

NEED-BASED EMPLOYMENT

SHAYAK SARKAR

INTRODUCTION	120
I. PRODUCTIVITY AND BEYOND	127
II. NEED-BASED EMPLOYMENT IN PRACTICE.....	131
<i>A. Historical Precedent: Need Through the New Deal's Work Programs.....</i>	131
1. Need-Based Employment Before the New Deal.....	131
2. Need and the New Deal's Pre-WPA Work Programs.....	133
3. Need and the WPA	135
<i>B. Contemporary Need-Based Employment.....</i>	138
1. Federal Work-Study	138
2. Work Opportunity Tax Credit	139
3. Government Contracting	141
4. Donating Leave	142
III. (RE)DEFINING NEED-BASED EMPLOYMENT	145
<i>A. Objective Assessments.....</i>	147
<i>B. Household Resources.....</i>	149
<i>C. Dependents Beyond Children.....</i>	151
<i>D. Wealth.....</i>	153
IV. ANTIDISCRIMINATION LAW'S PARADOX.....	155
<i>A. Beyond Worker Productivity: Relationships</i>	157
1. Antinepotism	158
2. Nepotism	161
<i>B. Disparate Impact from Need-Based Employment</i>	163
1. Sex.....	163
2. Sexual Orientation.....	167
3. Race and Intersectionality.....	168
<i>C. Defenses.....</i>	172
1. Business Necessity	172
2. Quantity or Quality of Production	175
CONCLUSION	178

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SHAYAK SARKAR*

Abstract: Scholars equate employment with productivity. The history of employment in America, however, is based on economic need rather than just productivity. After the Great Depression, New Deal programs prioritized putting poor Americans back to work. Need-based employment also resonates with modern intuitions and laws—work-study, tax credits, government contracting, and donated leave (encouraged by the world’s richest as a way for low-wage employees to survive pandemics). Despite need-based employment’s intuitive appeal and persistence, it implicates a significant legal problem. Consider a notable incident from then-Professor Ruth Bader Ginsburg’s life. As a new professor, the eventual Justice’s Dean paid Ginsburg less than her male colleagues because she had a highly paid spouse. As federal courts confront similar controversies, scholars and jurists have repeated Ginsburg’s anecdote as a classic example of sex discrimination.

A presumption that women can subsist on a husband’s income, or that gay married men swim in money, is straightforward sex discrimination. But when employees in fact experience such support—whether due to patterns of heterosexuality, hypergamy, or other financial realities—we must confront a tension. Our need-based inclinations conflict with how needs assessments incorporating one’s relationships may disparately impact otherwise protected groups. Because white women and gay men are more likely than Black counterparts to benefit economically from their marriage to men, intersectionality reveals need-based employment’s potential and encourages clarification of “business necessity” and other statutory defenses. This Article provides a fuller vision and potential legal defense of need-based employment, challenges and all.

INTRODUCTION

Employment remains core to American lives, even as some scholars theorize about a future “after work.”¹ Without the jobs we know, we may lose the

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lives we know.² Eighty years after the New Deal tested American household finances, the country was reminded of devastating job loss in the recent COVID-19 pandemic.³ In response, employers and employees often express (and enact) the sentiment that employment decisions should consider need, not just productivity.

Household financial need explicitly surfaces to protect workers across industries. As job cuts loom for university service workers, union representatives argue that “[m]any workers live in households in which they are the only ones working”⁴ Minor league athletes,⁵ restaurant workers,⁶ and frontline hos-

¹ See, e.g., Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 257, 282 (2018) (exploring the idea of “a jobless future, as machines and algorithms threaten to put vast swaths of the labor force . . . out of work” and responding to this world “after work” by “address[ing] how employment law might affect the pace of automation-related job losses”); *Household Data Annual Averages, 8. Employed and Unemployed Full- and Part-Time Workers by Age, Sex, Race, and Hispanic or Latino Ethnicity*, BUREAU OF LAB. STAT., <https://www.bls.gov/cps/cpsaat08.htm> [<https://perma.cc/J9A9-L8NU>] (Jan. 20, 2022) (reporting more than 100 million full-time workers over the age of sixteen and a single-digit unemployment rate in 2021).

² See, e.g., ANNE CASE & ANGUS DEATON, DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM 62 (2020) (describing how early twentieth-century “large-scale job loss” for some minority workers who were lower-skilled preceded the “mortality crisis [surrounding] crack cocaine and HIV,” echoing the more recent job and mortality crisis confronting similarly-situated white workers).

³ LAUREN BAUER, KRISTEN BROADY, WENDY EDELBURG & JIMMY O’DONNELL, BROOKINGS INST., TEN FACTS ABOUT COVID-19 AND THE U.S. ECONOMY 11–12 (2020), https://www.brookings.edu/wp-content/uploads/2020/09/FutureShutdowns_Facts_LO_Final.pdf [<https://perma.cc/4VAC-WMKY>] (discussing job losses related to the COVID-19 pandemic). Some have characterized the early recession as a “she-cession,” disproportionately disadvantaging women, especially those of color. See DIANA BOESCH & SHILPA PHADKE, CTR. FOR AM. PROGRESS, WHEN WOMEN LOSE ALL THE JOBS: ESSENTIAL ACTIONS FOR A GENDER-EQUITABLE RECOVERY 1 (2021) (quoting Alisha Haridasani Gupta, *Why Some Women Call This Recession a ‘Shecession,’* N.Y. TIMES (May 9, 2020), <https://www.nytimes.com/2020/05/09/us/unemployment-coronavirus-women.html> [<https://perma.cc/7AL8-STUD>]), <https://www.americanprogress.org/wp-content/uploads/2021/01/WomenLoseJobs-brief.pdf> [<https://perma.cc/56TH-T5SD>] (explaining the disproportionate impact of pandemic job losses on women).

⁴ Justin Jung, *Union Holds Protests at UC Medical Centers in Response to Recent Layoff Notices*, DAILY BRUIN (June 24, 2020), <https://dailybruin.com/2020/06/24/union-holds-protests-at-uc-medical-centers-in-response-to-recent-layoff-notices> [<https://perma.cc/YKM2-K64X>].

⁵ See, e.g., Susan Slusser, *Ex-A’s Starters Share Good News: Baseball Returning in Asia After Coronavirus Shutdown*, S.F. CHRON., <https://www.sfchronicle.com/athletics/article/Ex-A-s-starters-share-good-news-Baseball-15141176.php> [<https://perma.cc/JWR9-MPGA>] (Mar. 19, 2020) (quoting a minor league baseball player, who explained, “[s]ome of [the players] are the only ones working in their family; it’s super stressful”).

⁶ See, e.g., Stephen J. Kotz, *Cappelletti Leans on Take-Out Menu to Get by in Pandemic*, SOUTHAMPTON PRESS (May 14, 2020), <https://www.27east.com/southampton-press/cappelletti-leans-on-take-out-menu-to-get-by-in-pandemic-1698819/> [<https://perma.cc/VT7H-BRTW>] (quoting a restaurant’s owners, who explained that some of their employees “are the only ones working in their household” and that they felt “a moral obligation to do what [they could]” to help those employees).

pital employees⁷ similarly premise their need for employment on their status as the sole wage earners in their households.

This Article uses “need-based employment” as an umbrella term for factoring economic need into various employment decisions, including hiring, pay determinations, and terminations.⁸ Need-based employment is a theoretical surprise. We usually think of employment as primarily reflecting how workers can meet employers’ needs, not vice-versa.⁹ Where the law does acknowledge the role of “need” in employment, it often applies the label to recognize groups whose identity may correlate with economic disadvantage.¹⁰ Such discussions conflate gender, sex, and race with economic status.¹¹ Alternatively, in the context of compensated surrogacy and sex work, scholars criticize the hiring of “needy” workers—often, poor women of color.¹²

⁷ See, e.g., Lydia Hu, *Pay Cuts, Hour Reductions Planned for Some Mount Sinai Employees*, SPECTRUM NEWS NY1 (May 13, 2020), <https://www.ny1.com/nyc/manhattan/coronavirus/2020/05/13/pay-cuts--hour-reductions-planned-for-some-mount-sinai-employees> [<https://perma.cc/JWX2-5JU9>] (quoting a Mount Sinai employee as saying, “to have our time and pay cut . . . is really a slap in the face,” and “I’m not the only one with a one-paycheck household”).

