity Mainstreaming: A Preliminary Examination of the Role and Transformative Potential of Feminist Theory’ (2005) 38 Can J Political Sci 977, 978.

¹¹⁴⁴ Squires (n 11) 367.

¹¹⁴⁵ Verloo, ‘Multiple Inequalities, Intersectionality and the European Union’ (n 566) 214. See also, Chapters 3 and 6.

¹¹⁴⁶ *ibid* 214-216.

¹¹⁴⁷ See the discussion in Chapter 3.

expressly includes pregnancy and maternity, and expands the duty beyond what may be considered strictly a ‘woman’s issue,’ to include gender reassignment, age, race, religion or belief, disability, sex, and sexual orientation.¹¹⁴⁸

Overall, the PSED is an important change for pregnant workers, as it requires the specific issues and needs that pregnancy and maternity raise, (among others) are expressly *considered* when policy-makers draft, enact, and implement governmental policies, including those that are intended to advance substantive equality. This point deserves some elaboration. Using the example of a policy seeking to provide unpaid ‘paternity’ leave, it can be said that having ‘due regard’ will reveal differing implications for differing groups of women. Indeed, such a policy focus is of questionable value to women from a lower socio-economic group, and to those from a single-parent household. Added to this, as the typically lower earnings level of mothers causes families to choose to have the mother stay at home where the leave provided to parents is unpaid, traditional gender roles remain unchallenged.¹¹⁴⁹ Thus, ‘due regard’ will suggest that a policy supporting paid paternity leave will better advance substantive equality between women and men.

In light of the foregoing, an initial lesson from EU experience with gender mainstreaming suggests that every effort should be made to ensure that the US strategy is appropriately nuanced, so as to move beyond a simplistic model of equality to one that has a greater reach and positive impact upon the lives of *all* women.

e Lessons regarding the ‘complementary’ role of gender mainstreaming

If any of the foregoing discussion of gender mainstreaming has been at all clear, it should be understood that the strategy offers a distinct policy approach to addressing inequality—as against ‘equal treatment,’ which seeks to treat women the same as men, and ‘special treatment,’ which seeks to treat women differently from men. This is not to say that gender mainstreaming is a standalone strategy, nor is it intended to be used in place of the other approaches. Adopting Bennett and Booth’s metaphor of the ‘three

¹¹⁴⁸ See: Judith Squires, ‘Beyond Multiple Inequalities: Transversal Intersectionality, Diversity Mainstreaming and Participative Democracy’ [2010] *Kvinder Køn & Forskning* 85, 175.

¹¹⁴⁹ See Chapter 4.

legged stool,' gender mainstreaming in the EU is best described as dependant on three supports. The first two are equal treatment and special treatment. The third support is defined by Bennett and Booth as the 'gender perspective,' which

Promotes actions that aim to transform the organization of society to a fairer distribution of human responsibilities. It acknowledges the differences between women and between men. The transformation of human lives is premised on the understanding that men are not the deliberate oppressors of women, but can also be disempowered by current social arrangements. The gender perspective is delivered through new tools for gender-sensitive policy-making.¹¹⁵⁰

Thus, while equal treatment and special treatment are focused on the individual, gender mainstreaming is focused on the institutions, systems, and norms that create inequalities.¹¹⁵¹ It is generally agreed that these three focuses are distinct, but work together, and are mutually supportive for greater substantive equality in all social arrangements. Indeed, a Commission study of gender mainstreaming in fifteen EU member states describes the focus of positive action and gender mainstreaming as being 'complementary.' This is to say that while gender mainstreaming acts 'upstream' on the causes of inequalities, positive action acts 'downstream' against the inequalities and seeks to correct them.¹¹⁵²

Notwithstanding the foregoing, there is evidence to suggest that the three approaches have become 'hybridized' in some of the member states in the EU, creating a mix of approaches.¹¹⁵³ As a result, a concern has been raised by some academics that instead of working together, the strategy of gender mainstreaming may be used by EU government actors to weaken, neutralize, or even eliminate other gender equality efforts, particularly those involving positive/affirmative action measures. This concern has been most persuasively argued by Stratigaki, who uses labour market texts as evidence that

¹¹⁵⁰ C. Booth and C. Bennett, 'Gender Mainstreaming in the European Union: Towards a New Conception and Practice of Equal Opportunities?' (2002) 9 EJWS 430, 434.

¹¹⁵¹ *ibid.*

¹¹⁵² Commission, *Study on Integrating Gender Mainstreaming into Employment Policies: Covering Public-Authority Officials Responsible for Employment Policies and Social Partners in the 15 Member States of the European Union* (2002) 8, 17.

¹¹⁵³ See: M. Daly, 'Gender Mainstreaming in Theory and Practice' (2005) 12 Social Politics: Int'l Studies in Gender, State & Society 433, 437.

this has been the effect of gender mainstreaming in the EU.¹¹⁵⁴ Her concerns are highlighted by the comments of one EU Commission official who said, ‘If gender mainstreaming is everybody’s responsibility in general, then it’s nobody’s responsibility in particular.’¹¹⁵⁵ Notably, in response to such concerns, the EU Parliament has issued a Resolution reaffirming that gender mainstreaming is ‘No substitute for specific equality policies and positive actions, as part of a dual approach to achieving the goal of gender equality.’¹¹⁵⁶

Ultimately, the concern that gender mainstreaming will be used to crowd out positive action measures is unlikely to arise or have much traction in the US, where, as the discussion in Chapter 5 revealed, gender-based preferential measures are not generally accepted, rather they are extremely controversial and subject to legislative and constitutional constraints.¹¹⁵⁷ In other words, there is little fear that the adoption of a gender perspective in policy-making will undermine US affirmative action plans, which, in any event, are temporally limited. Recalling from the discussion in Chapters 3 and 5, positive/affirmative action measures are not expected to last into perpetuity, even in the EU. Similar temporal limitations exist in the US. As Justice Ginsburg cogently observed in *Grutter v. Bollinger*, Article 1 (4) of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) provides for ‘temporally limited affirmative action.’ authorizing, ‘temporary special measures aimed at accelerating *de facto* equality’, that, ‘shall be discontinued when the objective of equality of opportunity and treatment have been achieved.’¹¹⁵⁸ Therefore, rather than weakening or neutralizing positive/affirmative action measures, it may be concluded that gender mainstreaming offers both the EU and the US, an additional, longer-term, and arguably less controversial strategy for achieving greater substantive equality between women and men.

¹¹⁵⁴ Stratigaki, ‘Gender Mainstreaming vs Positive Action’ (2005) (n 11) 173.

¹¹⁵⁵ In Hafner-Burton and Pollack (n 1125) 452.

¹¹⁵⁶ Motion for a European Parliament Resolution on gender mainstreaming in the work of the European Parliament (2011/2151(INI)) [M].

¹¹⁵⁷ Called ‘affirmative action’ in the US.

¹¹⁵⁸ *Grutter* (n 813) 342.

III Gender mainstreaming in the US.

In Chapter 6, it was observed that sixteen US states, eighteen counties, and forty-four cities have legislatively implemented the standards of the ‘Convention to Eliminate All Forms of Discrimination Against Women’ within their boundaries, with some adopting the strategy of gender mainstreaming.¹¹⁵⁹ The purpose of the next two Parts is to present compelling evidence that the strategy has also been adopted at the federal level, via Executive Order No. 13506, issued by President Obama in 2009.¹¹⁶⁰

The discussion begins with a historical exploration of Presidential Executive Orders, for the purpose of providing an understanding of the limitations and promise of using such a unique vehicle to adopt the strategy. This is followed by a critical exploration of US implementation efforts, which is undertaken against a background of the lessons revealed from EU experience with the strategy, as discussed in Part II above.

a Presidential Executive Orders.

The assertion that the US has adopted gender mainstreaming domestically, and that it has done so via Executive Order raises the question of what an Executive Order is. In short, it is the command, or decree of a US President, intended to give guidance or direction to his, or her subordinates in the Executive Branch, or to affect an Act of Congress.¹¹⁶¹ The President’s power to issue such a command has two sources. Foremost, the President has ‘inherent’ authority to issue Executive Orders because of power bestowed by the US Constitution (Constitution). Secondly, the President may be delegated authority to issue an Executive Order by Congress.¹¹⁶² This executive authority is peculiar to the US federal system, with its divided government, through which executive power is vested in the President by virtue of the so-called ‘Vesting Clause’ contained in Article II, § 1, Clause 1 of the Constitution. Although there is no express authority to issue Executive Orders in the Constitution, the President is deemed to have authority to issue these orders from the aggregate powers that flow from, ‘either an act

¹¹⁵⁹ CEDAW (n 997).

¹¹⁶⁰ Executive Order No. 13506 (n 12)

¹¹⁶¹ See generally: Howard J. Krent, *Presidential Powers* (NYUP 2005)

¹¹⁶² See generally: Louis Fisher, *The Law of the Executive Branch: Presidential Power* (OUP 2014)

of Congress, or from the Constitution itself.’¹¹⁶³In light of this power, Fisher observes that Executive Orders ‘represent a purely presidential initiative,’ or implement ‘statutory policy.’¹¹⁶⁴Indeed, through what Mayer and Price term, ‘the power to command,’ US ‘presidents enjoy significant, but not unfettered latitude in governing the government through the issuance of executive orders’.¹¹⁶⁵This latitude is illustrated by the fact that there have been a vast number Executive Orders issued by US Presidents, covering matters ‘ranging from security clearances for all government employees, to smoking in the workplace.’¹¹⁶⁶

The text of each Executive Order appears in the daily Federal Register, and while there is no exact figure of the number issued to date, the numbered series of published Orders in the Federal Register reached 13,679 by October 10, 2014, with estimates up to 50,000 for unnumbered Orders.¹¹⁶⁷This large number suggests that Executive Orders are important tools for Presidents seeking to effectuate presidential policy, and while research suggests that many Executive Orders have been controversial and proved politically costly to Presidents, others have been effective ‘law-making.’¹¹⁶⁸This efficacy is particularly true of Executive Orders in the area of civil rights. There is a history of Executive Orders going back over seventy years that have been designed to promote equal opportunities in the US.¹¹⁶⁹In point of fact, *every* Executive Order issued in the civil rights arena to date, has been followed by some form of federal legislation.¹¹⁷⁰This suggests that the issuance of Executive Order No. 13506 is in keeping with the historic use of this executive power by Presidents when seeking to expand civil rights protections, and shape the public debate. It is arguable therefore that

¹¹⁶³ *Youngstown Sheet & Tube Co, et al. v. Sawyer* 343 US 579 (1952) 157, per Black, J.

¹¹⁶⁴ Fisher (n 1185)101.

¹¹⁶⁵ Kenneth R. Mayer and Kevin Price, ‘Unilateral Presidential Powers: Significant Executive Orders, 1949-1999’ (2002) 32 *Presidential Studies Quarterly* 367, 372.

¹¹⁶⁶ Krent (n 1184) 51.

¹¹⁶⁷ National Archives, ‘2014 Executive Orders Disposition Tables Barack Obama- 2014’ (*National Archives*, 12/1/2015) <<http://www.archives.gov/federal-register/executive-orders/2014.html>> accessed 1/12/2015, Fisher (n 1185) 102.

¹¹⁶⁸ Fisher (n 1185) 105. Among the Orders considered politically costly was Executive Order 9006 issued by President Roosevelt in 1942, and requiring the transfer of more than 11,000 Americans of Japanese descent to ‘relocation’ centers.

¹¹⁶⁹ For a brief history of Executive Orders in the area of civil rights, see: *Brennan* (n 693) 127 (fn1)

¹¹⁷⁰ See: Kenneth R. Mayer, *With the Stroke of a Pen* (2nd edn, Princeton University Press 2001) Ch. Six, for a discussion of the issuance of Executive Orders in the area of civil rights.

Executive Order No.13506 is merely the first step in the process of legislatively adopting gender mainstreaming as a national equality strategy.

The foregoing suggestion does not ignore the fact that there are significant drawbacks to using an Executive Order as a vehicle to adopt gender mainstreaming as a domestic equality strategy. As Krent writes in his book, *Presidential Powers*, Executive Orders are not ‘considered law in the conventional sense,’ and most ‘do not have the status of binding rule or regulation.’¹¹⁷¹The violation of an Executive Order cannot lead to a legal sanction, such as a fine or prison sentence. At best, federal departmental and agency heads found violating a presidential command are subject to removal from office. It may be concluded therefore, that although Executive Orders are required to be published in the Federal Register,¹¹⁷²they are ‘soft law’ as defined and discussed in Chapter 1. As such, they are a weaker vehicle than Congressional (hard) legislation, where, as Fine and Warber observe, ‘policy outcomes are more permanent.’¹¹⁷³Indeed, the results of this research suggest three reasons an Executive Order is a weaker vehicle for adopting gender mainstreaming than a statute. First, they are weaker because Executive Orders can be, and historically have been successfully challenged in the US Supreme Court, based upon the underlying principle of constitutional separation of powers.¹¹⁷⁴Secondly, they are weaker because Congress has the power to pass legislation overriding them. Finally, they are weaker because every President has the power to overturn an *existing* Executive Order, through efforts described by Mayer and Price as the actions of, ‘duelling presidencies.’¹¹⁷⁵In light of which, it may be deduced that the issuance of an Executive Order renders the adoption of gender mainstreaming much more fragile, and subject to continuing political good will.

However, it is also possible to conclude that the method for adoption of the strategy in the US is consistent with the traditional ‘soft law’ method of adoption utilized by the EU member states, as discussed in previous Chapters, and in Part II

¹¹⁷¹ Krent (n 1184) 51.

¹¹⁷² For exceptions to the publication requirement, see: 44 U.S.C. §1505(a) (1994)

¹¹⁷³ Jeffrey A. Fine and Adam L. Warber, ‘Circumventing Adversity: Executive Orders and Divided Government’ (2000) 42 *Presidential Studies Quarterly* 256, 257.

¹¹⁷⁴ See Chapters 5 and 6. Also, see: *Youngstown* (n 1186).