⁸ For pay, need-based employment chooses a definition of “a just distribution of earnings” that includes economic need over other definitions, including equal pay. Guillermina Jasso & Peter H. Rossi, *Distributive Justice and Earned Income*, 42 AM. SOCIO. REV. 639, 641 (1977) (presenting a possible income distribution option using “systematic criteria for allocation of . . . differently-sized earnings shares,” in which “criteria could be any of a large number of personal or family characteristics, such as . . . need”). The equivalence of hiring and terminations is not without controversy. See, e.g., *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1564 (3d Cir. 1996) (distinguishing, in a nonremedial affirmative action challenge, the disruption and severe cost of terminations from the cost of hiring goals).

⁹ Jasso & Rossi, *supra* note 8, at 641 (“Common wisdom stresses . . . fit between a person’s qualifications and performance and his/her earnings. . . . [D]istribution rules suggest achievement through personal qualities as the basic justification for income differentials with some modifications [for] the varied income needs of persons and households . . .”). Even regulation of wages, such as “living wage” initiatives, may reflect a desire to increase productivity. See *infra* note 56 and accompanying text (discussing the efficiency wage hypothesis).

¹⁰ Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1857 (1996) (describing how “[i]n the [constitutional] civil rights arena, the Court has failed to see any resemblance between economic status and the types of ‘group’ characteristics that require close legal scrutiny”); see also Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283, 1287 (2018) (providing the “first sustained argument for protecting poverty under [multiple] discrimination statutes, as opposed to the Constitution” (emphasis omitted)). This Article, in contrast, focuses on employers’ privileging, not just protecting, those with lower socioeconomic status.

¹¹ See, e.g., Peter Arcidiacono, Thomas Espenshade, Stacy Hawkins & Richard Sander, *A Conversation on the Nature, Effects, and Future of Affirmative Action in Higher Education Admissions*, 17 U. PA. J. CONST. L. 683, 686, 688, 721, 724 (2015) (quoting a spectrum of authors about the relative lack of, and merits militating towards, greater consideration of socioeconomic status in university admissions).

¹² See, e.g., Vivian M. Gutierrez & Berta E. Hernández-Truyol, *Unsexng Pregnancy?* (discussing surrogacy and other facets of the societal perception and treatment of pregnancy), in Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 234 (2010).

Amidst job loss, federal relief may raise questions of need-based employment. After the Great Recession of the late 2000s, the federal government introduced the Education Jobs Program, funneling billions to state governments “to retain or create education jobs.”¹³ The limited money could be used for compensation, whether to offer bonuses or pay salaries to teachers and other educational staff.¹⁴ As such, some teachers, as “the only ones working in their family,” supported bonuses, whereas unmoved school board members prioritized offering those teachers’ colleagues “another year of work[.]”¹⁵ These competing arguments corroborate instincts to allocate resources according to relative needs.

Similar concerns even surfaced amidst protests in response to police killings of Black civilians. The first Black female, and openly gay, mayor of Chicago cautioned against defunding the police.¹⁶ Despite acknowledging the dissonance of significant police expenditures in a resource-starved community, the mayor equated defunding a unionized police force with “getting rid of black and brown people . . . [and] one of the few tools that the city has to create middle-class incomes for black and brown folks.”¹⁷ By such logic, if nonwhite officers were privy to adequate spousal income or family funds, their public defunding would be less concerning.

For analytic clarity, consider how need-based concerns would affect three university employees facing imminent job cuts.¹⁸ Rashelle, Avi, and Raul are humanities professors paid \$70,000 per year, the approximate U.S. median household income.¹⁹ Their strong publications and teaching evaluations render

¹³ Act of Aug. 10, 2010, Pub. L. No. 111-226, § 101(5), 124 Stat. 2389, 2390. *See generally* Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions*, 34 YALE J. ON REG. 791 (2017) (describing the promise of legal intervention to address unemployment during severe recessions).

¹⁴ § 101(5)(A), 124 Stat. at 2390 (describing how education funds “may be used only for compensation and benefits and other expenses, such as support services, necessary to retain existing employees, to recall or rehire former employees, and to hire new employees”).

¹⁵ Kelli Gauthier, *School Board Discusses Employee Bonus Last Time Before Vote*, CHATTANOOGA TIMES FREE PRESS, <https://www.timesfreepress.com/news/story/2011/feb/01/school-board-discusses-employee-bonus-last-time/40991/> [<https://perma.cc/Q59G-EP5X>] (Feb. 1, 2011).

¹⁶ David Marchese, *Lori Lightfoot, Mayor of Chicago, on Who’s Hurt by Defunding Police*, N.Y. TIMES MAG. (June 22, 2020), <https://www.nytimes.com/interactive/2020/06/22/magazine/lori-lightfoot-chicago-police.html> [<https://perma.cc/CXT6-2VDV>].

¹⁷ *Id.*

¹⁸ *See generally* WILLIAM J. WOODWARD, EILEEN BURCHELL, DONALD R. WAGNER, & JONATHAN KNIGHT, AM. ASSOC. OF UNIV. PROFESSORS, FINANCIAL EXIGENCY, ACADEMIC GOVERNANCE, AND RELATED MATTERS (2004), <https://www.aaup.org/report/financial-exigency-academic-governance-and-related-matters> [<https://perma.cc/HJ2S-UCGB>] (discussing standards for cutting faculty jobs).

¹⁹ EMILY A. SHRIDER, MELISSA KOLLAR, FRANCES CHEN & JESSICA SEMEGA, U.S. CENSUS BUREAU, REP. NO. P60-273, INCOME AND POVERTY IN THE UNITED STATES: 2020, at 1 (2021),

them indistinguishable in a market with little demand. These three workers are, however, distinguishable by need. Although all three have student loans to repay, Rashelle and Raul are both married to high-income men working in finance, whereas Avi is widowed. Both Rashelle and Avi are also parents, whereas Raul is childless. Based on assessed need, the university retains only Avi, who has children to support but lacks additional household income.

Rashelle sues. She draws both upon the discriminatory history of employers privileging men as primary breadwinners as well as ongoing federal litigation, in which courts have described employer consideration of a husband's income as "outdated and improper."²⁰ In her complaint, she offers statistical evidence that college-educated women in her labor market are more likely to have high-income spouses than their male colleagues, leading the university's policy to have a sex-based disparate impact.

Need-based employment comes uncomfortably close to validating one scholar, who, reflecting on minimum wage laws and women in 1915, wrote, "A woman or girl with a comfortable home cannot be left to underbid in wages other women or girls who are less fortunate."²¹ Need-based employment also draws troubling parallels to the experience of then-Professor Ruth Bader Ginsburg.²² The young professor was told "she would be paid less than the male faculty member hired at the same time [because] [t]he man had a family to support . . . and Ginsburg was the wife of a successful tax lawyer."²³ Justice

<https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf> [<https://perma.cc/BE7K-8YTJJ>].

²⁰ See, e.g., *Kellogg v. Ball State Univ.*, 984 F.3d 525, 526 (7th Cir. 2021) (confronting a "plaintiff[] seeking to redress discriminatory payment decisions" and characterizing an employer's statement that the plaintiff "didn't need any more [starting salary], because . . . [her] husband worked" as "evidence of explicit misconduct" (alterations in original)).