¹¹⁷⁵ For a discussion of President George W. Bush’s efforts to overturn several ‘key’ Executive Orders issued by President Clinton, see: Mayer and Price, ‘Unilateral Presidential Powers: Significant Executive Orders, 1949-1999’(n 1188) 370.

above. This choice of soft law also suggests the existence of concerns that are not dissimilar to those found in the EU.¹¹⁷⁶ Concerns that include significant opposition to gender equality policy, in response to which, Fine and Warber suggest that US Presidents resort to Executive Orders when they are breaking new ground, and wish to ‘initiate significant government policies.’ Presidents are also said to engage in this type of unilateral action where they are unable to pass legislative measures, and are faced with ‘legislative gridlock.’¹¹⁷⁷ Mayer and Price agree, and write that Presidents use ‘their repository of power to achieve political and policy objectives that otherwise face ‘grim prospects.’¹¹⁷⁸ Deering and Maltzman add the observation that Executive Orders are used by presidents to move the ‘status quo closer to a president’s preferred policy outcome.’¹¹⁷⁹ To these arguments, the author adds the observation that gender mainstreaming legislation may have been unattractive to President Obama, not only because of the hurdles which a divided Congress create, but because legislative enactment is a particularly slow and contested process in the US. This certainly was the case with the Family and Medical Leave Act of 1993, which took ten years, and crossed several Presidencies before its passage was finally achieved.¹¹⁸⁰

All of which serves to suggest several very good reasons why an Executive Order would be the preferred vehicle for the adoption of such a potentially transformative domestic equality strategy in the US. These reasons are highlighted by the fact that at the time of its issuance (2009), President Obama had already signed the ground-breaking Lilly Ledbetter Fair Pay Act, which protects women against pay discrimination by employers, and was seeking passage of his monumental healthcare legislation (the Patient and Affordable Care Act).¹¹⁸¹ Consequently, he may have felt that he lacked the political support necessary to achieve passage of additional equality legislation.

¹¹⁷⁶ See Chapters 1, 3, and 4.

¹¹⁷⁷ Fine and Warber (n 1196) 259.

¹¹⁷⁸ Mayer and Price, ‘Unilateral Presidential Powers: Significant Executive Orders, 1949-1999’ (n 1188) 369.

¹¹⁷⁹ Christopher J. Deering and Forrest Maltzman, ‘The Politics of Executive Orders: Legislative Constraints on Presidential Power’ (1999) 52 Pol Res Q 767, 779.

¹¹⁸⁰ See the discussion in Elving (n 162) and Chapters 5 and 6.

¹¹⁸¹ Public Law 111-2: Lilly Ledbetter Fair Pay Act of 2009 (123 Stat.5; Date: 1/29/2009) 42 USC 2000a; ACA (n 120).

b Executive Order No. 13506.

To restate, there is no overarching statutory measure adopting gender mainstreaming nationally in the US. Gender mainstreaming does not form part of Title VII, or the PDA. Rather, this research has found that it has been adopted via a ‘soft law’ Executive Order issued by President Obama in 2009. With Executive Order No. 13506, ‘Establishing a Whitehouse Council on Women and Girls,’ President Obama stated that the Council’s purpose was ensuring:

*That each of the agencies in which they’re charged takes into account the needs of women and girls in the policies they draft, the programs they create, the legislation they support.*¹¹⁸²

The preceding discussion illustrates the vast array of literature addressing the power of Presidents to issue Executive Orders. In contrast, very little has been written about Executive Order No. 13506. Frank Deale and Rita Cant briefly reference the Order in the context of their analysis of the public interest law movement.¹¹⁸³ They note that ‘the status of women has received significant attention from the [Obama] Administration;’ and observe the Administration ‘willingness’ to collaborate with women’s rights organizations, consulting with them on issues of health care and labour policy.¹¹⁸⁴ Rona Kaufman Kitchen references Executive Order No. 13506 within a detailed analysis of President Obama’s efforts to strengthen work-family balance during his first term in office. Kaufman describes the Order as, ‘an important public gesture in support of women, ‘but she does not analyse its provisions.’¹¹⁸⁵ Additionally, Tara J. Mellish, in her discussion of the US’s domestic application of international human rights treaty norms, references the Order in a footnote, and only in the context of its ‘interagency’ structure.¹¹⁸⁶ Similarly, Marcia McCormick considers the Order in the context of a lack of legislative workplace reforms during President Obama’s first term in

¹¹⁸² Executive Order No. 13506 (n 12).

¹¹⁸³ Frank Deale and Rita Cant, ‘Barack Obama and the Public Interest Law Movement: A Preliminary Assessment’ (2010-2011) 10 Conn Pub Int LJ 233, 272.

¹¹⁸⁴ *ibid* 273.

¹¹⁸⁵ Rona Kafuman ‘Kitchen, ‘Off-Balance: Obama and the Work-Family Agenda’ (2012) 16 Empl Rts & Employ Pol’y J 211.

¹¹⁸⁶ Tara J. Mellish, ‘From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies.’ (2008) Student Scholarship Papers, YLS 390, 403 (fn 67).

office, noting only that Executive Order No. 13506 is one of several ‘presidential actions seemed designed to lead to future programs or regulations related to workplace reform.’¹¹⁸⁷

As a detailed exploration of Executive Order No. 13506 has not been undertaken to date, it is important to do so. In the ensuing subsections, the Order is explored against a background of the lessons drawn from EU experience with the strategy. The results of this exploration will suggest that while the Order has certain limitations, beyond its fragility as a vehicle for the adoption of such a transformative equality strategy, it also offers great promise. This is to say that as with its counterpart in the EU, US gender mainstreaming is intended to complement existing national equality measures. As such, it has the potential to reboot national efforts for advancing equality beyond the quagmire of the equal treatment versus special treatment debate that crystallizes in Congressional legislation.¹¹⁸⁸

c Executive Order No. 13506—its limitations

The Order has three limitations, any of which may act to curtail the transformative potential of the strategy. This section addresses those limitations and suggests ways in which they may be overcome.

The first and most obvious limitation of the Order is its failure to expressly reference the gender-mainstreaming concept. One could argue that this lack of reference, accompanied by a lack of academic interest in the substantive provisions of the Order counters any claim that the Order signifies the adoption of this particular equality strategy. In my view, academic interest in the US strategy will increase as its implementation efforts increase. Compared to mainstreaming in Canada and the Netherlands, where the strategy was first adopted in the 1970s, US efforts are in their initial stages.¹¹⁸⁹ As for a specific reference to gender mainstreaming, while preferable, this is not a necessary requirement of the strategy. Instead, an essential element of

¹¹⁸⁷ McCormick, M., ‘Workplace Reform In A Jobless Recovery’ (2012-2013) 81 UMKC Law Review 347, 351.

¹¹⁸⁸ See Chapters 5 and 6.

¹¹⁸⁹ See: Verloo, ‘Another velvet revolution? Gender mainstreaming and the politics of implementation’ (n 11) 4.

gender mainstreaming is a *change* in policy processes, based upon the assumption that most policies are gendered, in the sense that they are either gender blind or gender biased towards the male norm, thereby reproducing gender inequality. The change gender mainstreaming seeks is for policy-makers to incorporate a gender equality perspective in all of their policies, considering the differences between women and men. The language of Section 1 of Executive Order No. 13506 leaves no doubt that this is what the Order seeks to achieve, stating that:

*The purpose of this order is to establish a coordinated Federal response to the issues that particularly impact the lives of women and girls and to ensure that Federal programs and policies address and take into account the distinctive concerns of women and girls, including women of color and those with disabilities.*¹¹⁹⁰

This assertion is not intended to ignore the lessons from EU experience with the strategy, as discussed above and in Chapter 3, which made clear that conceptual confusion could arise in the face of a definitional void.¹¹⁹¹ In light of which, the Council's foremost challenge will be to ensure a common understanding and coordination of its broad efforts. The Whitehouse Council could of course, select *post facto* one of the two conventional definitions of gender mainstreaming to aid its efforts. That is, either the definition of the Economic and Social Council of the UN (ECOSOC) agreed conclusions 1997/2:

*The process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality,*¹¹⁹²

¹¹⁹⁰ Executive Order No. 13506 (n 12).

¹¹⁹¹ See Chapter 1 for a discussion of competing definitions of 'gender mainstreaming' and the surrounding debate.

¹¹⁹² UN, *Gender Mainstreaming: An Overview* (2002) 1.

Alternatively, the definition of the Group of Specialists of the Council of Europe, that:

*Gender mainstreaming is the organization, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies, at all levels and at all stages by the actors normally involved in policy-making.*¹¹⁹³

But, definitions, in and of themselves, do not resolve confusion. This is to say that the definitions themselves may not be clear. Considering the Council of Europe definition of gender mainstreaming, the question arises as to what is meant by the ‘gender equality perspective.’ Indeed, in the absence of clarity, it is difficult to disagree with Lombardo and Meier that the Council’s definition is ‘an empty signifier.’¹¹⁹⁴ This is to say that:

*It focuses on the procedural changes gender mainstreaming involves but does not address what we should understand by a gender equality perspective.*¹¹⁹⁵

The fact is, as Rees’s observes, gender mainstreaming is ‘hard to define.’¹¹⁹⁶ Beveridge’s observations add that gender mainstreaming is an idea that is ‘rather amorphous and fuzzy.’¹¹⁹⁷ It also seems that having a definition has not prevented the EU from having problems implementing the strategy on both the supranational and national levels. Therefore, rather than the adoption of a specific definition, it may be preferable for the Council to actively ensure that federal policies and programmes do represent the concerns of *all* women. The Council is assisted in this regard by the Order’s Section 5 mandate, regarding the creation of a ‘Federal Interagency Plan,’ (FIP), which:

¹¹⁹³ Council of Europe, *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practice*, EG-S-MS (98) 2. Strasbourg. Council of Europe (1998) (n 101). For a discussion of the differences between the two definitions, see: Verloo, ‘Another velvet revolution? Gender mainstreaming and the politics of implementation’ (n 11) 2.

¹¹⁹⁴ Lombardo and Meier (n 1140) 152.

¹¹⁹⁵ *ibid.*

¹¹⁹⁶ Rees (n 11) 570.

¹¹⁹⁷ Beveridge, ‘Building against the past: The impact of mainstreaming on EU gender law and policy’ (n 11) 193.

Shall include an assessment by each member executive department, agency, or office of the status and scope of its efforts to further the progress and advancement of women and girls. Such an assessment shall include a report on the status of any offices or programs that have been created to develop, implement, or monitor targeted initiatives concerning women or girls. The Federal interagency plan shall also include recommendations for issues, programs, or initiatives that should be further evaluated or studied by the Council.

The FIP has the potential to limit confusion and misunderstanding for those individuals tasked with implementation. That being said, the public unavailability of this plan renders it impossible to judge the extent to which its potential has been achieved. In fact, although the Order mandates accountability through reports and meetings of the Council, the extent to which accountability is to be made public is unclear. Efforts to obtain a copy of the FIP and Council meeting minutes have been unsuccessful to date. This suggests they are only produced for internal use, and that greater public dialogue is not intended, which is unfortunate.

A second limitation is the ambit of the Order. The Order only applies to the national executive branch of government. It does not expressly apply to state government, or to the private sector. This suggests that a large segment of US policy-makers are excluded from implementing gender mainstreaming in the US, at least in the absence of any state, or local mandate. However, because the US executive branch of government is the largest employer in the US, with approximately 2.7 million civilian employees and 15 departments, the Order's ambit may not be as limited as it first appears.¹¹⁹⁸ The fact that the Order applies not only to the policies of the Executive Branch, but also to the *programmes*, it provides, also suggests a greater potential for transformation than would otherwise be expected. This is especially true when one considers the breadth of US governmental programmes, as illustrated by the data from a 2008 national survey conducted by the Cornell University Survey Research Institute, indicating that 96% of Americans rely on at least one of 21 government programs to assist them.¹¹⁹⁹ All of which suggests that the Order may have a far greater reach, beyond

¹¹⁹⁸ OPM, *Data, Analysis & Documentation: Federal Employment Reports* (2012)

¹¹⁹⁹ Ann Carrns, 'How Many Government Programmes Have You Benefitted From?' *The New York Times* (New York, September 25, 2012) <<http://bucks.blogs.nytimes.com/2012/09/25/how-many-government-programs-have-you-benefitted-from/>> accessed 2/4/2013.

federal government. A reach that is undoubtedly enhanced by the fact that the Council consist of twenty-eight senior level people from all Cabinet level and other agencies, and is chaired by a close advisor to the President.¹²⁰⁰Not only does this high-level commitment, combined with the overall support of the President lend strength and gravitas to the work of the Council, it is in keeping with lessons from the EU, regarding the need for high-level support for implementation, and the ‘participation of women at senior levels in the decision-making process.’¹²⁰¹This high-level participation in the US has been supported by a modest increase in the number of women in senior positions within the Federal government, from 24% in 2001 to 29% in 2010.¹²⁰²

The third and arguably greatest limitation of the Executive Order is that the Council has an ‘advisory’ role only. This is to say that while the Council may suggest legislative and/or policy redesign to the President, it has no power to unilaterally require, or to effectuate change. However, because the Order mandates a combinational *participatory-democratic* and *expert-bureaucratic* approach to mainstreaming, which requires the inclusion of external experts and other stakeholders in the work of the Council, there is the potential for the Council’s recommendations to be more persuasive. Ultimately, the extent to which this approach will be successful depends largely upon the impact of the power differences between those involved in aiding the Council in any self-critical review. Notably, self-critical review has been absent from the documentation posted by the Council, Departments and Agencies to date, as discussed in Part IV below. While available documentation clearly highlights existing inequalities and the steps being taken by the Council members to address them, there is no Council documentation indicating regular monitoring, or critical review.

In summary, there are three clear limitations Executive Order No. 13506. While the discussion revealed that the first two limitations are not insurmountable, the third

¹²⁰⁰ Valerie Jarrett, See: Whitehouse, ‘*Council on Women and Girls.*’ The Chair is listed as a ‘Senior Advisor and Assistant to the President for Intergovernmental Affairs and Public Engagement.’ <<http://www.whitehouse.gov/administration/eop/cwg>> accessed 26/04/11.

¹²⁰¹ S. Mazey, ‘Gender mainstreaming strategies in the EU: Delivering on an agenda?’ (2002) 10 Fem L S 227, 234.

¹²⁰² EEOC, *Annual Report on the Federal Work Force Part II: Work Force Statistics* (2010) 24.

limitation presents a somewhat greater challenge to the success of the US strategy, as discussed further in Part IV below.

d Executive Order No. 13506—its transformative promise.

Despite its limitations, the express provisions of the Order suggest that that it holds great transformative promise. Specifically, Section 1, establishing the Council, requires that it provide a *coordinated* federal response to issues that have a direct impact on the lives of women and girls. Stating that:

Federal programmes and policies address and take into account the distinctive concerns of women and girls, including women of color and those with disabilities.