²¹ Henry Bournes Higgins, *A New Province for Law and Order: Industrial Peace Through Minimum Wage and Arbitration*, 29 HARV. L. REV. 13, 20 (1915). Modern surveys have shown that in other countries, a majority of adults still completely agree with the statement "[w]hen jobs are scarce, men should have more rights to a job than women." JONATHAN EVANS, NEHA SAHGAL, ARIANA MONIQUE SALAZAR, KELSEY JO STARR & MANOLO CORICHI, PEW RSCH. CTR., *HOW INDIANS VIEW GENDER ROLES IN FAMILIES AND SOCIETY* 16 (2022), <https://www.pewresearch.org/religion/2022/03/02/how-indians-view-gender-roles-in-families-and-society/> [<https://perma.cc/E78R-FNY6>] (comparing majority agreement with the statement in Tunisia, India, and Nigeria with minimal agreement, less than six percent, in Australia, the U.S., U.K., Canada, and Sweden).

²² Insofar as a husband's "education[]" and the division of labor[] determine what part women shall or shall not play," need-based employment resonates with Adrienne Rich's definition of patriarchy. ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 57 (1976).

²³ Wendy Webster Williams, *Justice Ruth Bader Ginsburg's Rutgers Years: 1963–1972*, 31 WOMEN'S RTS. L. REP. 229, 232–33 (2010) (footnotes omitted) (citing Ruth Bader Ginsburg, Assoc. Just., U.S. Sup. Ct., Remarks at Rutgers University School of Law (Apr. 11, 1995)).

Ginsburg's experience, shared by Justice Kagan and other leading law school deans, has been characterized as one of "blatant discrimination."²⁴

Raul also sues, arguing that need-based employment violates Title VII's protection against sexual orientation discrimination.²⁵ Raul and his husband see need-based employment as a retrograde endorsement of Justice Scalia's 1996 dissent in *Romer v. Evans*, which justified a lack of concern for gay rights because of their "high disposable income."²⁶ Raul and his husband were disowned by their families and, facing unfavorable laws and expenses to have children, live childless in a pricey metropolis.²⁷ Raul feels that he, akin to Rashelle, should not be punished for finding education, economic security, and a loving spouse after his family's and society's abandonment.²⁸ Both might argue that their discrimination-responsive creation of private economic security not be weaponized against them.²⁹

These characterizations raise a question: can need-based employment avoid illegal sex discrimination? When need is used explicitly, complicated antidiscrimination implications arise. Because patterns of marriage and wealth vary demographically, need-based employment may disparately impact certain women and gay men. As marriage becomes "the province of the privileged," its benefits accrue unevenly.³⁰ Among women, white women are the most like-

²⁴ Adam Liptak, *Kagan Says Her Path to Supreme Court Was Made Smoother by Ginsburg's*, N.Y. TIMES (Feb. 10, 2014), <https://www.nytimes.com/2014/02/11/us/kagan-says-her-path-to-supreme-court-was-made-smoother-by-ginsburg.html> [<https://perma.cc/3RHY-2PG4>]; Angela Onwuachi-Willig, Opinion, *Ruth Bader Ginsburg Fought Tirelessly for What She Believed Was Right*, BU TODAY (Sept. 20, 2020), <https://www.bu.edu/articles/2020/ruth-bader-ginsburg/> [<https://perma.cc/N9FD-H2FV>].

²⁵ See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (affirming the Second Circuit conclusion that "sexual orientation discrimination does violate Title VII").

²⁶ *Romer v. Evans*, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting).

²⁷ See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 567 (1998) (arguing that the "lack of dependents may be traced in part to social discrimination that prevents gays from gaining custody of children"); Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401, 417–18 (2021) (describing how earlier "medical need" requirements in state surrogacy statutes discriminated against male same-sex couples).

²⁸ See Alyssa Schneebaum & M.V. Lee Badgett, *Poverty in US Lesbian and Gay Couple Households*, FEMINIST ECON., Jan. 2019, at 1, 3 (2019) (finding that "same-sex couples' poverty rates are held down by the fact that they have protective characteristics [including higher education], particularly for male same-sex couples").

²⁹ But see, e.g., Felice Batlan, *Engendering Legal History*, 30 LAW & SOC. INQUIRY 823, 835 (2005) (critiquing the "privatization of need" undergirding ideas that wives "should be dependent on husbands, not on the state"); cf. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1644 (2003) (critiquing "marriage's viability as the policy solution to female poverty"); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1387 (2003) (describing how privatization gives private contractors, not just family members, "authority over welfare program participants").

³⁰ Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1279 (2015).

ly to have higher-earning husbands, which mechanically increases their household income.³¹ In many places, married gay male couples earn more than other couples, even when comparing only couples with children.³² Doctrinally, could Title VII defenses protect an effort to advance economic equality through need-based employment, despite possible disparate impacts against women and gay men?

This Article analyzes the legality and virtues of thoughtfully designed need-based employment, including by highlighting disparate impact concerns. The loose intuitions of need-based employment have been occasionally formalized in American law. Those scattered examples merit attention and motivate organizing principles for considering need.

The Article proceeds as follows. Part One provides background for two underlying questions: why do we pay people what we pay them, and why do we hire them at all?³³ To answer these questions, I review economic theory's traditional tying of employment to productivity rather than need.

Part Two presents historical and current need-based employment.³⁴ From Civil War widows' pleas for government employment to the New Deal's Works Progress Administration, the federal government used need-based employment for economic relief. This precedent offers possibilities for economic equality but also exclusionary perils. Unlike the New Deal's focus on white men, need-based employment should reach across sex and racial categories. Beyond history, modern law corroborates need-based employment's presence, and I offer four examples: federal work-study, the Work Opportunity Tax Credit, government contracting, and donated leave.

Part Three charts out core principles for an employer or union seeking to institute a need-based employment program.³⁵ In doing so, it builds upon historical and modern examples. It also reaches beyond the workplace to synthesize how the law considers need in other programs—welfare, the Earned Income Tax Credit, and tax law's regulation of retirement savings. From these, I argue for four seemingly uncontroversial principles in defining need for need-based employment: (i) using objective rather than subjective assessments; (ii)

³¹ Raj Chetty, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q.J. ECON. 711, 747 (2020) (“[B]lack women continue to have substantially lower levels of household income than white women, both because they are less likely to be married and because black men earn less than white men.” (emphasis omitted)); see *infra* notes 296–328 and accompanying text (discussing intersectional, sex- and race-based disparities in marriage).

³² Robin Fisher, Geof Gee & Adam Looney, *Same-Sex Married Tax Filers After Windsor and Obergefell*, 55 DEMOGRAPHY 1423, 1437 tbl.3 (2018).

³³ See *infra* notes 38–61 and accompanying text.

³⁴ See *infra* notes 62–170 and accompanying text.

³⁵ See *infra* notes 171–242 and accompanying text.

considering household income, which internalizes what others, including spouses, are bringing into the home; (iii) acknowledging dependents beyond just children in a household; and finally, (iv) considering wealth alongside income.

Part Four engages the fraught questions these simple principles raise.³⁶ Because of heterosexuality, hypergamy, and financial patterns, need-based employment may give rise to disparate impacts and related antidiscrimination challenges. To analyze these challenges, I analogize to caselaw on nepotism—a context where consideration of employee relationships lies in tension with sex-based disparate impacts. Next, I explore the intersection of sex and race, describing how need-based employment may disparately impact white women and gay men but benefit their Black counterparts. Lastly, I consider two primary defenses under federal law and state law analogs: first, the familiar business necessity defense; and second, the less well-studied “quantity and quality of production” defense.

My contribution is largely descriptive. Throughout, I concede the complexity and normative tradeoffs of need-based employment, but also emphasize its historical precedent and current incarnations.³⁷ In other words, it is messy and loosely defined but here to stay. This Article aims to bring much needed clarity to the legal academy’s understanding of need-based employment.

I. PRODUCTIVITY AND BEYOND

Conventional theory holds that employers’ decisions about hiring and pay reflect productivity, or “merit.”³⁸ This Part offers a primer on productivity’s role in determining pay and explains how productivity’s shortcomings lead to other considerations, namely employee need.

What determines people’s pay for their work? One basic economic theory of pay involves marginal productivity.³⁹ According to the seminal work *The*

³⁶ See *infra* notes 243–379 and accompanying text.

³⁷ While this Article focuses on employees rather than independent contractors, the insights, if not the specific antidiscrimination laws, will still apply.

³⁸ See *infra* notes 39–40 and accompanying text; Michael S. Knoll, *Perchance to Dream: The Global Economy and the American Dream*, 66 S. CAL. L. REV. 1599, 1601 (1993) (describing how a “higher level of productivity led to a higher wage rate and standard of living”); Christopher McCruden, *Merit Principles*, 18 OXFORD J. LEGAL STUD. 543, 564, 568–75 (1998) (acknowledging but critiquing various definitions of merit in discussions of employment and affirmative action). In the public sector, the federal government’s “Merit System Principles” establish protection against discrimination and political patronage: “Equal pay should be provided for work of equal value” and “[e]mployees should be retained on the basis of the adequacy of their performance . . .” 5 U.S.C. § 2301(b)(3), (6).

³⁹ See, e.g., J.L. Stein, *The Predictive Accuracy of the Marginal Productivity Theory of Wages*, 25 REV. ECON. STUD. 182, 182 (1958) (“The marginal productivity theory of wages maintains that, in the long run . . . a firm will . . . equate the marginal (revenue) product of labor with the wage rate (assuming no monopsony power).”); Knoll, *supra* note 38, at 1601 n.8 (citing PAUL SAMUELSON, *ECONOM-*

Theory of Wages, the marginal product is equal to the employer's output gain by the additional labor.⁴⁰ The 1960s American folk musical trio, Peter, Paul, and Mary, sang "If I had a hammer, I'd hammer in the morning, I'd hammer in the evening all over this land."⁴¹ Presumably, more hammering means more furniture, which means more sales and revenue. Economists argue that employee compensation should not exceed the value of the employee's marginal output.⁴² If paid less than that value, however, the employee may be poached by a competing employer. Therefore, employees' productivity should define their pay.⁴³

Amazon, for example, is keenly aware of its employees' productivity, carefully measuring its warehouse workers minute-by-minute and item-by-item.⁴⁴ In its lawyers' words, Amazon tracks employees using a "proprietary productivity metric" called the Associate Development and Employment Tracker (ADAPT).⁴⁵ ADAPT tracks the number of items each employee scans in the warehouse, including gaps in scanning called "time off task" (TOT).⁴⁶ At day's end, supervisors scan the system for TOTs, may question each associate about why they were off task, and may fire workers who take too many pauses that are not determined to be "reasonable."⁴⁷

ICS 627 (11th ed. 1980)) (asserting that "[e]conomics teaches that labor in unregulated markets is paid its marginal product").

⁴⁰ J.R. HICKS, *THE THEORY OF WAGES* 8 (1932) (defining marginal product as "the difference between the total [actual] physical product . . . and that which would have been secured from the same . . . resources if the number of labourers had been increased or diminished by one").

⁴¹ PETER, PAUL & MARY, *If I Had a Hammer (The Hammer Song)*, on PETER, PAUL & MARY (Warner Bros. 1962).

⁴² HICKS, *supra* note 40, at 8 ("At any given wage it will pay employers best to take on that number of labourers which makes their marginal product . . . equal in value to the wage.").

⁴³ Of course, one person's productive work may be another's unproductive leisure. The song ends "If I had a song, I'd sing it in the morning, I'd sing it in the evening." PETER, PAUL & MARY, *supra* note 41. The songs performed by Peter, Paul, and Mary added revenue to their (and their musical collaborators') pockets; but everyday Joes lack the creativity and voice to be compensated for their musical "work," however much joy it brings them.

⁴⁴ Letter from Crystal S. Carey, Att'y, Morgan, Lewis & Bockius LLP, to Barbara Elizabeth Duvall, Field Att'y, Nat'l Lab. Rel. Bd. 2 (Sept. 4, 2018), https://cdn.vox-cdn.com/uploads/chorus_asset/file/16190209/amazon_terminations_documents.pdf [<https://perma.cc/4ZPX-QV23>]; see Colin Lecher, *How Amazon Automatically Tracks and Fires Warehouse Workers for 'Productivity'*, THE VERGE (Apr. 25, 2019), <https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations> [<https://perma.cc/PQY9-EBQM>] (describing Amazon's surveillance of workers to track their productivity).

⁴⁵ Carey, *supra* note 44, at 2; Alessandro Delfanti, *Machinic Dispossession and Augmented Despotism: Digital Work in an Amazon Warehouse*, 23 NEW MEDIA & SOC'Y 39, 48–50 (2021) (describing how Amazon "warehouse labor is quantified" and how managers "use data from associates' performance to rank and discipline them" (citing Phoebe Moore & Andrew Robinson, *The Quantified Self: What Counts in the Neoliberal Workplace*, 18 NEW MEDIA & SOC'Y 2774 (2016))).

⁴⁶ Carey, *supra* note 44, at 2 n.2.

⁴⁷ *Id.*

Young lawyers at large American law firms defend Amazon's practices. These associates earn far more than Amazon warehouse workers but less than the revenue they generate for the firm. Yet the \$200,000-plus base salaries earned by some twenty-four-year-old law school graduates are not simply prizes for scholastic achievement. Referencing marginal product theory, Yale Law School's career development office explained to students that "[i]n order to be profitable to your firm, you must make enough money from your billable hours not only to cover your salary and your overhead, but also to generate revenue for the firm."⁴⁸ A typical law firm associate can easily expect to generate nearly double her salary in revenue: 1,500 billable hours charged (very) conservatively at \$400 per hour generates \$600,000 in revenue from clients.⁴⁹ The firm's even more richly paid partners profit from associates' labor.⁵⁰ The value ascribed to the legal work—hundreds of dollars per hour, or more than twenty times the minimum wage—is descriptive, not normative: the young lawyer's work is "worth" what the client is willing to pay.

Many workers' wages fall short of their productivity, and capitalists may extract the surplus.⁵¹ Workers face barriers to switching jobs, so the imagined perfect employment competition will not exert the same upward pressure on wages.⁵² Throughout the world, farm workers without either the ability to mi-

⁴⁸ YALE L. SCH. CAREER DEV. OFF., THE TRUTH ABOUT THE BILLABLE HOUR (2002), https://law.yale.edu/sites/default/files/area/departments/cdo/document/billable_hour.pdf [<https://perma.cc/MS5B-GKWK>].

⁴⁹ This is true even assuming fifty percent in overhead costs above and beyond the six-figure salary. Also, consider that a federal judge questioned Yahoo in 2020 about its attorney fees for a case where the work of a first-year law student was billed at \$200 an hour. Dorothy Atkins, *Judge Koh Questions \$30M Atty Fee Bid in Yahoo Breach MDL*, LAW360 (June 18, 2020), <https://www.law360.com/technology/articles/1284462/judge-koh-questions-30m-atty-fee-bid-in-yahoo-breach-mdl> [<https://perma.cc/E62X-B5K5>]; see also Debra Cassens Weiss, *At Least 3 BigLaw Firms Charge More Than \$1K per Hour for Top Associates*, ABA J. (May 27, 2020), <https://www.abajournal.com/news/article/at-least-3-biglaw-firms-charge-more-than-1k-an-hour-for-top-associates> [<https://perma.cc/9LQH-MAX2>] (identifying several law firms that may bill clients for more than \$1,000 per associate hour).

⁵⁰ *The 2021 Am Law 100: Ranked by Gross Revenue*, AM. LAW. (Apr. 20, 2021) <https://www.law.com/amercanlawyer/2021/04/20/the-2021-am-law-100-ranked-by-gross-revenue/> [<https://perma.cc/G68G-3ZQG>] (ranking the top earning law firms in the United States).

⁵¹ See *id.* (listing law firms with the most gross revenue). Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 350 (1985) ("[T]he firm earns additional profit by buying the associates' time at 'wholesale' and selling it to the client at 'retail.'").