Although Section 1 does not explicitly refer to pregnancy, maternity, or breastfeeding, it is offered that they are implicitly ‘distinctive’ concerns of women and girls. It is also suggested that the Order’s inclusion of the concerns of ‘women of color and those with disabilities’ is in keeping with lessons from the EU, wherein a broader focus for mainstreaming, beyond gender, has been adopted. This broader approach is considered a more ‘joined up’ way for gender mainstreaming to be used to tackle discrimination.¹²⁰³ Thus, the inclusion of broader concerns in the Order effectively acknowledges the limitations of considering ‘disadvantage occurring along a single categorical axis.’¹²⁰⁴ The understanding being that one group’s effect is not the same as another. It is an understanding that was discussed in earlier Chapters, and in Part II above, and anticipates the cumulative or stacking effect with each addition; whether that addition is race, disability, sex, age, and so forth. Consequently, it is asserted that the clear breadth of the Order suggests a desire for greater transformative change in the US, because inclusivity demands consideration of the concerns of *all* women. This inclusivity is essential to women generally and pregnant workers specifically, as they

¹²⁰³ See: Judith Squires, ‘The Challenge of Diversity: The Evolution of Women’s Policy Agencies in Britain’ (2007) 3 Pol & Gender 513, for a discussion of the shift in approach in Britain.

¹²⁰⁴ Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (n 1165) 140. See Chapters 1, 2, and 4 for a discussion of what the EU terms ‘multiple discrimination.’

have distinctive concerns, both related to their own individuality, and more broadly, related to the lack of workplace accommodations and job-protected paid leave.

In order to achieve this inclusivity, Section 4 of the Order requires the Council to engage in outreach efforts with representatives of non-profit organizations, state, and local government agencies, elected officials, and other interested persons who will assist with the Council's development of a detailed set of recommendations. This mandate is crucial. Lessons from the EU's experience with mainstreaming, as discussed above, suggest that outreach efforts help to achieve a broader understanding of gender impacts. Arguably, they will also facilitate the necessary expertise, knowledge, and skills needed for the creation of the Council's recommendations, particularly if the Council has limited human and/or financial resources. What is more, they will enable a level of public accountability that the discursive analysis of EU efforts reveals is important for successful implementation. In this regard, the most recent example of the Council's outreach efforts is promising. The 2015 'Working Group on Challenges and Opportunities for Women of Color' (Working Group) brings together:

*Policy staff from the White House and across the federal agencies—as well as experts, leaders, and advocates from outside government—to focus on issues including education, economic security, health, criminal and juvenile justice, violence, and research and data collection.*¹²⁰⁵

This Working Group is a direct result of a report issued by the Council in November 2014, on 'Women and Girls of Color: Addressing Challenges and Expanding Opportunity.'¹²⁰⁶The report highlights the progress made and challenges faced by this particular group of women and girls in five areas: education, employment, health, violence against women, criminal and juvenile justice. In employment, the report observes that some states 'are leading the charge' in protecting pregnant workers' rights, and restates the need for Congress to pass the 'Pregnant Workers Fairness Act,' which would:

Require employers to make reasonable accommodations to workers who have limitations from pregnancy, childbirth, or related medical

¹²⁰⁵ Office of the Press Secretary, 'White House Report: Women and Girls of Colour: Addressing Challenges and Expanding Opportunity' (*White House*, 12/11/14) accessed 16/1/2015.

¹²⁰⁶ CWG, *Women and Girls of Colour: Addressing Challenges and Expanding Opportunity* (2014) 2

*conditions (unless it would impose an undue hardship on the employer). The legislation would also prohibit employers from forcing pregnant employees to take paid or unpaid leave if a reasonable accommodation would allow them to work.*¹²⁰⁷

These efforts clearly suggest that by consistently addressing issues of concern to women, and including a broad array of stakeholders in their discussions, the Council has adopted a combination of the ‘*expert-bureaucratic*’ and ‘*participatory-democratic*’ approaches to mainstreaming that were discussed in Part II, above.¹²⁰⁸ There is, however, a potential drawback to the Order’s requirement of inclusivity; in that, there is no express provision for reimbursement of the financial costs to stakeholders participants. This raises concerns, as cost burdens have been found to negatively impact stakeholder participation in the EU’s gender mainstreaming efforts.¹²⁰⁹ However, the absence of any specific funding appropriation to cover the costs of the work of the Council may make this a difficult issue to address. Instead, the Order mandates that the Department of Commerce provide funding and administrative support to the Council. While the results of this study suggest that funding is not a problem at this time, the pressures of competing priorities and limited resources within the US executive branch should not be underestimated. Indeed, lessons from EU efforts suggest that significant challenges are posed to implementation efforts when resources, both human and financial, are inadequately allocated.¹²¹⁰ While it is not clear what exactly constitutes ‘adequate’ resources or how they are quantified, foresight of this potential challenge can make a decisive difference in the successful implementation of the US strategy.

The second and arguably greatest transformative promise comes from the actual focus of the Order’s mainstreaming efforts, which are required to be both general and specific. Generally, they apply to *all* policies and programmes of the Executive Branch. Specifically, they are focused on ‘assisting women-owned businesses to compete

¹²⁰⁷ *ibid* 25-26.

¹²⁰⁸ See also Commission, *Manual for Gender Mainstreaming: employment, social inclusion and social protection policies* (n 641). The manual makes multiple references (8) to the need to include ‘all the relevant stakeholders’ in carrying out mainstreaming policies.

¹²⁰⁹ Donaghy (n 1147) 56.

¹²¹⁰ Research into mainstreaming by large UK NGO’s indicated that the lack of resources was a ‘major constraint’ to implementation. See: Helen Derbyshire, ‘Gender mainstreaming: recognising and building on progress. Views from the UK Gender and Development Network’ (2012) 20 *Gen & Dev* 405, 415.

internationally and working to increase the participation of women in the science, engineering, and technology workforce.’¹²¹¹ It is suggested that such a focus requires the redesign of governmental policies, in order to address the special needs that pregnancy, maternity, and breastfeeding create. Especially, as research has indicated that in STEM academia, family responsibilities, the lack of work-life balance, and inadequate child-care provision are among several factors that lead women to leave higher education.¹²¹² In this regard, gender mainstreaming can be useful for securing the redesign of policies that serve to create and/or perpetuate the disadvantage, inequality, and exclusion of women from academia. For instance, the reports and data collected pursuant to the strategy could lead to the redesign of ‘stop clock’ policies, providing that leave for childbirth, maternity and/or breastfeeding would no longer negatively impact the path to tenure for many women. As Barres observes, ‘a few small changes can make a significant difference in outcome.’¹²¹³

Having presented the Order, and considered its strengths and weaknesses as vehicle for adopting the strategy of gender mainstreaming, the next section explores the actual implementation of the strategy in the US, and considers the extent to which the Order’s transformative promise has been realized.

IV US implementation efforts in review.

Before the results of this study of US implementation efforts are discussed, it is important to offer a caveat, which is to caution that it is not possible to make a definitive assessment regarding the implementation of gender mainstreaming in the US. The reasons for this are two-fold. First, the implementation of the strategy is only five years old, and as gender mainstreaming is a long-term strategy, it is fair to conclude that US efforts are in their infancy. At least when compared to the EU, which, as a 2008 Report to the EU Commission noted, despite having more than 20 years of experience, implementation in the EU is ‘still at an initial stage.’¹²¹⁴

¹²¹¹ ‘STEM.’

¹²¹² AAUW, *Why So Few? Women in Science, Technology, Engineering and Mathematics* (ISBN: 978-1-879922-40-2, 2010) 71.

¹²¹³ BA Barres, ‘Does gender matter?’ (2006) 442 *Nature* 133.

¹²¹⁴ Commission, *Manual for Gender Mainstreaming: employment, social inclusion, and social protection policies*. (n 641) 9.

A second reason this assessment must be qualified is incomplete documentation. Research requests for additional information from the Council have been unsuccessful. This has limited the author's analysis to documents that are publically available, in print, and electronically, through the websites of the Council on Women and Girls, and those of the Executive Departments and Agencies. Without access to additional documentation, if it exists, or a response to communication requests, it is unclear whether some policies have been implemented, or are merely in the planning phase, and also whether there is adequate monitoring and review of implementation. Nevertheless, it is fair to say that the Council's website, those of the Executive Departments and Agencies, and the public records of the National Archives and the US Library of Congress contain valuable information relating to the varied implementation efforts to date. Thus, against a background of the lessons that EU experience offers the US in its implementation of the strategy, an exploration of US implementation efforts follows.

a US reports and data.

In 2011, an essential baseline report was prepared for the Council, outlining the indicators of social and economic well-being of American women (Report).¹²¹⁵The Report provided the Council with detailed information, including demographics, health, education, employment, and the problem of violence against women. Supplemented by two other reports, 'Women, Minorities and Persons with Disabilities in Science and Engineering,' and 'Science and Engineering Indicators 2010,' the gender-specific data and statistics contained in all three reports clearly highlighted inequalities for women in the US, and provided critical information upon which to base the Council's initial implementation efforts. Notably, the Council's analysis of this data underpinned President Obama's own concerns, revolving around the gender pay gap between women and men (81%), the lack of paid leave, the lack of equal educational opportunities, the lack of affordable childcare, and the persistence of violence against women.¹²¹⁶These shared concerns then became the focus of Councils implementation efforts.

¹²¹⁵ Commerce, *Women in America: Indicator of Economic and Social Well-being* (n 789).

¹²¹⁶ The gender pay gap is defined as the difference between male and female median earnings divided by male median earnings. Maternity leave is offered as one among other reasons for the pay gap. The 84%

It is important to note here that the use and analysis of gender data and statistics suggests that the Council is utilizing an approach to gender mainstreaming that is in keeping with the EU approach, and more importantly, with the objectives of the Beijing Declaration and Platform for Action, adopted at the 4th World Conference on Women in 1995, which prioritized mainstreaming for advancing gender equality.¹²¹⁷ Specifically, Strategic Objective H3 of the Platform promotes efforts to ‘Generate and disseminate gender disaggregated data and information for planning and evaluation.’¹²¹⁸ Undoubtedly, this approach has been strengthened by a Presidential Memorandum, issued in 2011, and directed to the heads of the executive departments and agencies. ‘The ‘Enhanced Collection of Relevant Data and Statistics Relating to Women’ Memorandum urges the collection of additional data in the areas of maternal mortality and women in leadership, beyond the executive branch and to include public service and corporations. This expansion in data collection is important, as it suggests that implementation of the US strategy is intended to occur beyond the confines of the federal public sector.

However, while it is anticipated that the data collected will be utilized by the Council to inform its recommendations to the President, a problem will occur if the focus of the Council is ‘inputs, rather than outputs.’ That is, if their focus is gathering information, rather than making specific proposals for change. Such a focus will likely cause the Council’s mainstreaming efforts to be inadequate, or as McGuaran explains, ‘more incremental than transformative.’¹²¹⁹ To illustrate by example—the collection of data indicating that the continued participation in the labour force by pregnant women and women who have recently given birth is limited by the lack of workplace accommodations, paid leave and affordable childcare, is merely informative, if the Council does not use this data to suggest policy changes to the President.¹²²⁰ Arguably, such data should lead the Council to recommend changes in government policy relating

gap is between men and women, who worked fulltime in 2012, see: BLS, *Women in the Labor Force: A Databook* (2014).

¹²¹⁷ Platform for Action (n 452).

¹²¹⁸ UN, *Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995* (1995).

¹²¹⁹ McGuaran (n 484) 228.

¹²²⁰ See: National Science Board, *Science, and Engineering Indicators* (2012); NSF, *Women, Minorities, and Persons with Disabilities in Science and Engineering: Data Tables 2012* (2012).

to gender pay reviews, work place accommodations, greater working time flexibility, adequate and affordable care provisions, and job-protected paid leave arrangements. However, in the absence of public access to the Council's specific recommendations to the President, it is difficult to assess the Council's actual 'outputs.' While this research did find a multitude of gender equality initiatives emanating from the various Departments and Agencies, without access to the FIP and to the Council's recommendations to the President, it cannot be said conclusively that all of these initiatives are the result of the Council's work. Although some Departmental and Agency reports and initiatives do refer directly to the Council and Presidential policy, some do not. Therefore, it is not possible to know just how many Council recommendations have been made, adopted, implemented, or rejected.

b US focus—science, technology, engineering, and mathematics (STEM).

What is known is that the Council's focus, specifically with regard to STEM education and careers for women, is in keeping with the 'Agreed Conclusions' of the UN Commission on the Status of Women on the critical areas of concern from the Beijing Platform for Action, from the 56th Session in 2011. Those Conclusions seek greater 'Access and Participation of women and girls in education, training, science and technology...'¹²²¹Notably, this focus has already resulted in changes being taken by the US Census Bureau in its collection of data relating to STEM education for women and girls.¹²²²In turn, this data has been used to underpin the gender equality plans of the various Departments and Agencies coordinating with the Council. These plans are intended to meet the challenges posed to increased female representation in engineering and scientific fields, including the specific challenges created by pregnancy and childcare responsibilities. These plans include the 10-year plan by the National Science Foundation to adopt family-friendly practices. Similarly, at National Aeronautics and Space Administration (NASA), the:

¹²²¹ CSW, *Agreed conclusions on access and participation of women and girls in education, training and science and technology, including for the promotion of women's equal access to full employment and decent work. 55th session (22 February-4 March and 14 March 2011)* (2011).

¹²²² DOE, 'Civil Rights Data Collection' (*ED.gov*) <<http://www.crdc.ed.gov/Security/Home.aspx>> accessed 2/6/2013.

*NASA Family Friendly initiatives include flexible work and leave schedules; leave sharing, flexi-place programs..Many NASA installations also offer onsite or nearby childcare facilities.*¹²²³

NASA has also created the WISH outreach programme as part of its ‘Women and Girls Initiative,’ to encourage female high school students to consider STEM careers,¹²²⁴‘For its part, The Women’s Bureau’ of the Department of Labor (DOL) lists its priorities as equal pay, workplace flexibility and higher paid jobs for women. It seeks to achieve this goal via the use of roundtable discussions, teleconferencing with workforce practitioners, the dissemination of a guide to high growth and emerging industry occupations, and by offering job training in green industries.¹²²⁵In contrast, the Department of Energy plan includes advertising STEM internship and scholarship opportunities for women, offering links to reports and publications on women in STEM, and a showcase of its female employees, who offer suggestions for getting underrepresented groups interested in STEM.¹²²⁶

Arguably, the Council’s efforts have received impetus from the ‘Equal Futures Partnership,’ (Partnership), which was launched in 2012 by Secretary of State Clinton. Along with twenty-six partners, including Australia, Denmark, Finland, Belgium, Croatia, Latvia, and the EU, the US has committed:

*To policy, legal, and regulatory reforms to promote two mutually reinforcing goals: to expanded economic opportunity for women and increased political and civic participation by women at local, state, and national level.*¹²²⁷

The Partnership, along with external stakeholders, identified four areas for implementation and reporting on its commitment, many of which are identical to the areas identified for the Council’s mainstreaming efforts. They are STEM education and

¹²²³ NASA, ‘NASA People: A Quick Look at NASA Employee Benefits’ (*US.gov*). <<http://nasajobs.nasa.gov/benefits/benefits.htm>> accessed 27/08/2013

¹²²⁴ NASA, ‘Women and Girls Initiative: <http://women.nasa.gov>’ (*NASA*, 23/8/2013) <<http://women.nasa.gov/outreach-programs/>> accessed 27/08/2013

¹²²⁵ DOL, ‘Women’s Bureau: Green Jobs for Women’ (2013) <<http://www.dol.gov/wb/media/green.htm>> accessed 26/8/2013.