⁵² Powerful local employers without much competition in hiring can drive wages below marginal productivity, concerning our political branches. See, e.g., *Fact Sheet: Executive Order on Promoting Competition in the American Economy*, WHITE HOUSE (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/> [<https://perma.cc/5CRX-6CUL>] (citing José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUM. RES. SUPP. S167 (2022)). Scholars debate how workers' rights and coordination might be allowed to serve as a countervailing force against employer power. Compare Sanjukta Paul, *Recovering the Moral Economy Foundations of the*

grate (due to poor transportation infrastructure) or access to credit tend to receive lower pay.⁵³ A statutory minimum wage can exert opposing pressure, compensating people for productivity that would otherwise benefit only the employer.⁵⁴ For the farm workers, a minimum wage raises wages closer to marginal productivity.⁵⁵ New evidence also corroborates the efficiency wage hypothesis—the minimum wage may actually improve productivity, particularly in a weak labor market.⁵⁶

Measuring a worker's productivity is difficult.⁵⁷ In contrast to law firm associates⁵⁸ or fast-food workers⁵⁹ easily monitorable output, a nanny or caregiver's marginal product of labor is ambiguous.⁶⁰ Although some describe care work as immeasurable and priceless, few seem to pay more than twenty dollars per hour.⁶¹

Sherman Act, 131 YALE L.J. 175, 180 (2021) (drawing upon legislative history to argue for “dispers[ing] economic coordination rights” to “both contain[] domination and accommodat[e] democratic coordination” (emphasis omitted) (citing Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. Rev. 378, 380–82 (2020))), with Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 22–25 (1966) (arguing that Congress wanted to disallow “cartels”).

⁵³ Seema Jayachandran, *Selling Labor Low: Wage Responses to Productivity Shocks in Developing Countries*, 114 J. POL. ECON. 538, 540, 569–70 (2006) (explaining how structural drains on worker productivity subtract from worker wages in developing nations).

⁵⁴ 29 U.S.C. § 206(a)(1)(A)–(C) (setting the federal minimum wage).

⁵⁵ See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY*, 312–13 (Arthur Goldhammer trans., 2014) (stating that for such workers, “imposing a minimum wage may not only be just but also efficient”).

⁵⁶ Decio Coviello, Erika Deserranno & Nicola Persico, *Minimum Wage and Individual Worker Productivity: Evidence from a Large U.S. Retailer*, 130 J. POL. ECON. 2315, 2316 (2022) (using administrative data from a U.S. retailer and a “border-discontinuity research design” to find that a minimum wage increase led to an increase in productivity, measured by sales per hour).

⁵⁷ PIKETTY, *supra* note 55, at 311 (discussing how to roughly calculate marginal productivity).

⁵⁸ Kevin A. Kordana, Note, *Law Firms and Associate Careers: Tournament Theory Versus the Production-Imperative Model*, 104 YALE L.J. 1907, 1916 (1995) (assuming that “associates can be easily monitored” because “each [associate] produces work that is, typically, billed directly to the client”).

⁵⁹ Christine Jolls, *Fairness, Minimum Wage Law, and Employee Benefits*, 77 N.Y.U. L. REV. 47, 64 (2002) (describing how “employees are instructed with great precision . . . on the proper order in which to stack the elements of a hamburger sandwich (lettuce, tomato, cheese, hamburger, etc.)”).

⁶⁰ Jolls, *supra* note 59, at 64 (contrasting fast food laborers and hamburger assembly with the “discretion enjoyed by [child care] employees in performing their work”); see also Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167, 1172 (2015) (discussing how “[i]ntimate workers’ willingness to act altruistically on behalf of consumers generates value” and persists even while “certain intimate workers are exempt from law that guarantees payment for these efforts” (citing 29 U.S.C. § 213(a)(15), (b)(21))); Shayak Sarkar, *The New Legal World of Domestic Work*, 32 YALE J.L. & FEMINISM 1, 21–24 (2020).

⁶¹ See, e.g., *Occupational Outlook Handbook, Childcare Workers*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/ooh/personal-care-and-service/childcare-workers.htm> [<https://perma.cc/46PZ-TMP4>] (Oct. 4, 2022) (noting median pay of \$13.22 per hour); Desiree Leung, *2022 Nanny Pay Rates: How Much Should I Pay My Nanny*, CARE.COM (Nov. 19, 2021), <https://www.care.com/hp/2021-nanny-pay-rates-how-much-should-i-pay-my-nanny> [<https://perma.cc/GJ5B-FZZ4>].

II. NEED-BASED EMPLOYMENT IN PRACTICE

Productivity drives pay, but outside of surveilled warehouses and large law firms with billable hours, it is difficult to measure. Employers unsurprisingly consider other factors. I use need-based employment as a broad term for any practices that factor economic need into employment decisions. The practice of incorporating economic need into employment decisions, if not the specific term “need-based employment,” pervades American history and law. In fact, the specific term does appear in the U.S. Code, in the context of federal work-study, but this Article considers the practice more broadly.⁶² Section A of this Part begins by examining how public actors have explicitly based employment decisions on needs assessments (synonymous with means testing).⁶³ That history is long, from the letters of grieving Civil War widows seeking work to Congress’s regimented New Deal work relief during the Great Depression.⁶⁴

After addressing the New Deal’s work programs—including sex- and race-based exclusions that led some scholars to describe it as “affirmative action for white Americans”⁶⁵—Section B of this Part moves to modern times.⁶⁶ I provide four other examples of need-based employment in the law: federal work-study; employment subsidized by the Work Opportunity Tax Credit; need-based hiring requirements in government contracting; and donated leave, the transfer of one employee’s paid leave to allay another’s need. Each example attests to need-based employment’s continued existence, however limited. These examples motivate Part Three’s analysis of the broad parameters by which need-based employment should be defined and designed, providing some analytic discipline to a concept.

A. Historical Precedent: Need Through the New Deal’s Work Programs

1. Need-Based Employment Before the New Deal

Long before the New Deal, women pleaded their dependents’ need—and the absence of male relations—to secure government employment.⁶⁷ As one historian writes, “[l]acking the vote, and therefore unable to demand [federal]

⁶² 20 U.S.C. § 1087-53(b)(4); see *infra* notes 121–127 and accompanying text.

⁶³ See *infra* notes 68–120 and accompanying text.

⁶⁴ While Theda Skocpol famously connected Civil War veteran benefits for widows and dependents to modern direct-relief programs, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992), I focus on work relief.

⁶⁵ See, e.g., IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* 161 (2005).

⁶⁶ See *infra* notes 121–170 and accompanying text.

⁶⁷ Beyond pleading need to secure employment, nineteenth century women also made pension petitions to Congress to secure benefits. Kristin A. Collins, “*Petitions Without Number*”: *Widows’ Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements*, 31 *LAW & HIST. REV.* 1 (2013).

appointments, these women . . . pleaded the death of fathers and husbands in the Civil War,” post-war economic challenges, and the need for work “to support the dependents left in their care.”⁶⁸ Employment application letters from this era capture how women applicants pointed both to male relatives’ political loyalties and vivid examples of their and their dependents’ acute economic need.⁶⁹

Need-based federal employment resurfaced in the 1930s, when a belt-tightening Congress targeted dual federal employment of the married.⁷⁰ Congress passed the Economy Act of 1932 partly “to curb public spending and help the economy navigate the Great Depression.”⁷¹ Beyond providing for progressive pay cuts,⁷² the second part of the Act singled out “married persons” for layoffs.⁷³ Where both spouses were in federal service, these “married persons (living with husband or wife) . . . [were to] be dismissed before any other persons”⁷⁴

Not all legislators supported the proposal to disadvantage married couples in federal employment.⁷⁵ Some legislators rooted their nonsupport in low-paid constituents’ assertions that the proposal would dismantle families;⁷⁶ others

⁶⁸ Cathryn L. Claussen, *Gendered Merit: Women and the Merit Concept in Federal Employment, 1864–1944*, 40 AM. J. LEGAL HIST. 229, 229–30 (1996) (citation omitted) (citing CINDY SONDIK ARON, *LADIES AND GENTLEMEN OF THE CIVIL SERVICE: MIDDLE-CLASS WORKERS IN VICTORIAN AMERICA* 47 (1987)).