¹²²⁶ DOE, ‘Women @ Energy’ <<http://energy.gov/diversity/listings/women-energy>> accessed 26/8/2013.

¹²²⁷ OPS, ‘Fact Sheet: The Equal Futures Partnership- from Promise to Progress’ (*White House*, 13/4/2013) <<http://www.whitehouse.gov/the-press-office/2013/04/19/fact-sheet-equal-futures-partnership-promise-progress>> accessed 16/1/2015.

careers, civic education and public leadership, domestic violence, and women entrepreneurs. Arguably, with this external commitment to improving the economic and social wellbeing of US women, and the obligation to report and meet regularly to discuss national progress, the Council has been given the green light to move ahead on its implementation efforts.¹²²⁸

c US focus—flexible working

The results of this research suggests that flexible working is an area in which President Obama is clearly concerned to implement one aspect of his gender mainstreaming strategy beyond the boundaries of the Executive Branch, potentially positively impacting a larger segment of US society. There is no doubt that he has been assisted in this regard by the passage of the Telework Enhancement Act, 2010. This Act requires federal agencies promote the use of telework in achieving workplace flexibility. While an undeniable limitation of the Act is its lack of application to either state government, or the private sector, it serves to set the standard, suggesting ‘best practices’ for employers, and forms part of what the Council emphasizes is a goal of making *all* workplaces a safe, fair, and flexible place for women.¹²²⁹ This goal has been actively championed by the current Administration. Utilizing a report by the Council of Economic Advisors (COEA) on ‘Work-life Balance and the Economics of Workplace Flexibility,’ the President and the First Lady have hosted a forum on these issues, called ‘The White House Summit on Working Families.’¹²³⁰ The DOL has followed by launching a national dialogue in ten cities across the nation in order to discuss best practices and solutions.¹²³¹ Also aiding the summit, the COEA released a report on the ‘Economics of Paid and Unpaid Leave’, which has formed the basis for four new proposals.¹²³² While these proposals do not expressly call for maternity leave, they seek

¹²²⁸ Dept. State, ‘Remarks at Equal Futures Partnership’ (22/9/14).

<<http://www.state.gov/secretary/remarks/2014/09/231987.htm>> accessed 16/1/2015

¹²²⁹ CWG, *Keeping America’s Women Moving Forward* (2012) 44.

¹²³⁰ OPS, ‘Fact Sheet: The White House Summit on Working Families’ (*The White House*, 23/6/2014) <<http://www.whitehouse.gov/the-press-office/2014/06/23/fact-sheet-white-house-summit-working-families>> accessed 17/1/2015.

¹²³¹ DOL, ‘US DOL, Women’s Bureau Regional Forums on Working Families’ (*DOL.GOV*, 2014) <<http://www.dol.gov/wb/workingfamilies/>> accessed 17/1/2015.

¹²³² COEA, *The Economics of Paid and Unpaid Leave* (n 897).

paid leave generally, which helps pregnant workers and the families they support. The proposals involve:

- Calling upon Congress and State and local legislatures to enact legislation providing up to 7 days paid sick time per annum;
- Proposing \$2 billion in funding for States to develop family and medical leave programmes—\$1 million of which is to be used to fund feasibility studies;
- Signing a Presidential Memorandum directing federal agencies to advance up to 6 weeks of paid leave for parents of a new child; and
- Calling on Congress to pass legislation giving federal employees six additional weeks of paid parental leave.¹²³³

These proposals and the national dialogue surrounding them reveal concerns similar to those found in the EU, relating to demographic, economic, and social changes, as discussed in Chapters 3 and 4. As in the EU, women have entered the US labour market in increasing numbers. Indeed, the US labour force participation rate of women ages 25-54 was 55.1% in 1970, increasing to 73.7% in 2012.¹²³⁴ Added to this, 63% of all children are living in a family where both parents work.¹²³⁵ Despite these changes, the US is the only developed country in the world that does not provide paid maternity leave. Nor does it provide paid sick leave or a right to request flexible working. With all Americans living longer, the number of elderly family members has also increased. Nevertheless, 43 million private sector workers in the US are without access to paid sick leave, to enable them to care for themselves, their children, or their elderly family members.¹²³⁶ The impact of these policies is revealed in the research of Hegewisch and Gornick, which shows that the US labour participation of prime working-age women

¹²³³ OPS, 'Fact Sheet: White House Unveils New Steps to Strengthen Working Families Across America,' (n 1084).

¹²³⁴ DOL, *Labor Force Statistics from the Current Population Survey* (2014), A. Moslsa and S. Hipple, *Trends in labor force participation in the United States* (DOL, 2006).

¹²³⁵ COEA, *The Economics of Paid and Unpaid Leave* (n 897) 5.

¹²³⁶ Whitehouse, *Eleven Facts About American Families And Work* (2014); Lyles (n 114)

(age 25 to 54) has ‘stalled,’ that half of all full-time employees believe that they would not be able to work part-time in the same position, and that:

*The lack of workplace flexibility, together with the lack of public support for child care, pushes many mothers temporarily out of the workplace or into inferior jobs—with highly adverse long-term effects on earnings, family income and retirement security,*¹²³⁷

However, notwithstanding strong executive branch support for flexible working and paid leave, Congress has failed to act. In particular, it failed to enact the ‘Flexibility for Working Families Act,’ which would have provided a statutory *right* to request flexible work terms and conditions. Instead, US private sector employees are reliant upon state and local measures, and the voluntary employer policies discussed in Chapter 6, and emphasized by the Council.¹²³⁸ This voluntary approach stands in stark contrast to the broader statutory support for flexible working found in the EU, where France, Germany and the Netherlands have ‘a general open-ended right to reduced hours,’ and the United Kingdom has statutorily provided employees with a right to request flexible working since 2003.¹²³⁹ Likewise, Congressional failure to pass the ‘Healthy Families Act,’ requiring employers with 15 or more employees, to provide up to 7 paid sick days per annum, means that 40% of US private sector employees have to decide between taking care of their health, or keeping their job.¹²⁴⁰

d Implementation efforts—broad and deep.

Arguably, in the area of education, by tying state grant awards to demonstrated efforts to close the STEM gap for underrepresented groups, the President has actually been able to implement gender mainstreaming beyond the boundaries of the Executive branch.¹²⁴¹ This is to say that with the *Race to the Top* programme, and its total budget of

¹²³⁷ A. Hegewisch and J.C. Gornick, *Statutory Routes to Workplace Flexibility in Cross-National Perspective* (IPWR, 2007) 3.

¹²³⁸ U.S. [Senate/House]. 113th Congress, S.1248/IS/H.R.2559.I.H. Flexibility for Working Families Act. Washington: Government Printing Office, 2013.

¹²³⁹ Hegewisch and Gornick (n 1259) 19.

¹²⁴⁰ The Healthy Families Act (H.R. 1286/ S. 631).

¹²⁴¹ The Whitehouse supports the CEO led organization: ‘Change the Equation: Improving learning in science, technology, engineering and mathematics’ (2013) <<http://changetheequation.org/>> accessed 2/7/2013.

\$4.35 billion, the President has been able to support educational innovation and gender reform at the state level, through competitive grant awards.¹²⁴² This programme is important as it seeks broad collaboration with state and nongovernmental stakeholders, to not only improve STEM education and training, but also to take a more comprehensive effort intended to get more girls interested in STEM studies, and to provide support for increased representation of women in academic faculty. This is an encouraging sign that US efforts at gender mainstreaming are intended to be both broad and deep.

A closer review of the Council's work also reveals that its areas of interest is not limited to STEM studies and careers, flexible working, or paid leave. Instead, it is also concerned to address the problems faced by women in business, the persistence of the gender pay gap, and the need to end violence against women. This broad interest is illustrated by the fact that in 2010, at the request of the Council, the Department of Commerce prepared a report on women-owned businesses and the Treasury Department prepared a report on women in finance leadership. Both reports contained valuable suggestions regarding the supports necessary to increase the number of women in both fields, including financial education, assistance, healthcare, flexible working and safe, adequate childcare.¹²⁴³ The importance of these reports and suggestions cannot be overstated, as they give clear direction to Congress and to the private sector as to the policy of the President's Council regarding the specific needs of women, and urging them to follow suit.

In another encouraging sign, where Congress has been unable or unwilling to act on his redirected policies, the President has been able to achieve a measure of change through federal rulemaking. This was the case when Congress failed to pass the *'Fairness in Women-Owned Small Business Contracting Act of 2012,'* which sought to provide not only special contractual preference to women-owned businesses, but also to study any US industry where women are underrepresented. The Small Business Administration responded to this failure with the issuance regulations requiring that 5%

¹²⁴² Dept. Ed, 'Race to the Top District' <<http://www2.ed.gov/programs/racetothetop-district/index.html>> accessed 5/9/2013.

¹²⁴³ DOC, *Women-Owned Businesses in the 21st Century* (2010); Dept. of Treasury, *White House Council on Women and Girls Report* (2010).

of federal contracting dollars go to women-owned businesses.¹²⁴⁴ While these regulations are not as expansive as the defeated Act, they are already achieving the same result—increased substantive equality, as is illustrated by the fact that although the regulations only came into effect on May 7, 2013, to date, more than 9,000 firms have registered in the programme repository.¹²⁴⁵

It is also notable that several Departments and agencies that are members of the Council have created bodies tasked with addressing specific issues relating to women and girls, increasing public awareness, and ensuring greater enforcement of federal equality laws.¹²⁴⁶ This horizontal approach to implementation of the gender mainstreaming strategy was bolstered by the President’s creation of ‘The National Equal Pay Enforcement Task Force’ in 2010.¹²⁴⁷ Designed to increase enforcement actions, it combined professionals from across the Executive Branch, including the Equal Employment Opportunity Commission (EEOC), the Department of Justice, the DOL, and the Office of Personnel Management. The Task Force’s 2012 report offers a rare example of monitoring and review, with the caveat that the report listed only its accomplishments and lacked any analysis of failed efforts or underperformance. Despite its failure to constitute a truly adequate measure of monitoring and review, the report did indicate that the Task Force secured more than \$381 million in relief for victims of discrimination. These efforts should be applauded. Nevertheless, it is suggested that a better example of gender mainstreaming is the President’s call to statutorily increase in the federal minimum wage, to \$10.10, for not only is it a gender-neutral measure, but as Rubery observes, it is a policy that is more ‘likely to close the gender wage gap.’¹²⁴⁸

¹²⁴⁴ U.S. Senate 112th Congress, S. 2172. IS Fairness in Women-Owned Small Business Contracting Act of 2012 (March 7, 2012); Women-Owned Small Business Federal Contract Programme 78 Fed.Reg. 88, 26504 (May 7, 2013), 13 CFR Part 127 RIN 3245-AG55.

¹²⁴⁵ CWG, *Keeping America’s Women Moving Forward* (n 760) iv.

¹²⁴⁶ For example, see: DOJ, *Sexual Violence in the United States: Summary of the Roundtable Proceedings* (2010).

¹²⁴⁷ Whitehouse, ‘National Equal Pay Enforcement Taskforce.’

<http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf> accessed 2/28/2013

¹²⁴⁸ Rubery, ‘Gender mainstreaming and gender equality in the EU: the impact of the EU employment strategy’ (n 11) 515. It is noted that the author was referring to the minimum wage in the UK. Any change in the federal minimum wage would require US Congressional approval. For current Congressional proposals seeking an increase in the minimum wage, see: ‘current legislation: minimum wage’ (*Library of Congress*, January 2014).

<<http://beta.congress.gov/search?q=%7B%22source%22%3A%22legislation%22%2C%22search%22%3>

e Criticisms and observations.

The results of this exploration into the Council's implementation efforts to date, suggest the strongest criticism should be levied at its reporting and monitoring. It is evident that the departments and agencies made reports to the Council in 2009 and 2010, referring to programmes and policy changes to be implemented in response to inequalities highlighted. However, there is no clear evidence that the Council has subjected those efforts to careful monitoring or critical review. Further, although, a 2012 Report from the Council offered a long list of policies, programmes and legislative initiatives to date, it did not assess its failures with respect to any of them.¹²⁴⁹ This is unfortunate, as the discussion in Part II revealed that an essential lesson from EU experience with the strategy of gender mainstreaming is the necessity of monitoring and review of implementation efforts. This is to say that to be effective, review must be openly critical, with specific recommendations where underperformance is found. Only through the mechanism of open review can gender mainstreaming hope to challenge what Benschop and Verloo describe as 'existing-fossilized-gender norms,' rather than merely operating as an administrative or check box exercise.¹²⁵⁰ This suggests that 'accountability' may well be one of the most important lessons for the US to take from EU experience with implementation. This is to say that in the absence of careful monitoring and open review, on a long-term and annual basis, it is unlikely that the US strategy will be effective in tackling structural discrimination against women generally, and pregnant workers specifically.

Notwithstanding the foregoing, it is offered that US implementation efforts to date offer great promise, coupled with some concerns. Furthermore, these concerns arise more from limitations in the strategy itself, rather than from the lack of effort by the Council. Great promise is contained in the varied efforts undertaken by Council members, suggesting a transformative, broad, and inclusive approach beyond gender; as well as evident expertise with gender mainstreaming tools. The Council's outreach

A%22minimum+wage%22%2C%22congress%22%3A113%7D> accessed 27/1/2014. For State action on the issue, see: NEC and others, *A Year of Action: Progress Report on Raising the Minimum Wage* (2014)

¹²⁴⁹ CWG, *Keeping America's Women Moving Forward* (n 760).

¹²⁵⁰ Benschop and Verloo (n 1118) 29.

efforts and horizontal approach to implementation are important, as the opinions and research they seek to garner can help inform its recommendations, create greater buy-in to the strategy, and widen the strategy's impact beyond the federal workplace.

Additionally, the high level political commitment to increasing substantive equality by President Obama, as illustrated by his declarations of April 17th, as Equal Pay Day, March as National Women's History Month and January as National Stalking Awareness Month,¹²⁵¹ and his public support of legislation intended to offset the disadvantages of pregnant and breastfeeding workers, provides impetus to the Council's efforts. This impetus has been furthered by passage of the 'Patient Protection and Affordable Care Act,' in 2010, which expanded the availability and affordability of health care for pregnant women, and required some employers to provide reasonable break times and private spaces for nursing mothers to pump breast milk during the work day, for up to one year after the child's birth.¹²⁵²

In conclusion, it is suggested that it is premature to judge whether US emergent efforts at gender mainstreaming are merely ameliorative, or will result in real structural change. But, even as a fragile and embryonic start to a long-term strategy, the Order offers an exciting and promising next stage for gender equality in the US. The importance of this next stage lies in the ability of the Council to continue to formulate suggestions for policy change, and to expand its implementation efforts, beyond the confines of the Executive Branch and into the private sector.

V Gender mainstreaming—shifting the trajectory

This final Part seeks to present evidence that gender mainstreaming operates as a complement to existing equality measures and offers a holistic and less controversial means by which to shift the trajectory of the US antidiscrimination law.¹²⁵³ This is to say that in a nation where the enactment of 'special treatment' laws and affirmative action measures benefitting particular groups of people are particularly controversial, the

¹²⁵¹ Whitehouse, 'Presidential Actions-Proclamations' (*whitehouse.gov*, 2013).

<<http://www.whitehouse.gov/briefing-room/presidential-actionhuss>> accessed 19/10/2013

¹²⁵² See: The Patient Protection and Affordable Care Act (n 119). Note: This Act is otherwise referred to in the national press as 'Obamacare.'

¹²⁵³ See Chapters 1 and 2 for a discussion of the feminist theoretical arguments surrounding equality measures.

strategy of gender mainstreaming is less likely to create the same degree of malcontent. This is because, as Verloo observes, gender-mainstreaming policies ‘are hybridized, as they interact with different local conditions.’¹²⁵⁴

a Gender mainstreaming is complementary.

The discussion in Part II above and in previous Chapters highlighted the complementary role that gender mainstreaming plays in the EU. The results of this study suggest that the soft law strategy can play an equally complementary role in the US, where the national enactment of antidiscrimination law has been a particularly slow and difficult project, as well as one in which initial proposals did not expressly intend to benefit women. Instead, as the scholarly review of the 1964 debate surrounding Title VII suggests the inclusion of ‘sex’ as a protected category may have been an attempt to derail the entire Bill, rather than any legitimate proposal to expand the Bill’s parameters.¹²⁵⁵ But, Title VII is not the only national equality measure that has had a difficult history. Academic review of the debate surrounding the passage of the Family and Medical Leave Act (FMLA) of 1993 reveals a similar divisiveness. Indeed, the record clearly shows that the FMLA was initially intended to be a paid maternity leave law, but the jostling of stakeholder interests, including those of liberal feminists, shaped it into a far narrower gender-neutral measure.¹²⁵⁶ A measure that Wright, Gornick, and Meyers accurately refer to as a ‘weak national leave law.’¹²⁵⁷ Any doubt that this was the result should be dispelled by the majority ruling of the US Supreme Court in the 2012 case of *Coleman v. Court of Appeals of Maryland*, which emphasizes not only the overall weakness of the FMLA as an equality measure, but the consequences of Congress’s failure to expressly address leave discrimination against pregnant employees, and those who have just given birth.¹²⁵⁸ In *Coleman*, the Court held that the self-care provisions of the FMLA are not applicable to state employees. The majority

¹²⁵⁴ Verloo, ‘Another velvet revolution? Gender mainstreaming and the politics of implementation’ (n 11) 98.

¹²⁵⁵ For a discussion of this conventional view and the argument that it is wrong, see: Gold (n 724).

¹²⁵⁶ *Daniel Coleman v. Court of Appeals of Maryland et al.* (n 162)1342.

¹²⁵⁷ Erik Olin Wright, Janet C Gornick and Marcia Meyers, *Gender equality: Transforming family divisions of labour*, vol 6 (Verso Books 2009) 41.

¹²⁵⁸ *Daniel Coleman v. Court of Appeals of Maryland et al.* (n 162).

took the view that the self-care leave provision of the statute was not ‘necessary to make the family-care provisions effective,’ and that ‘to the extent that the provision helped single parents retain their jobs and therefore addressed neutral leave policies with a disparate impact on women, it was not directed at a pattern of constitutional violations’ by the states.¹²⁵⁹The Court stated that:

*At the time the FMLA was enacted, there was no evidence of... discrimination or stereotyping in sick-leave policies. Congress was concerned about the economic burdens imposed by illness-related job loss on employees and their families and about discrimination based on illness, not sex.*¹²⁶⁰

The minority dissenting opinion countered the majority view with a careful examination of the history of the legislative measure, arguing that ‘Congress had evidence of a well-documented pattern of discrimination against women.’¹²⁶¹The minority also observed that ‘it would make scant sense to provide job-protected leave for a woman to care for a new-born, but not for her recovery from delivery, a miscarriage, or the birth of a stillborn baby.’¹²⁶²Ultimately, however, the overemphasis on gender neutrality by Congressional lawmakers permitted the majority in *Coleman* to reach its conclusion.

More recently, the difficulties faced by Congressional representatives seeking to advance substantive equality are highlighted by the battles surrounding proposals for paid leave and breastfeeding accommodations. In both cases, the Bills’ proponents have been required to re-propose them over multiple sessions of Congress, while also accepting limitations on their mandates, all in an ongoing effort to obtain the necessary number of votes to secure their passage. In the case of legislation for paid sick days (The Healthy Families Act), this Act was proposed as far back as 2004, and a proposal to amend Title VII, to add breastfeeding as a protected status, has been offered in multiple

¹²⁵⁹ *ibid* 1337.

¹²⁶⁰ *ibid* 1335.

¹²⁶¹ *ibid* 1342.

¹²⁶² *ibid* 1345.

sessions of Congress since 1998. Both have yet to pass, notwithstanding the strong Presidential support they receive.¹²⁶³

It could be argued that the relatively prompt enactment of the PDA in 1978, two years after the Supreme Court judgment in *Gilbert* that it reversed, contradicts any suggestion that the enactment of gender equality measures has been slow and contentious project in the US. A response to this argument is that the PDA was not an equality measure per se, as much as it was a limited law clarifying *original* Congressional intent that pregnancy discrimination is sex discrimination under Title VII. As observed in *Newport News v. EEOC*, in enacting the PDA, Congress, ‘unambiguously expressed its disapproval of both the judgment and the reasoning of the Court in the *Gilbert* decision,’ and instead took the view that it was ‘the dissenting Justices [who] correctly interpreted the Act.’¹²⁶⁴

b Gender mainstreaming is holistic and less controversial.

Recalling from Chapter 1, it was suggested that soft law strategies form one part of four essential elements to a holistic approach to addressing the problem pregnancy discrimination. The results of this research suggests that gender mainstreaming, while not without some limitations, is an essential soft law strategy in a holistic approach that seeks to achieve the structural changes that will lead to greater substantive equality between women and men. The importance of this soft law strategy for the US is its ability to transcend the divide between civil and political rights, and social and economic rights, as well as the public/private sphere divide that epitomizes US antidiscrimination measures for pregnant workers. Its importance also lies in the fact that no one legal measure can ever hope to completely eradicate discrimination and achieve equality for pregnant workers. As noted by Congress during the 1963 debates surrounding the enactment of Title VII:

No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership

¹²⁶³ See: Healthy Families Act (S.2520.IS; H.R. 4575.IH), and 105th Congress 2d Session, H.R. 3531 IH: New Mother’s Breastfeeding Promotion and Protection Act of 1998. See Chapter 6.

¹²⁶⁴ *Newport News* (n 770) 678 (Quoting H.R. Rep. No. 95-948, 95th Cong., 2nd Sess. p. 2 (1978).

*provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.*¹²⁶⁵

This observation was prescient. As the discussion in previous Chapters revealed, the US Constitution and federal statutes have given women access to the labour market, but they have not been a universal remedy for discrimination. This is to say that while workplace doors are no longer closed to women, structural barriers continue to exist that operate to keep women at the bottom of the ladder to advancement.¹²⁶⁶ The fact is, Constitutional and statutory rights and remedies can never be a complete panacea to gender discrimination. Furthermore, as the discussion in Chapter 4 has shown, the US is not alone in this regard. As Sandra Fredman has observed in the context of UK law, ‘three decades of anti-discrimination legislation have not been able to address deep-seated discriminatory structures.’¹²⁶⁷ Similarly, Epstein argues, ‘The problem is no longer one of entry, but of promotion and inclusion into the informal networks leading to the top.’¹²⁶⁸ Her observation is strengthened by Roth’s research, in which it is noted that ‘opportunity is institutionally structured,’¹²⁶⁹ and by Sterba’s, who observes that women hold ‘only 10% of management positions.’¹²⁷⁰

The discussion in previous Chapters also revealed that pregnancy in the workplace holds its own unique challenges for antidiscrimination legislation. Challenges that neither US ‘equal treatment’ measures nor EU ‘special treatment’ measures have been able to fully resolve. With the adoption of gender mainstreaming by the US, it is hoped that these challenges may be more carefully targeted, as policy-makers will no longer be constrained to utilizing individual rights and affirmative action measures to address a seemingly intractable problem.

¹²⁶⁵ *Steelworkers v Weber* (n 793) at 203, Justice Brennan quoting H.R. Rep No. 914, 88th Cong., 1st Sess., pt.1, p.18 (1963).

¹²⁶⁶ See the discussion in O’Neil, Hopkins and Bilimoria (n 630); Bagilhole (n 627); Margaret Graham Tebo, ‘Pounding on A Glass Ceiling’ [American Bar Association] 89 ABA Journal 84.

¹²⁶⁷ Fredman, *Discrimination law* (n 21) 6

¹²⁶⁸ Cynthia Fuchs Epstein, ‘A Theory of Female Subordination,’ in Lorber (n 218) 31.

¹²⁶⁹ LM Roth, *Selling women short: Gender and money on Wall Street* (Princeton University Press 2006)

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¹²⁷⁰ Sterba (n 55) 11.

VI Conclusion

This Chapter set out to do two things. First, to critically consider EU experience with the strategy of gender mainstreaming, and the lessons it offers US nascent efforts. Secondly, against a background of these lessons, this Chapter sought to present compelling evidence that with the issuance of Executive Order No. 13506, gender mainstreaming has become a US domestic equality strategy.

It was argued above, that EU experience with gender mainstreaming reveals five important lessons for the US: (1) The need to adopt a ‘transformative’ approach to gender mainstreaming, one that is designed to integrate gender into all systems, structures, policies, processes, procedure, organization and culture. (2) The need to anticipate challenges to mainstreaming efforts, including a lack of commitment by those charged with implementing the strategy, a lack of financial and human resources, or institutional capacity. (3) The need to include a broad array of external experts and stakeholders in research, data collection, and policy discussions, in an effort to offset the challenges listed above, and to increase ‘buy in’ for the strategy. (4) The need for a broad approach to mainstreaming; one that reflects an understanding of intersectionalities and involves a move from gender mainstreaming to ‘diversity’ or ‘equality’ mainstreaming. (5) The understanding that gender mainstreaming offers a distinct and complementary policy approach to addressing inequality, as against ‘equal treatment,’ which seeks to treat women the same as men and ‘special treatment,’ which seeks to treat women differently from men.

The discussion above also revealed that while the use of an Executive Order renders the US strategy somewhat fragile and reliant upon ongoing political good will, this ‘soft law’ measure is often a precursor to legislation, and has been a historically successful vehicle for advancing civil rights. A closer review of US implementation efforts also revealed that many of the steps taken by the Whitehouse Council and the US Departments and Agencies resonate closely with the focus of gender mainstreaming in the EU. For instance, gender mainstreaming in employment and educational policies seeks to encourage women and girls to consider STEM careers, recognizes the need for workplace flexibility and paid leave, and emphasizes strong cooperation between

internal policy-makers and external experts and stakeholders. While it was acknowledged that the lack of critical monitoring or review of US efforts may ultimately serve to limit the strategy's transformative effect, it was also safely argued that the strategy's ability to be complementary, holistic, and a less controversial tool for achieving greater substantive equality is a promising development in the trajectory of US antidiscrimination law.

Chapter 8: Conclusion

I Introduction

The antidiscrimination laws of the European Union (EU) and the United States of America (US) seek to prohibit pregnancy discrimination in the workplace, but their approach to the problem has historically differed. US law has been defined by an ‘equal treatment’ formal equality approach to the problem. The contrasting EU laws seek substantive equality by combining equal treatment with ‘special treatment’ measures, complemented by the strategy of gender mainstreaming.

The Introductory Chapter of this thesis defined the central question that this research sought to address: Is the trajectory of US antidiscrimination law shifting away from a purely formal equality approach to addressing pregnancy discrimination, towards a more holistic approach that seeks greater substantive equality, and imposes a duty to promote or achieve equality? This question inherently raised a number of important ancillary research questions. In particular, what is the historical, legal, and conceptual background against which EU and US antidiscrimination law has been enacted? How does this affect the equality measures they adopt to address pregnancy discrimination, and their possibilities for future development?

This discussion begins with a summary of findings, before addressing the specific conclusions that these findings suggest.

II Summary of Findings

a Historical differences.

An exploration of EU and US antidiscrimination law was prefaced by an analysis of the historical differences between the two jurisdictions. The evidence presented in Chapters 3 and 5 revealed that whereas the EU is a creature of international treaty and the power to make law is conferred by the twenty-eight members of its economic and social union, the US is a sovereign nation defined by its federal system of government, in which power is divided between the fifty individual states and the federal government. Under this division, national legislative power is vested in Congress, with

the states having power under the Tenth Amendment to the US Constitution to make geographically limited laws.

In addition to a difference in conferral of legislative authority, the EU has at its disposal a variety of forms for its laws that have no comparable in the US. At one end of the spectrum is the primary legislation of the Treaties and secondary legislation in the form of Regulations, Directives, and Decisions. At the other end of the spectrum are the communications, notices, guidelines, recommendations, strategies, and the opinions of the EU Commission and Parliament. Juxtaposed to this, the US Congress and the state legislatures may only enact Bills and Resolutions, and the President may issue Executive Orders, designed to manage the federal government.

However, finding differences in legislative authority and form does not take us far. They do not explain the substantive differences in EU and US antidiscrimination laws. These differences are attributable to the historical, political, social, economic, and cultural events that affect these two legal systems and the laws they produce. As the discussion in Chapter 3 revealed, there is an economic and social basis to EU sex discrimination law. The foundation of this dual basis is Article 119 in the original constitutional Treaty, providing for equal pay for equal work between men and women. The point of which was to avoid ‘competitive disadvantage in intra-community competition.’¹²⁷¹ Article 119 also emphasized that the union is not merely an economic one, but one that ensured social progress. This notion that there is a ‘double aim’ in the EU, that it is at once both economic and social in its aims, has since been solidified by the provisions of the amending Treaties, and is most clearly highlighted in the adoption of the Charter of Fundamental Rights, which was made legally binding by the Treaty of Lisbon.¹²⁷²

In contrast, as the evidence presented in Chapter 5 indicated, US gender discrimination law has at its roots racism, not market competition. The Fourteenth Amendment to the Constitution providing that no state shall, ‘deny to any person within its jurisdiction the equal protection of the laws,’ was not initially construed by the US

¹²⁷¹ *Defrenne II* (n 289), paras 10-12.