⁶⁹ *Id.* at 230; ARON, *supra* note 68, at 102 (describing how “being ‘needy’ was another way to win a job in [the federal] government,” and how female applicants provided “emotion-laden descriptions of [the] enormous family and financial problems . . . congruent with proper female behavior”). In contrast, men described themselves as “unfortunate in business” with emotional descriptions reserved for the “very old, very young, or physically disabled men—men who found themselves as helpless and dependent as women.” ARON, *supra* note 68, at 102–03; John S. Gilkeson, Jr., *Ladies and Gentlemen of the Civil Service: Middle-Class Workers in Victorian America*, 75 J. AM. HIST. 278, 278 (1988) (book review) (summarizing how “[p]rospective [federal] clerks were compelled by economic hardship” and that “well after the passage of the Pendleton Act in 1883, federal clerks continued to search for patrons to protect their jobs from office intrigue”).

⁷⁰ Act of June 30, 1932, Pub. L. No. 72-212, § 213, 47 Stat. 382, 406.

⁷¹ U.S. GOV’T ACCOUNTABILITY OFF., OFF. OF GEN. COUNS., 3 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12-22 (3d ed. 2008); *see also* Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 900–902, 904 (2012) (describing how the Economy Act regulates the interagency marketplace—which allows agencies to sell one another goods and services—and was meant to “improve governmental efficiencies”).

⁷² § 105(d), 47 Stat. at 401.

⁷³ *Id.* § 213, 47 Stat. at 406.

⁷⁴ *Id.* The same dismissal hierarchy extended to appointment.

⁷⁵ 75 CONG. REC. 13796 (1932) (statement of Sen. Wesley Jones) (“[P]ersonally I have been in favor of not having this amendment affect the married people who are now in the departments. I am not going into the reasons for it, but that was my position until the end.”).

⁷⁶ *Id.* at 13797 (“Mr. La Follette: . . . I think the Senator from Pennsylvania is absolutely correct about it, because some people have called at my office saying that they are receiving very low salaries, and that it would be impossible for them to exist if one of them is dismissed, and that they will be forced to separate. Mr. Reed: In other words, in the name of economy, we are breaking up families. Mr. La Follette: Exactly.”).

simply deemed the proposal “outrageous.”⁷⁷ The married persons’ clause ultimately passed. As one Senator admitted, this “discrimination” was to preserve “breadwinners:” “when there are many men without employment” and “with large families,” dismissals seemed “fair.”⁷⁸ Proponents framed the program as reallocating jobs from dual government-employee households towards unemployed men, rather than people generally.⁷⁹

2. Need and the New Deal’s Pre-WPA Work Programs

The private need for work catalyzed transformative public works. Later in the 1930s, the federal government formally intervened to employ struggling Americans as part of the economic-recovery effort.⁸⁰ The federal programs prioritized hiring the unemployed and needy for work relief jobs,⁸¹ and literally reshaped the American “landscape by placing a federal façade on the public architecture of local communities.”⁸² These programs also literally rewrote history, as the Works Progress Administration (WPA) funded writers and historians to interview a dying generation of former slaves and give life to their memories.⁸³ Through laws, work, and words, the New Deal showed us how to employ the needy in service of the nation.

Originally, work relief was distinguished from direct relief partly through the absence of means testing. Harry Hopkins, President Franklin D. Roosevelt’s Secretary of Commerce and a key WPA administrator, believed that requiring those without work to prove their destitution comprised “wholesale degradation.”⁸⁴ The predecessor to the WPA, the short-lived Civil Works Ad-

⁷⁷ *Id.* at 13803 (statement of Sen. Kenneth McKellar).

⁷⁸ *Id.* at 13515 (statement of Sen. John McDuffie) (“In a time like this when there are many *men* without employment . . . it seemed but fair, in the event dismissals must come, they should be made in cases where two or more of the same family are on the Government pay roll. . . . One bread-winner, at least in every family, was the thought . . .” (emphasis added)).

⁷⁹ *But cf.* Joan C. Williams, *Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case*, 73 U. CIN. L. REV. 365, 381 (2004) (rethinking, decades later, the “breadwinner” and “primary caregiver” models in favor of one where “both parents are equally involved in care work and market work”).

⁸⁰ *See, e.g.*, The Emergency Relief Appropriation Act of 1935, Pub. L. No. 74-11, 49 Stat. 115.

⁸¹ Price V. Fishback, William C. Horrace & Shawn Kantor, *The Impact of New Deal Expenditures on Mobility During the Great Depression*, 43 EXPLORATIONS ECON. HIST. 179, 184–87 (2006).

⁸² Carroll Van West, “*The Best Kind of Building*”: *The New Deal Landscape of the Northern Plains, 1933–42*, 14 GREAT PLAINS Q. 129, 129, 132 (1994) (describing how the Civil Works Administration (CWA) lasted for only a few months from 1933–1934).

⁸³ *See* Marie Jenkins Schwartz, *The WPA Narratives as Historical Sources* (discussing the nuances and criticisms of historians’ use of WPA stories to understand slavery in America), in THE OXFORD HANDBOOK OF THE AFRICAN AMERICAN SLAVE NARRATIVE 89, 89–100 (John Ernest ed., 2014).

⁸⁴ William W. Bremer, *Along the “American Way”*: *The New Deal’s Work Relief Programs for the Unemployed*, 62 J. AM. HIST. 636, 639 (1975) (quoting Harry L. Hopkins, *The War on Distress*, in NEW DEAL THOUGHT (Howard Zinn ed., 1966)); Deborah C. Malamud, “*Who They Are—or Were*”: *Middle-Class Welfare in the Early New Deal*, 151 U. PA. L. REV. 2019, 2050 (2003) (noting how

ministration (CWA), provided construction jobs throughout the United States without means-testing millions of participants in the winter of 1933 to 1934.⁸⁵ Overwhelmed by applicants, the CWA turned away millions.⁸⁶

Post-CWA programs under the Federal Emergency Relief Administration (FERA) began to utilize needs assessments without excluding the white-collar and middle-class.⁸⁷ The wage rate was independent of family circumstances, but the number of hours for which a worker was eligible reflected a family's budgetary deficiency.⁸⁸ This deficiency, or bureaucratic need calculation, could reflect a previous standard of living (reminiscent of modern child support calculations),⁸⁹ that appealed to white-collar, middle-class workers.⁹⁰

FERA then made way for the need-based Works Progress Administration (WPA), the most notable work program during the Depression era.⁹¹ To fund these work programs, Congress passed emergency relief laws on an annual basis through the 1940s.⁹² In the 1939 emergency law, the WPA required that "preference shall be determined, as far as practicable, on the basis of relative needs"⁹³

Hopkins and his staff thought that asking a worker to sign a "pauper's oath": a statement under oath that they could no longer support themselves and their families . . . was a dangerous threat to morale—but especially to the morale of the white-collar worker").

⁸⁵ Van West, *supra* note 82, at 132 (describing how the CWA lasted for just months, from 1933–1934); NANCY E. ROSE, *PUT TO WORK* 38–39 (1994).

⁸⁶ ROSE, *supra* note 85, at 38.

⁸⁷ Malamud, *supra* note 84, at 2040 (arguing that even under the new, post-CWA FERA rules, there was "ample opportunity . . . to meet the needs of the unemployed white-collar worker"); Nancy E. Rose, *Work Relief in the 1930s and the Origins of the Social Security Act*, 63 SOC. SERV. REV. 63, 68–69 (1989) (describing how FERA administrators intended to attract, and did attract, white-collar workers).

⁸⁸ ROSE, *supra* note 85, at 29.

⁸⁹ See Lori W. Nelson, *High-Income Child Support*, 45 FAM. L.Q. 191, 192–93 (2011) (noting the high amounts of child-support that can be required of high-earning parents and providing Iowa as an example where "the standard of living of the child had no dissolution occurred" is a legally permissible consideration in making support determinations).

⁹⁰ ROSE, *supra* note 85, at 29. A once high-earning man could now be found needier and therefore eligible for more pay via more hours but *not* a higher hourly wage.