¹²⁷² Treaty of Lisbon (n 266).

Supreme Court to mean equality between women and men.¹²⁷³ Instead, it was construed to end racism. The desire to combat racism likewise underpinned the Civil Rights Act of 1964 (Title VII), the nation's benchmark antidiscrimination legislation, where the debate surrounding its enactment suggests the inclusion of a prohibition of sex discrimination may have been an attempt to derail the entire Bill, rather than a desire to advance equality between women and men.¹²⁷⁴

b Legal differences.

Historical differences aside, Chapter 3 revealed that the only limit upon the substantive provisions of EU antidiscrimination law is the ability of its member states to agree. In contrast, the US Constitutional mandate of formal equality places specific parameters on the adoption of *all* national and state legislation. Applying these parameters to the PWD in Chapter 6 revealed that the US Supreme Court would subject the Directive to an 'intermediate level' of judicial scrutiny. To be constitutionally valid, its provisions of job protected paid leave, and workplace accommodations would have to be found to 'serve important governmental objectives' and 'the discriminatory means employed [must be] substantially related to the achievement of those objectives.'¹²⁷⁵ From the ensuing discussion it was determined that while job protected paid leave and workplace accommodations may pass a constitutional challenge, mandatory maternity leave would not.

c Conceptual differences.

The Introductory Chapter examined the multiple meanings of 'equality,' observing from the intense academic debate surrounding the concept that there is no single legal or theoretical definition of equality in the EU or the US. Instead, it found that legal concepts of equality are informed by three distinct 'visions.' These visions are formal equality, substantive equality, and equality as diversity, or dignity and inclusion. In summary, formal equality is the narrowest vision, reducing equality to equal

¹²⁷³ See: Ginsburg, 'Constitutional Adjudication in the United States as a Means of Advancing The Equal Stature of Men and Women Under the Law' (n 697).

¹²⁷⁴ Title VII. (n 171).

¹²⁷⁵ *United States v Virginia* (n 807) 533.

treatment, and requiring employers to ignore the sex-based differences between women and men in the decision-making process. When applied to pregnancy, formal equality requires ‘pregnancy blindness,’ meaning that employers are required to treat a pregnant employee the same as other employees—equally well, or equally badly. In contrast, substantive equality seeks to recognize difference in order to eliminate workplace disadvantages. The question arises, however, as to *what* differences should be recognized and *how* they should be taken into account. Should legislation seek ‘equality of opportunity’ in the removal of workplace barriers, or should it seek ‘equality of results,’ via the proportional representation of the sexes, minorities, and other traditionally excluded groups? It is the more radical ‘equality of results’ vision of substantive equality that informs the third vision of equality, which focuses on the dignity, autonomy, and worth of individuals. This vision requires the removal of socio-economic and political barriers that contribute to inequality. It rejects the narrowly defined concepts of formal and substantive equality, and antidiscrimination legislation that contains only *negative* duties, in favour of imposing *positive* duties and obligations to promote equality and inclusion.

The influences of all three visions were found within EU and US antidiscrimination law, to varying degrees. Formal equality exercised a strong influence in the original Treaty, as an isolated provision with regard to equal pay.¹²⁷⁶ It was then expanded during the 1970s by three Directives regarding equal pay, equal treatment as regards access to employment, vocational training, promotion, and working conditions, and equal treatment in matters of social security.¹²⁷⁷ While these primary and secondary laws have since been amended, the central prohibition of discrimination ‘on grounds of sex’ remains. Likewise, formal equality has been cemented into the US rights-based approach to equality, as set forth in the Fourteenth Amendment to the US Constitution and Title VII, which prohibits discrimination on a number of specifically enumerated grounds, including ‘because of,’ or ‘on the grounds of sex.’¹²⁷⁸

¹²⁷⁶ Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (Euratom).

¹²⁷⁷ Equal Treatment Directive (n 122); Equal Treatment in matters of social security (n 174); Equal Pay Directive (n 172).

¹²⁷⁸ Title VII (n 171).

With the adoption of the Pregnant Workers Directive (PWD) in the EU, and the Pregnancy Discrimination Act (PDA) in the US, there was a discernible shift towards substantive equality.¹²⁷⁹ This shift has been strongest in the EU as the PWD *expressly* affords women special protection against dismissal from the beginning of pregnancy until the end of maternity leave, save in exceptional circumstances. The PDA only *implicitly* permits some preferential treatment of pregnancy, so long as it is consistent with the goal of achieving equality of employment opportunities.¹²⁸⁰ This shift to substantive equality has been bolstered by a derogation from formal equality that exists in both EU and US antidiscrimination law, which permits gender-based measures to address sex segregation in employment. However, the fact that quotas and targets are impermissible positive action measures, or affirmative action measures as they are called in the US, reveals an overriding preference for a substantive vision of ‘equality of opportunity,’ not ‘of results.’ This can be attributed to a desire in the EU to address existing inequalities and not to make new ones, and the fact that affirmative action measures are extremely controversial in the US, where they are ‘painted as a policy of institutionalized discrimination against white men.’¹²⁸¹

There is only limited evidence that the dignity vision of equality permeates EU antidiscrimination law and policy, and even less in the US. An illustration can be found in the adoption of the strategy of gender mainstreaming, which requires governmental policy-makers and implementers not to accept that existing policy or the policy being advanced or considered is in effect gender-neutral, or free of bias towards the male norm. As observed in Chapter 3, in the EU, Articles 8 and 10 of the Treaty on the Functioning of the European Union (TFEU) impose a positive obligation to alter practices and structures that serve to perpetuate inequality, disadvantage, and exclusion, providing that the EU ‘shall aim to eliminate inequalities, and to promote equality between men and women, in all its activities.’ Consideration 2 in the preamble to the Recast Directive 2006/54/EC, expressly references the ‘positive obligation to promote equality between women and men’ at the national level. But, as potentially

¹²⁷⁹ Pregnant Workers Directive (n 112); PDA (n 117).

¹²⁸⁰ See: *Guerra* (n 693).

¹²⁸¹ Leonard (n 817) 61.

transformative as this strategy is, the discussion in Chapter 7 revealed that it has fallen short of its potential to date.

The evidence presented in Chapters 6 and 7 indicated a subtle shift in the US towards the imposition of positive duties at the federal, state, and local levels of government, most notably with the adoption of gender mainstreaming as a domestic equality strategy. At the federal level, Executive Order No. 13506 established a ‘Whitehouse Council on Women and Girls,’ with a stated purpose of ensuring:

*That each of the agencies in which they’re charged takes into account the needs of women and girls in the policies they draft, the programmes they create, the legislations they support.*¹²⁸²

Additionally, sixteen US states, eighteen counties, and forty-four US Cities were found to have legislatively implemented the standards of the Convention to Eliminate All Forms of Discrimination Against Women within their boundaries.¹²⁸³ These international standards require the adoption of gender mainstreaming, as well as positive action, as ‘temporary special measures aimed at accelerating de facto equality...’ and ‘special measures aimed at protecting maternity.’ While this use of ‘soft’ law to impose positive obligations has its drawbacks, including vagueness and lack of sanction for non-compliance, the evidence presented in Chapters 1 and 7 revealed that soft law is a useful tool for advancing equality where there is significant opposition to the expansion of public policy objectives.

III Conclusions

The findings of this research, which have been discussed in previous Chapters, support a number of specific conclusions:

¹²⁸² Executive Order No. 13506 (n 12).

¹²⁸³ The Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M.33 (1980).

a The mandate of formal equality has been successful in tackling the problem of overt sex discrimination, but has been unable to adequately address pregnancy discrimination.

Chapter 2 used the experiences of five employees at two hypothetical companies, one located in the US, and one located in the EU, to catalogue some of the real or potential disadvantages faced by women who are either pregnant, seeking to become pregnant, or who wish to continue to breastfeed their child upon a return to work. These examples and the case law examined in Chapter 5, served to clarify the limitations of a mandate of formal equality, which requires employers treat pregnant employees the same as non-pregnant employees who are similarly situated with respect to their ability to work. It also clarified the failure of the concept of indirect discrimination to address employer policies that disproportionately impact pregnant workers. These workplace policies generally pertain to the provision of sick leave, light duty assignments, flexible work, and part-time work. These disadvantages do not exist in the EU, as the equality Directives entitle pregnant workers to an accommodation, or paid leave, and the right to request flexible working arrangements upon a return to work. Instead, the evidence in Chapter 4 revealed that the EU variant of the US paradigm of disparate impact discrimination is used to address other areas of discrimination where workplace policies are based upon unexamined assumptions and stereotypes that disproportionately affect women, especially those who work part-time.

b Derogations from equal treatment can have unintended negative consequences for the wider canvas of equality.

By treating pregnancy as *sui generis* and permitting measures that give ‘special advantages’ to women, antidiscrimination law can address the lacuna in protection that a requirement of formal equality creates. At the same time, a potential for conflict arises where legislation provides for formal equality *and* requires treatment that respects difference. Where these conflicts are sought to be resolved through litigation, there is the risk that judicial interpretation will tend to overemphasize women’s childbearing capacity, thereby reinforcing gender stereotypes, and/or emphasize other competing interests. This research revealed that this is the case in the EU, where the economic

underpinning of the union has necessitated gender equality measures emphasize the labour market participation of pregnant women and the idea of economic maximization, rather than equality *per se*. However, while the research conducted by Masselot and di Torella into the case law of the CJEU up until 2001, concluded that the manner in which the Court has treated pregnant workers and workers on maternity leave reflects the male norm, social stereotypes, and the concept of a ‘productive worker,’ the results of this research serve to suggest that the Court’s decisions more properly reflect the EU’s economic underpinning and the limitations of the EU measures themselves, rather than the failings of the Court.¹²⁸⁴

The limitations of ‘special treatment’ measures in addressing pregnancy discrimination and their role in continuing gender stereotypes form part of a large body of feminist legal theory discussed in Chapter 2, and throughout this thesis. These theorists play a key role in highlighting how anti-discrimination measures help overcome, or contribute to the disadvantage of women. Their concerns suggest that a key challenge in addressing pregnancy discrimination in the EU and the US is finding the right balance between protection and equality in their antidiscrimination laws.

c Gender mainstreaming can help policy-makers find the right balance between protection and equality in their antidiscrimination laws.

The results of this research suggest that gender mainstreaming offers policy-makers an additional tool through which they can find the right balance to address the seemingly intractable problem of pregnancy discrimination. And, in contrast to formal equality and special treatment, which focus upon the rights and needs of individuals, gender mainstreaming focuses on the institutional structures that give rise to inequality, disadvantage, and exclusion. This conclusion does not ignore the fact that as with all concepts used to address equality issues, gender mainstreaming is a contested concept that has strengths and weaknesses, as well as its supporters and critics. Notwithstanding its weaknesses, the findings in Chapters 3 and 7 revealed that the strategy has great transformative promise, because it applies to all policies-economic, social, and political,

¹²⁸⁴ Masselot and di Torella (n 395)

and enables equality measures to be more carefully targeted. Overall, the results of this research suggested three clear reasons EU and US policy-makers are embracing this long-term equality strategy. They are: (1) The strategy operates to complement existing antidiscrimination law. (2) It is forward looking, rather than focused on past events, and (3) It is a less controversial means of achieving gender equality than the adoption of positive/affirmative action measures, while being similarly focused on group based/collective disadvantage.

d The EU is redirecting its gender equality policy approach to be more holistic.

The evidence presented in Chapters 3 and 4 revealed that the EU approach to pregnancy discrimination is informed by an understanding that as the workplace does not exist in a vacuum, addressing discrimination in one forum, without considering the impact of other issues, including the household division of labour, the costs and availability of child and dependent care, and the need to balance the competing demands of work and family life, will render inadequate any single response to the problem. Instead, what is required is a holistic approach, as defined in Chapter 1. This approach consists of four essential elements. 1. Considering the problem of pregnancy discrimination within the wider context of gender equality. 2. Collaboration between government and non-government stakeholders, with the purpose of informing policy and creating greater support for governmental initiatives. 3. Using a combination of ‘hard’ and ‘soft’ law initiatives specifically designed to advance substantive equality for pregnant workers that go beyond the individual prohibition of discrimination, to include measures designed to actively advance substantive equality *and* impose a duty to promote equality of opportunity. 4. Reconsideration and redirection of policy efforts where evaluations, reports, and studies suggest that tweaking is necessary to achieve greater substantive quality for pregnant, breastfeeding workers, and women on maternity leave. In Chapter 4, EU redirection was highlighted by the EU Commission’s proposal for two new equality Directives and its renewed focus upon gender neutrality in national reconciliation measures, which actively seek to de-couple care from motherhood, to mutualise the costs of maternity and paternity leave, and be responsive to the challenge

that pregnancy discrimination poses in a changed environment. In particular, the 2008 Proposal for a new PWD, which was withdrawn in July 2015, and is to be re-proposed in 2016, holds considerable promise for advancing substantive equality and the holistic approach of the EU, as it is anticipated that the new Proposal will address shortcomings in the original PWD that were not anticipated when the 2008 Proposal was drafted, and were only revealed by recent CJEU judgments declaring that men and surrogate mothers do not have a right to maternity leave.¹²⁸⁵ An express inclusion of men in the Proposal will help to deconstruct gender stereotypes and shift the focus from the biological and productive role of women to a broader and more balanced right to care.

Added to this, if adopted, a Proposed Directive for improving the gender balance among non-executive directors of companies listed on the stock exchange will do much to remove structural inequalities in the workplace, as it sets a minimum objective of 40% women as non-executive directors of public listed companies.

These Proposals, the redirection of reconciliation measures, and the establishment by the Commission of a High-Level Group on Non-Discrimination, Equality, and Diversity for the development of common objectives for equality and non-discrimination, reveal an EU approach to gender discrimination generally, and pregnancy discrimination specifically, that is proactive, holistic, and ever evolving.

e US antidiscrimination law is shifting towards a more holistic approach that seeks greater substantive equality, and imposes a duty to promote or achieve equality.

This research revealed that there are several surprising and important developments on the national, state, and local level of the US that indicate the trajectory of its antidiscrimination law is slowly shifting from a purely ‘equal treatment’ approach to tackling the problem of pregnancy discrimination in the workplace, towards one that seeks greater substantive equality. On the national level, this includes the adoption of two national laws, the provisions of which help to address the lack of workplace accommodations that have often resulted in the lawful dismissal of pregnant and breastfeeding workers. First, the 2008 Act designed to amend the American’s with

¹²⁸⁵ *Montull* (n 385); *Z v A Government department* (n 395); *C.D.* (n 395).