⁹¹ See Nancy E. Rose, *Bring Back the WPA: Lessons from the Job Creation Programs of the 1930s* (noting how "the WPA is the best known Depression era work program," over the "more innovative and controversial" FERA and CWA), in *EMPLOYMENT GUARANTEE SCHEMES* 155, 155 (Michael J. Murray & Mathew Forstater eds., 2013).

⁹² See generally Brent McKee, *Emergency Relief Appropriation Acts (1935–1943)*, THE LIVING NEW DEAL (May 6, 2018), <https://livingnewdeal.org/glossary/emergency-relief-appropriation-acts-1935-1943/> [https://perma.cc/GX8T-A8X5] (describing the annual passage of funding). As one economist described him, FERA, and then-WPA, administrator "Hopkins was continually going hat in hand to Capitol Hill . . . threatening Congress with the specter of millions of needy unemployed who would no longer receive federally supported relief if FERA funds were not supplemented." John Joseph Wallis, *The Political Economy of New Deal Fiscal Federalism*, 29 ECON. INQUIRY 510, 513 (1991).

⁹³ Emergency Relief Appropriation Act of 1939, Pub. L. No. 76-24, § 16(a), 53 Stat. 927, 933.

3. Need and the WPA

To combat “misery of gigantic proportions,” from 1935 to 1943, the WPA employed nearly ten million individuals and categorized them by need.⁹⁴ The WPA’s definition of need generally considered the entire household’s needs and resources and prioritized those with children.⁹⁵ Veterans benefited from a secondary preference within classes of need, but proposals to give all veterans primary preference, regardless of need, failed.⁹⁶ Need thus persisted as the main criterion upon which to ration employment.

Federal regulations established two categories of need for certified applicants.⁹⁷ First need preference, or Class A, went to members of families with “no income,” whereas second need, or Class B, was for those with income insufficient for maintenance on a subsistence level.⁹⁸

Even in this federal categorization of need, the government prioritized families.⁹⁹ If single individuals with no income had no dependents, they could be placed in second need.¹⁰⁰ The employment of such workers was generally limited to one per family.¹⁰¹

Need did not entirely override performance-based standards. The program excluded anyone whose work habits or “record shows that he is incapable of performing satisfactorily”¹⁰² Roosevelt envisioned the able-bodied building a stronger country through work relief while avoiding “dole relief.”¹⁰³

Although Congress debated the interaction of the need category with other preference categories, including veterans, it remained focused on need. Congressman James E. Van Zandt of Pennsylvania proposed to amend the program by allowing veterans access to WPA employment, regardless of need.¹⁰⁴ Yet House colleagues rejected making veteran status a primary preference.

⁹⁴ FED. WORKS AGENCY, FINAL REPORT ON THE WPA PROGRAM 1935–1943, at III (1947), <https://tile.loc.gov/storage-services/service/gdc/gdclcn/47/03/21/99/47032199/47032199.pdf> [<https://perma.cc/P7HH-VW9E>].

⁹⁵ See *infra* notes 97–101 and accompanying text (discussing family preference).

⁹⁶ See *infra* notes 104–106 and accompanying text (discussing the debate about need and veteran status in the Congressional Record).

⁹⁷ See 87 CONG. REC. 5146 (1941) (statement of Rep. James Van Zandt).

⁹⁸ *Id.*

⁹⁹ FED. WORKS AGENCY, *supra* note 94, at 21 & n.9.

¹⁰⁰ *Id.* However, federal approval was required for such redefinition, and if that approval was granted, it applied on a statewide basis. *Id.*

¹⁰¹ Edwin Amenta & Drew Halfmann, *Wage Wars: Institutional Politics, WPA Wages, and the Struggle for U.S. Social Policy*, 67 AM. SOCIO. REV. 506, 512 (2000).

¹⁰² Emergency Relief Appropriation Act of 1939, Pub. L. No. 76-24, § 16(c), 53 Stat. 927, 934.

¹⁰³ Amenta & Halfmann, *supra* note 101, at 511.

¹⁰⁴ 87 CONG. REC. 5145–46 (1941) (statement of Rep. James Van Zandt). His concern was partly inspired by veterans with service-connected payments being placed in Class B, and then losing WPA opportunities to Class A needy non-veterans.

Congressman Emmet O'Neal of Kentucky, a WWI veteran himself, rejected the idea that a "veteran who has no dependents, or who has no great [family] financial responsibility . . . should take precedence over a widow with two or three children who may be in the direst of need."¹⁰⁵ Congressman O'Neal asserted that veterans themselves would repudiate "an unfair benefit and unfair preference over those" worse off than them.¹⁰⁶ These fairness arguments pushed for veteran preference to remain secondary to need.

Need's primacy did not entirely solve the work allocation calculus because need, employability, veteran status, and gender could intersect. If needs were the same, veterans could be given further preference, but so could veterans' widows (unless remarried) as well as wives of unemployable veterans.¹⁰⁷ Moreover, government reports observed the tension between urging mothers to be employable and self-supporting on one hand and providing welfare that allowed greater attention to children on the other.¹⁰⁸

Unlike earlier programs' budgetary deficiency approach, the WPA incorporated rigid wage structures. By 1939, the wage rates differed based on the skill required, the region of the country, and the level of urbanization.¹⁰⁹ The WPA schedule paid the most "unskilled workers" in rural counties in the South (Wage Region III) \$31.20 monthly, less than a third of the "professional and technical" workers in urban counties in New England (Wage Region I).¹¹⁰ Yet even as the budgetary deficiency approach ebbed, the program offered supplementary relief for those who needed more than their WPA earnings, preserving the intimate, and perhaps invasive, role of social workers.¹¹¹ Need calculations differed through broad geographic and skill adjustments as well as narrower supplements.

Need's primacy also did not eliminate the WPA's effective focus on white men. Women were rarely certified as heads of household—often a requirement for eligibility—in the "family wage" model and were effectively excluded from construction jobs, the paradigmatic New Deal work.¹¹² The less available

¹⁰⁵ *Id.* (statement of Congressman Emmett O'Neal).

¹⁰⁶ *Id.*

¹⁰⁷ COMM. ON LONG-RANGE WORK & RELIEF POLICIES, NAT'L RES. PLAN. BD., SECURITY, WORK, AND RELIEF POLICIES 64 (1942), <https://www.ssa.gov/history/reports/NRPB/NRPBChapter4a.pdf> [<https://perma.cc/JC7E-RQZR>].

¹⁰⁸ Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1254–56 (1983).

¹⁰⁹ ROSE, *supra* note 85, at 78.

¹¹⁰ FED. WORKS AGENCY, *supra* note 94, at 25. In 1941, supplemental allowances to the schedule became available. *Id.*

¹¹¹ See Bremer, *supra* note 84, at 644 (describing how public officials were "to study every aspect of a family's financial situation and were privy to the most intimate details of family life").

¹¹² Nancy E. Rose, *Discrimination Against Women in New Deal Work Programs*, AFFILIA, Summer 1990, at 25, 30–32; see also Joanne L. Goodwin, "Employable Mothers" and "Suitable Work": A

“woman’s work” included education and consumer goods production, domestic work, and, somewhat surprisingly, archaeological excavation.¹¹³ Black women wrote letters to federal leaders, chronicling their needs and exclusion amidst the WPA’s wasteful employment of others who did little for their communities.¹¹⁴ Black employment also faced white resistance: one wealthy white doctor wrote to his Senator, expressing indignation that the federal government paid a Black woman more to sew than he would pay her to be his daughter’s maid.¹¹⁵ Public opposition to granting opportunities to Black people interfered with local implementation.¹¹⁶

Over time, people—particularly white men—left the WPA rolls, which closed altogether by 1950.¹¹⁷ Despite emphasizing putting needy Americans to work,¹¹⁸ after the New Deal work relief programs, Congress considered but declined a legal guarantee of a job to interested workers.¹¹⁹

Re-evaluation of Welfare and Wage-Earning for Women in the Twentieth-Century United States, 29 J. SOC. HIST. 253, 258 (1995) (describing how New Deal programs were “inscribed with family wage ideals” and emphasized “male contribution”); Nancy K. Cauthen & Edwin Amenta, *Not for Widows Only: Institutional Politics and the Formative Years of Aid to Dependent Children*, 61 AM. SOCIO. REV. 427, 435 (1996) (describing the WPA as “devised to provide jobs to ‘employables’—typically male heads of households, but also some women”).