Disability Act, suggests that certain impairments resulting from pregnancy may be considered disabilities requiring employers to provide a ‘reasonable’ accommodation to an employee. Secondly, the Patient Protection and Affordable Care Act of 2009, requires some employers to provide unpaid reasonable break time and a place for employees to express breast milk for one year after a child’s birth.¹²⁸⁶ There are also an increasing number of proposals for national legislation designed to provide workplace accommodations for pregnant and breastfeeding workers, and paid leave. While the evidence presented in Chapters 5 and 7 revealed that these proposals are unlikely to become law anytime soon, they indicate an acknowledgement of the failure of formal equality to adequately address the problem of pregnancy discrimination.

The discussion in Chapter 5 also revealed that by virtue of the Tenth Amendment to the US Constitution, all state legislatures are free to adopt *broader* antidiscrimination laws than those provided by Congress, as long as they do not conflict with Constitutional guarantees, and are not pre-empted by federal law, under the Supremacy Clause of the Constitution (Article VI, Clause 2).¹²⁸⁷ In Chapter 6, a systematic and in-depth review of equality measures of the fifty US states and Washington D.C., revealed that although these measures are *ad hoc* and cannot offer the broad protection afforded by national law, they play a vital role in addressing the problem of pregnancy discrimination in the US and filling the lacuna left by Congressional adherence to formal equality.

The final and most promising development in US antidiscrimination law is the adoption of gender mainstreaming as domestic equality strategy. Considered against a background of the lessons from the EU’s experience with the strategy, the discussion in Chapter 7 revealed that in the five years since it was first adopted in the US, the disaggregated statistics and reports it has spurred have provided the foundation for the gender equality plans of a number of federal departments and agencies that benefit pregnant workers; as well as forming the basis for legislative proposals designed to

¹²⁸⁶ An Act to restore the intent and protections of the Americans with Disabilities Act of 1990. (PL 110-325 (S 3406) (2008). Fair Labo[u]r Standards Act of 1938 (29 U.S.C. 207). NB: The Patient Protection and Affordable Care Act, Public Law 111-148, Section 4207, as of March 23, 2010 amended section 7.

¹²⁸⁷ For a discussion of Congressional pre-emption of state law, see: *Guerra* (n 693) 280-281.

address the lack of paid leave, workplace flexibility, public support for child care, and the need for a higher minimum wage.

Notwithstanding the well-documented limitations of gender mainstreaming and evidence presented in Chapter 7 indicating that the US adoption of the strategy via soft law renders it fragile and subject to ongoing political goodwill, the strategy offers great transformative promise for US antidiscrimination law; enabling it to move beyond the confines of formal equality. And, while it would be premature to say that adoption of the strategy represents a complete turning point in the trajectory of US antidiscrimination law, it is the clearest political recognition to date of the need to transcend the divide between civil and political rights, and social and economic rights; as well as the public/private sphere divide that epitomizes US antidiscrimination measures for pregnant workers.

f US antidiscrimination law will never completely converge with EU antidiscrimination law.

While these research findings suggest that US antidiscrimination law is shifting perceptibly towards a substantive equality approach to addressing the problem of pregnancy discrimination, they also reveal three reasons why it will never completely converge with EU antidiscrimination law, even if it were desired. These are: (1) A Directive is not a legal measure that is available to Congress; meaning that the *form* of US antidiscrimination law can never be identical to that of the EU. (2) As the US Constitution prohibits the adoption of a mandatory maternity leave law, the *substance* of US antidiscrimination law can never be the identical to that of the EU. (3) Finally, there is a significant conceptual barrier to complete convergence with EU law, as ‘special treatment’ restrictions upon women’s employment are not acceptable to US liberal feminists, who have strong support in the US Congress. Notwithstanding this, it can be appreciated that the trajectory of US antidiscrimination law is not as dismal as it once was.

Appendix 1: EU Member State Pregnancy and Maternity Measures

EU minimum	Emees	Risk Assess.	Pregnancy Leave	Pregnancy Pay	Maternity Pay	Maternity Leave	Prohibition against Dismissal	Night Work	Breastfeeding							
PWD 92/85/EEC	All	Yes	Yes- if no accom.	Adequate	Adequate	14/2 wks	Pregnancy & Leave Duration	Can't require	Yes							
EU Member State Provisions																
																LEGEND
																* Coverage for female employees, workers and apprentices
Austria	All*^	Yes	Same	Wages	Wages/€8.65 **	16/16 or 20 wks	Same	Same>16 wks	Yes	# Modified for:						Female homeworkers
Belgium	All<	Yes	Same	Wage x 1wk/60%	82%(salary 30 days/75%-max €98.70 pd**	15 or 17/1 wks	Same	Same	Yes							Housemaids/mother's helps
Bulgaria	All	Yes	Same	90% salary	90% salary	410/45 days	Same	Same	Yes							Contracts agents and civil servants
Croatia	All	Yes	Same	100% salary	100% AWW.	6mos/98 days	Same	Same & underground etc.	Yes							Federal state and municipal civil servants
Cyprus	All	Yes	Same	100% salary	75% salary	18wks/11	Same	Same	Yes							Female teachers employed by a federal state
Czech Rep.	All	Yes	Same	70% of a reference amount	70% of reference amount.	28-37 weeks/14 days	Same	Same	Yes							^ Not applicable to self employed.
Denmark	All	Yes	Same	7th day max €124.80 pw	26 wks x€230	42/2 weeks	Same	Same	Yes							/ mandatory leave period.
Estonia	All	Yes	Same	100% avg inc pd.	100% AWW.	140/30 days	Same	Same	Yes							>Work restrictions, including lifting or standing, after birth.
Finland	All	Yes	Same	30-90% salary if not transfer, or earnings based sickness alw.	30-90% salary	105/30 days	Same	Same	Yes							** Rate for marginally employed.
France	All	Yes	Same	100% ADW	100% ADW max€81.27	16-26***/8 wks		Same	Yes							*** Weeks by
Germany	All	Yes	Same	100% ADW max €13 per day/ Employer balance	100% ADW max €13 per day/ Employer balance	14/6 weeks	Same	Ltd 8.5 hours	Yes							
Greece	All	Yes	Same	100% salary x17wks/€683.76 pm x 6mos	100% pay	10mos/17 wks	Same	Same	Yes							ADD: AVERAGE DAILY WAGE=ADW
Hungary	All	Yes	Same	70% DGE x15 days, 60% max year	70% ADW	24/4 wks	Same	same	Yes							AVERAGE WEEKLY WAGE=AWW
Ireland	All	Yes	Same	7th day €80.09-€124.80	€230 pw x 26 wks	42/6 wks	Same	Same	Yes							Daily Gross Earnings =DGE
Italy	All	Yes	Same	50% ADW x20 days/66.6% thereafter	80% salary 5mos/30% 6 mos	11/5mos	Same	same	Yes							AV ins wage
Latvia	All	Yes	Same	80% AIW	80% AIW	112-136 days	Same	Same	Yes							
Lithuania	All	Yes	Same	80-100% salary x2 days, 40% to day 6,80% after.	100% salary	126-140 days	Same	same	Yes							
Luxembourg	All	Yes	Same	100% salary employer paid	100% salary max €9,007.43 per month	16-20/16 wks	Same	Same	Yes							
Malta	All	Yes	Same	100% ADW x3 days, €12.01 or €18.57 pd	100% salary by employer 4 wks/€160pw x4 weeks	18/6 wks	Same	same	Yes							
Netherlands	All	Yes	Same	100% salary max €174.64 pd	100% salary max €174.64 pd	14-18/4-6	Same	Same	Yes							
Poland	All	Yes	Same	100% salary	100% salary	26-45/2 wks	Same	same	Yes							
Portugal	All	Yes	Same	75% salary	100% x 5mos, 80% x 6 mos, 25% x 3mos	4-9mos/6 wks	Same	Same	Yes							
Romania	All	Yes	Same	75% AMW	85% salary min €135-€899	126/42 days	Same	Same	Yes							
Slovakia	All	Yes	Same	25% and 55%, after 3 days	55% ADW	34-43/14 wks	Same	same	Yes							
Slovenia	All	Yes	Same	90% salary	90%-100% salary	105/28 days	Same	Same	Yes							
Spain	All	Yes	Same	60-75% salary	100% salary	16-18/10 wks										
Sweden	All	Yes	Same	80% ADW max 910 SEK pd	80% ADW x420 days, max 910 SEK pd, 60 days 180 SEK pd	480-660 days										
UK	All	Yes	Same	100% salary if no accommodation/ £86.70 stat sick pay x 28 wks	90% AWW x 6wks, max £136.78 x 36 wks.	52/2-4wks										

Appendix 2: US State and Washington D.C. Antidiscrimination Measures

State	Measure	Employer Size	Employees Covered	Pregnancy Expressly	Accommodation for Pregnancy	Discrimby Association	Statute	Notes on worker exclusions and legend
Alabama	No	0	0	No	No	No	No	
Alaska	Yes	1 All, but D.W.*	Yes	No*	No*	Yes-	Alaska Stat. § 18.80.220 et seq (2012)	D.W.=Domestic Workers
Arizona	Yes	15 All	No	No	No	No	A.R.S. § 41-1401 et seq (2013)	
Arkansas	Yes	9 All, but Fam.***	Yes	No	No	No	A.C.A. § 16-123-102 et seq. (2012)	Not include familial employees or those in training programme
California	Yes	5 All	Yes	Yes	No	No	Gov. Code, § 12900 et seq (FEHA) and Gov. Code, § 12945.1 et seq (CFRA)	
Colorado	Yes	1 All, but D.W.	No	No	Yes*	No	C.R.S. 24-34-401 (2012)	If spouse / fiancé is an employee
Connecticut	Yes	3 All, but D.W.	Yes	Yes	No	No	Conn. Gen. Stat. § 46a-51 -60 (a) (7)	
Delaware	Yes	4 All, but D.W. Ag & Fam	No	No	No	No	19 Del. C. § 710-§ 718.	Any individual employed in Agriculture
D.C.	Yes	1 All, but Fam.& P. A.*****	Yes	No	No	No	D.C. Code § 2-1401.01-§ 2-1431.08.	# Legislation Pending
Florida	Yes	15 All	No	No	No	No	Fla. Stat. § 760.01-§ 760.854	
Georgia	Yes	10 All, but D.W. & Ag	No	No	No	No	O.C.G.A. § 34-5-1 - 34-5-7(Sex discrimination in wage rate.)	
Hawaii	Yes	1 All	Yes	Yes	No	No	HRS § 3784-§ 378.10, HAR 4§12-46-106 through 108	Individuals w/out disabilities associated with a person w/disability(§ 67-5900)
Idaho	Yes	5 All	No	No	Yes*	No	Idaho Code § 67-5901-§ 67-5910	Accommodations for public employees only:(75 ILCS 5/2-102(H))
Illinois	Yes	15 All, but D.W.	No	No#	No	No	775 ILCS 5/1-101 35-30;	
Indiana	Yes	6 All, but D.W. & Fam	No	No	No	No	Burns Ind. Code Ann § 22-9-1-	
Iowa	Yes	4 All	Yes	No#	No	No	Iowa Code § 216.6(2)	
Kansas	Yes	4 All, but Fam,D.W	No	No	No	No	K.S.A. §44-1001-K.S.A. §44-1044 and K.S.A. §44-1110-44-1133	Not contained in Anti discrimination law. (15 employees required.)
Kentucky	Yes	8 All, but Fam,D.W.	Yes*	Yes*	No	No	KRS § 344.010-090 and KRS § 334.040	
Louisiana	Yes	25 All, but Fam,D.W.	Yes	Yes	No	No	La. R.S. 23:341-342.	
Maine	Yes	1 All, but Fam	Yes	No	No	No	5 M.R.S. § 4572-A	
Maryland	Yes	15 All, but public officials	Yes	Yes	No	No	Md. STATE GOVERNMENT Code Ann. § 20-101-§ 20-120B	
Massachusetts	Yes	6 All, but Fam,D.W.	No	No	No	No	ALM.Gl.ch. 151B, § 1 et seq (2013)	Spouse, child
Michigan	Yes	1 All, but Fam	Yes	No	No	No	MCLS prec 37.2101-37.1607	
Minnesota	Yes	1 All	Yes	No#	No	No	Minn. Stat. § 363A.01-§ 363A.43.	
Mississippi	No	0	0	No	No	No	No	
Missouri	Yes	6 All	No	No	Yes	Yes	§ 213.010 R.S. Mo. (2013) et seq	
Montana	Yes	1 All	Yes	No	No	No	Mont. Code Anno. § 49-2-310 (2012)	
Nebraska	Yes	15 All	Yes	No	No	No	R.R.S. Neb § 48-1102 (2012);R.R.S. Neb § 48-1111	
Nevada	Yes	15 All	No	No**	No	No	Nev. Rev. Stat. Ann. § 613.310 to § 613. 45 (2013)	Not include temporary/seasonal workers.
New Hampshire	Yes	6 All, but Fam,D.W., Ag	Yes	No	No	No	RSA 354-A:7 VI	
New Jersey	Yes	1 All, but D.W.	No	No#	No	No	N.J. Stat. § 105-1 to § 10-6-2 (2013)	
New Mexico	Yes	4 All	No	No	No	No	N.M. Stat. Ann. § 28-1-1 § 28-20-2 (2012)	
New York	Yes	4 All, but Fam,D.W.	No	No*	No	No	NY CLS Exec § 290-§ 301 (2013)	
North Carolina	Yes	15 All	No	No	No	No	N.C. Gen. Stat. § 143-422.1-N.C. Gen. Stat. § 143-422.3	
North Dakota	Yes	1 All	Yes	No	No	No	N.D. Cent. Code, § 14-02.4-02 (2013)	
Ohio	Yes	4 All, but D.W.	Yes	No	No	No	ORC Ann 4112.01 (2013)	
Oklahoma	Yes	1 All, but Fam,D.W.	No	No	No	No	25 Okl. St. § 1101 (2013)	
Oregon	Yes	1 All, but Fam,D.W.	Yes	No#	No	No	Chapter 659A, ORS § 659A.029 (2011)	
Pennsylvania	Yes	4 All, but D.W., Ag	No*	No	No	No	43 P.S. § 951 et seq. (2013)	
Rhode Island	Yes	4 All, but Fam,D.W.	Yes	No	No	No	R.I. Gen. Laws § 28-5-1 et seq. (2012);R.I. Gen. Laws § 42-112-1 (2012)	
South Carolina	Yes	15 All	Yes	No	No	No	S.C. Code Ann § 1-13-10 et seq (2012)	
South Dakota	Yes	1 All	Yes	No	No	No	S.D. Codified Laws § 20-13-1 et Seq (2013);ARSD 2003:0912 (2013)	
Tennessee	Yes	8 All	Yes	No	No	No	Tenn. Code Ann § 4-21-101 et seq (2013)	
Texas	Yes	15 All	Yes	No	No	No	Tex. Lab. Code § 21.001 et seq. (2012)	
Utah	Yes	15 All	Yes	No	No	No	Utah Code Ann. § 34A-5-101 (2013)	
Vermont	Yes	1 All	No	No	No	No	21 V.S.A. § 495 (2012)	
Virginia	Yes	6 All	Yes*	No	No	No	Va. Code Ann § 2-2-3900 et seq. (2013)	*Medical conditions expressly include 'lactation' § 2-2-3903
Washington	Yes	8 All	Yes	No	No	No	Rev. Code Wash (ARCW) § 49.60.010 (2013);WAC § 162-30-020 (2013)	
Wisconsin	Yes	1 All, but Fam	Yes	No	No	No	Wis. Stat. § 111.31 et seq. (2012)	
Wyoming	Yes	2 All	Yes	No	No	No	Wyo. Stat. § 27-9-101 et seq. (2013)	
48 of 50 States have State anti discrimination legislation in employment (96%)								

Appendix 3: US State and Washington D.C. Breastfeeding Accommodation Measures

State	Accomm	Employee	Mandate	Beyond 1	Paid?	Mandate	Privately	Statute	Legend
Alabama	No	No	No	No	No	No	No	No	* States mandating employers make 'reasonable effort' only to provide a private place for expressing milk.
Alaska	No	No	No	No	No	No	No	No	** States mandating mediation prior to litigation.
Arizona	No	No	No	No	No	No	No	No	*** Statute uses 'may' rather than 'shall' or 'must' in setting forth employer obligations.
Arkansas	Yes		1 Yes	Not stated	No	Yes*	No	A.C.A. § 11-5-116 (2012)	
California	Yes		1 Yes	No	No	Yes*	No	Cal Lab Code § 1030-33 (2013)	
Colorado	Yes		1 Yes	2 years	No	Yes*	Yes**	C.R.S. 8-13.5-102 et seq. (2012)"Workplace Accommodations for Nursing Mothers Act."	
Connecticut	Yes		1 No	Not stated	No	Yes*	Yes	Conn.Gen. Stat. §. 31-40w	Employer not reqd to provide breaks, but may breastfeed during meal/break period.
Delaware	No	No	No	No	No	No	No	No	
D.C.	Yes		1 Yes	Not stated	No	Yes*	Yes	D.C. Code § 2-1402.82 (2013)and D.C. Code § 2-1402.81 (2013)	
Florida	No	No	No	No	No	No	No	No	
Georgia	Yes		1 No***	No	No	No***	No	O.C.G.A. § 33-24-58 (2013)	
Hawaii	Yes		1 No	Infant	No	No	Yes	HRS § 378-2(7), HRS § 378-10 (2013)	Emer not have to provide breaks.Emee may breastfeed during meal/break period.
Idaho	No	No	No	No	No	No	No	No	
Illinois	Yes		5 Yes	Infant	No	Yes*	No	820 ILCS 260/10 (2013) et seq.'Nursing Mothers in the Workplace Act.'	
Indiana	No	No	No	No	No	No	No	No	
Iowa	No	No	No	No	No	No	No	No	
Kansas	No	No	No	No	No	No	No	No	
Kentucky	No	No	No	No	No	No	No	No	
Louisiana	No	No	No	No	No	No	No	No	
Maine	Yes		1 Yes	3 years	No	Yes*	No	26 M.R.S. § 604 (2013)	
Maryland	No	No	No	No	No	No	No	No	
Massachusetts	No	No	No	No	No	No	No	No	
Michigan	No	No	No	No	No	No	No	No	
Minnesota	Yes		1 Yes	1 year	No	Yes*	No	Minn. Stat. § 181.939 (2013)	
Mississippi	Yes	No	No	No	No	No	No	Miss. Code Ann. § 71-1-55 (2013) prohibits discrimination against nursing mothers.	
Missouri	No	No	No	No	No	No	No	No	
Montana	No	No	No	No	No	No	No	No	
Nebraska	No	No	No	No	No	No	No	No	
Nevada	No	No	No	No	No	No	No	No	
New Hampshire	No	No	No	No	No	No	No	No	
New Jersey	No	No	No	No	No	No	No	No	
New Mexico	Yes		4 Yes	None stated	No	Yes	Yes	N.M. Stat. Ann. § 28-20-2 (2013) Contained in Human Rights law.	
New York	Yes		1 Yes	3 years	No	Yes*	No	NY CLS Labor § 206-c (2013)	
North Carolina	No	No	No	No	No	No	No	No	
North Dakota	Yes	None stated	No***	Infant	No	No***	No	N.D. Cent. Code, § 23-12-17 (2013)	
Ohio	No	No	No	No	No	No	No	No	
Oklahoma	Yes		1 No***	None stated	No	No***	No	40 Okl. St. § 435 (2013)(Occupational Health and Standards Act of 1970(OSHA))ref to 'child' suggests beyond 1yr.	
Oregon	Yes		25 Yes	18months	No	Yes*	No	ORS § 653.077 (2012)	
Pennsylvania	No	No	No	No	No	No	No	No	
Rhode Island	Yes		1 No***	Infant	No	Yes*	No	R.I. Gen. Laws § 23-13.2-1 (2012)	
South Carolina	No	No	No	No	No	No	No	No	
South Dakota	No	No	No	No	No	No	No	No	
Tennessee	Yes		1 Yes	infant	No	Yes	Yes	Tenn. Code Ann. § 50-1-305 (2013)	
Texas	Yes	None stated	No***	None stated	No	No***	No	Tex. Health & Safety Code § 165.003 (2013)	
Utah	No	No	No	No	No	No	No	No	
Vermont	Yes		1 Yes	3 years	No	Yes	Yes	21 V.S.A. § 305 (2013)	
Virginia	No	No	No	No	No	No	No	No	
Washington	No	No	No	No	No	No	No	No	
Wisconsin	No	No	No	No	No	No	No	No	
Wyoming	No	No	No	No	No	No	No	No	

Appendix 4: US State and Washington D.C. Pregnancy, Disability, Family, Medical and/or Maternity Leave Measures

US State and Washington D.C. Pregnancy Disability, Family, Medical and, or Maternity Leave Measures Applicable to Private Employers									
State	Measure?	Employer Size	Eligibility	Weeks?	Paid?	Job-Protected?	Statute	LEGEND	
Alabama	0	0	0	0	0	0	0	* States w/both leave provisions & temporary disability insurance (TDI).	
Alaska	0	0	0	0	0	0	0	** References a monetary benefit only, not leave entitlement.	
Arizona	0	0	0	0	0	0	0	*** References States w/legislative measures pending.	
Arkansas	0	0	0	0	0	0	0	# Reference to leave measures delayed in implementation to 2015	
California	Yes*	5/5.	12/1250	16/12**	Yes/No	Yes/No	CGC§ 12900 (2013);CGC§ 12945.2 (2013);Cal Unemp Ins Code § 3300 (2013) 6 of 12 weeks paid.		
Colorado	0	0	0	0	0	0	0		
Connecticut	Yes*	75/4	12/1000	16/Reasonab	No***	Yes	C.G.S. § 31-51kk -§ 31-51qq ; § 46a-51 (17). No paid leave,§ 31-57r-w. (2013),Sick Leave for Service wrkrs 1 hr per 40 wk.		
Delaware	0	0	0	0	0	0	0		
D.C.	Yes*	20	12/1000	32/7or 5 days	No/Yes**	Yes	D.C. Code § 32-501 (16 weeks birth/ self care) D.C. Code § 32-131.02 *(emplrs w/100 empees paid sick leave, max 7 days		
Florida	0	0	0	0	0	0	0		
Georgia	0	0	0	0	0	0	0		
Hawaii	Yes*	1/100	6/no min	Reasonable pr	Yes	Yes	HRS § 378-1; HER 4,§12-46-106-108 ; § 398-1; HRS § 392-21, pd if eligible for TDI, 14 wks employ, 20 hrs/ \$400/52 wks		
Idaho	0	0	0	0	0	0	0		
Illinois	0	0	0	0	0	0	0		
Indiana	0	0	0	0	0	0	0		
Iowa	Yes	4	None stated	8	No	Yes	Iowa Code § 216.6(2) Temp disabled by pregnancy, childbirth or related medical condition.		
Kansas	0	0	0	0	0	0	0		
Kentucky	0	0	0	0	0	0	0		
Louisiana	Yes	25	All pregnant emp	16	No	Yes	La. REST 23:342(2)(b)		
Maine	Yes	15	limos	10	No	Yes	26 MRS. § 843- § 849		
Maryland	0***	0	0	0	0	0	0 (Legislation pending HOB 1334)		
Massachus	Yes***	6	12 weeks	8	No	Yes	Mass. Maternity Leave Act, ALMA GL chi. 149, § 105D (Legislation pending - Bill H.79)		
Michigan	0***	0	0	0	0	0	0 (Legislation pending HB 4706(2013))		
Minnesota	Yes	21	12/half time	6	No	Yes	Minn. Stat. § 181.940 et seq. (2013) (parenting leave for birth of child.)		
Mississippi	0	0	0	0	0	0	0		
Missouri	0	0	0	0	0	0	0		
Montana	Yes	1	All pregnant emp	Reasonable pr	No	Yes	Mont. Code Anno., § 49-2-310-311. (2012)		
Nebraska	0	0	0	0	0	0	0		
Nevada	0	0	0	0	0	0	0		
New Ham	Yes	6	All pregnant emp	Unstated	No	Yes	RSA 354-A:VI,(b) (2013)		
New Jerse	Yes*	50	12/1000	12/26.	No/Yes	Yes/No**	§ 34:11B-1, care for newborn, not own condition; § 43:21-29 *monetary benefit, not leave(26 wks. 6-8 normal preg.)		
New Mexi	0	0	0	0	0	0	0		
New York	0***	1	4	26	Yes**		NY CLS Work Comp § 200. Cash only, no medical benefits. (Legislation pending-AO363)		
North Car	0	0	0	0	0	0	0		
North Dak	0	0	0	0	0	0	0		
Ohio	0	0	0	0	0	0	0		
Oklahoma	0	0	0	0	0	0	0		
Oregon	Yes	25	180 days/25 hou	24	No***	Yes	ORS § 659A.153. 12 wks parental leave/ pregnancy disability leave.(Legislation pending: SB 801,HB 2645, HB 3390.)		
Pennsylva	0	0	0	0	0***		0 (Legislation pending-The General Assembly of Pennsylvania Senate Bill No. 962, Session of 2013.)		
Rhode Isla	Yes*	50/4	12/30 hours pw	13/30**	No/Yes	Yes/No	R.I. G.L. § 28-48-1 (2012); § 28-41-8 (Disability due to pregnancy & childbirth entitled to unempl benefits.)		
South Car	0	0	0	0	0	0	0		
South Dak	0	0	0	0	0	0	0		
Tennessee	Yes	100	12/Fulltime	16	No	Yes	Tenn. Code Ann. § 4-21-408 (2013)		
Texas	0	0	0	0	0	0	0		
Utah	0	0	0	0	0	0	0		
Vermont	Yes	10 or 15	12/30 hours pw	12	No***	Yes	21 V.S.A. § 471 et seq. (2012) (Legislation pending:S36)		
Virginia	0	0	0	0	0	0	0		
Washingtc	Yes#	50/8	12/1250	12/8 or as lon	No/No	Yes/Yes	(ARCW) § 49.60.030; 49.78.220; § 49.78.390 (2013); 162.30.020.(State FMLA is not concurrent w/FMLA for pregnancy)		
Wisconsin	Yes	50	12/1000	8 total	No	Yes	Wis. Stat. § 103.10 (2012)6 weeks for birth of child. 2 weeks for medical leave.		
Wyoming	0	0	0	0	0	0	0		

Appendix 5: Table of Cases

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C183 Maternity Protection Convention, 2000 (No.183), Geneva, 88th ILC session (15 Jun 2000).

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Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions [1976] OJ 1976 L39/40 (Equal Treatment Directive)

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Council Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L269/15

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Abbreviations

ACA	Patient Protection and Affordable Care Act
ACLU	American Civil Liberties Union
ADA	American's with Disabilities Act.
ADAAA	ADA Amendments Act
ADEA	Age Discrimination in Employment Act
AG	Advocate General
AWE	Average weekly earnings.
BFOQ	Bona Fide Occupational Qualification
BLS	Bureau of Labour Standards
CEDAW	Convention to Eliminate All Forms of Discrimination Against Women
CFR	Charter of Fundamental Rights
CFRA	California Family Rights Act
CRA	Civil Rights Act of 1991
CJEU	Court of Justice of the European Communities
COEA	Council of Economic Advisors
DOL	Department of Labour
EA	Equality Act 2010
ECJ	European Court of Justice
ECOSOC	Economic and Social Council of the UN
EEC	European Economic Community
EEOC	Equal Employment Opportunity Commission
EES	European Employment Strategy
EHRC	Equality and Human Rights Commission
EIGE	European Institute for Gender Equality
EPA	Equal Pay Act
EPC	Equal Protection Clause
EPD	Equal Pay Directive
ERA	Equal Rights Amendment

ESA	European Social Agenda
ETD	Equal Treatment Directive
EU	European Union
EO	Executive Order
FEHA	Fair Employment and Housing Act- California
FIP	Federal Interagency Plan
FLSA	Fair Labo[u]r Standards Act
FLT	Feminist legal theory
FMLA	Family and Medical Leave Act
GED	Gender Equality Duty
GINA	Genetic Information Non-Discrimination Act
GPD	Gross Domestic Product
HB	House Bill
ILO	International Labour Organisation
IVF	In Vitro Fertilisation
MHRA	Missouri Human Rights Act
NAACP	National Association for the Advancement of Colored People
NAP	National Action Plans
NASA	National Aeronautics and Space Administration
NRP	National Reform Programme
NYC	New York City
OECD	Organization for Cooperation and Economic Development
OFCCP	Office of Federal Contract Compliance Programmes
OMC	Open Method of Coordination
PDA	Pregnancy Discrimination Act
PDLL	Pregnancy Disability Leave Law
PLD	Parental Leave Directive
PFL	Paid Family Leave-California

Platform	1995 Beijing Platform for Action
PSED	Public Sector Equality Duty
PWD	Pregnant Workers Directive
QMV	Qualified Majority Voting
SB	Senate Bill
STEM	Science, Technology, Engineering, Mathematics
TEU	Treaty on European Union (Maastricht)
TFEU	Treaty on the Functioning of the European Union
Title VII	Civil Rights Act 1964
UK	United Kingdom
UN	United Nations
UN ECOSOC	United Nations Economic and Social Council
US	United States of America
USSC	United States Supreme Court

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