¹¹³ Rose, *supra* note 112, at 28; Cheryl Claassen, *Black and White Women at Irene Mound*, 12 SE. ARCHAEOLOGY 137, 138 (1993) (describing a New Deal project where, “[i]n Savannah, Georgia, 167 women (including 106 black women) were trained as housekeeping aides to assist in homes where the usual white housekeeper was temporarily disabled”).

¹¹⁴ Rose, *supra* note 112, at 25; BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 399–405 (Gerda Lerner ed., 1972) (collecting letters from Black women to leaders, including President and Mrs. Roosevelt, as well as WPA head Harry Hopkins). See generally Dorothy E. Roberts, *Welfare: Yesterday and Today*, 24 CONTEMP. SOCIO. 1 (1995) (reviewing LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994) and JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994)) (describing how the books connect, respectively, the New Deal and subsequent American welfare programs to both an “unwillingness” to extend full citizenship to Black people as well as “patriarchal norms about women’s place”).

¹¹⁵ James Francis Tidd, Jr., *Stitching and Striking: WPA Sewing Rooms and the 1937 Relief Strike in Hillsborough County*, TAMPA BAY HIST., Spring/Summer 1989, at 5, 11–12.

¹¹⁶ Cf. LIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919–1939*, at 279–81 (1990) (describing Black experiences with discrimination in Chicago’s WPA program).

¹¹⁷ FED. WORKS AGENCY, *supra* note 94, at 45 (enumerating how, from the late 1930s to early 1940s, WPA jobs became less concentrated among white men). The report explains that “even under wartime conditions, [Black workers] were at a disadvantage in obtaining private jobs . . . [because] opportunities for education and training have been very limited These disadvantages were reflected in the steadily growing proportion of [Black] workers on the WPA rolls in the later years of the program.” *Id.*

¹¹⁸ William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 81 (1996) (arguing that, “[i]n many ways, the welfare reforms of 1996 reflect a resurgence of several of the fundamental themes of colonial poor law”).

¹¹⁹ Anita Bernstein, *Just Jobs*, 45 U. BALT. L. REV. 209, 218 (2016) (discussing how “[e]arly versions of the Humphrey-Hawkins Full Employment and Balanced Growth Act of 1978 . . . [would

New Deal work programs provide lessons and cautions for need-based employment. They established the primacy of the broader family, not just the individual, in assessing need, including against other rationing criteria. Through need-based employment, workers—particularly white males—were understood and prioritized as components of family units. Yet the programs selectively accounted for workers' lives beyond their productivity, disadvantaging women and Black people.¹²⁰

B. Contemporary Need-Based Employment

Need-based employment survived the New Deal in significant but understudied ways. Four corners of employment and tax law manifest this survival: the federal work-study program, government-certified and -subsidized employment for the Work Opportunity Tax Credit, hiring requirements attached to government contracting, and donated leave.

1. Federal Work-Study

The term “need-based employment” appears in the U.S. Code only through the statutory framework for federal work-study programs.¹²¹ Congress envisioned federal work-study funds for those “who are in need of earnings from employment to pursue courses of study at eligible institutions”¹²² Student eligibility for work-study funds turns on a financial needs assess-

have] provided an enforceable legal entitlement to a job for anyone who wanted one” (citation omitted) (citing Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-523, 92 Stat. 1887 (codified as amended in scattered sections of 2 U.S.C., 12 U.S.C., 15 U.S.C.)).

¹²⁰ Roberts, *supra* note 114, at 2–3; Margot Canaday, *Building a Straight State: Sexuality and Social Citizenship Under the 1944 G.I. Bill*, 90 J. AM. HIST. 935, 955 (2003) (characterizing Congress’s mid-twentieth century opposition to extending veterans’ benefits to homosexual people as reflecting how “much further it had moved from New Deal aspirations to distribute state resources broadly among the citizenry” (emphasis omitted)); Malamud, *supra* note 84, at 2059–60 (noting that while “New Deal social welfare policy has been trenchantly critiqued for using federalism to downgrade economic programs aimed at meeting the needs of women by placing them under state rather than federal authority . . . efforts to generate programs for women within the federal system of work relief stands as an exception to that general trend”).

¹²¹ 20 U.S.C. § 1087-53(b)(4). The higher education statutory framework similarly refers to need-based grants. *See id.* § 1070(a)(2) (“[P]roviding . . . grants to those students who demonstrate financial need”); *see also* *Federal Pell Grant Program*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/programs/fpg/index.html> [<https://perma.cc/2DBB-TWE9>] (Aug. 29, 2022) (describing how “[t]he Federal Pell Grant Program provides need-based grants to low-income undergraduate and certain postbaccalaureate students”).

¹²² 20 U.S.C. § 1087-51(a). Another purpose was “to encourage students receiving Federal student financial assistance to participate in community service activities that will benefit the Nation and engender in the students a sense of social responsibility” *Id.*

ment.¹²³ That need analysis centers on the calculation of an expected family contribution.¹²⁴ The family contribution data elements include parental assets and income¹²⁵ for a dependent student; spousal assets and income¹²⁶ for an independent student; and family size, namely the number of dependents.¹²⁷

Beyond its express statutory use of the term, work-study is notable for the number of participating university-employers and student-workers hired on the basis of need. As a persistent part of American higher education for more than fifty years, federal work-study funds thousands of postsecondary institutions to distribute over one billion dollars annually to hundreds of thousands of student-workers.¹²⁸ Although unique in its statutory mention, federal work-study is one of many examples of need-based employment.

2. Work Opportunity Tax Credit

Need-based employment arises from the Work Opportunity Tax Credit (WOTC), a tax subsidy for employing certain workers.¹²⁹ Legislative history frames the WOTC as “an important incentive for employers to undertake the expense of providing jobs and training to *economically disadvantaged* individuals”¹³⁰ The categories of eligible workers include Supplemental Nutrition Assistance Program (SNAP) recipients¹³¹ as well as disabled workers, who are likely to face, but need not explicitly demonstrate, economic disad-

¹²³ 34 C.F.R. § 675.9(c) (2021) (defining “financial need” as “in accordance with part F of Title IV of the HEA,” or Higher Education Act).

¹²⁴ *Id.* Part F of Title IV of the HEA is titled “Need Analysis” and contains 20 U.S.C. §§ 1087kk–1087vv, with the determination of family contribution outlined in § 1087nn.

¹²⁵ 20 U.S.C. §§ 1087nn(b)(1)(B), 1087oo(b)(1)(A)–(B).

¹²⁶ *Id.* §§ 1087nn(b)(1)(A), 1087qq(a)(1)(A)–(B).

¹²⁷ Family size considerations surface in the income protection allowances, which are deducted from total income to calculate the available income for the family contribution. *Id.* §§ 1087oo(a)–(c), 1087qq(a)–(b).

¹²⁸ See, e.g., Judith Scott-Clayton, *The Causal Effect of Federal Work-Study Participation: Quasi-Experimental Evidence from West Virginia*, 33 EDUC. EVALUATION & POL’Y ANALYSIS 506, 506–10 (2011) (describing how “Federal Work-Study is still a significant source of student aid” and empirically analyzing its impact); JUDITH SCOTT-CLAYTON & RACHEL YANG ZHOU, CTR. FOR ANALYSIS OF POSTSECONDARY EDUC. & EMP., DOES THE FEDERAL WORK-STUDY PROGRAM REALLY WORK—AND FOR WHOM? (2017) (summarizing work-study’s “longstanding reach” and empirical research on its efficacy).

¹²⁹ 26 U.S.C. §§ 38(b)(2), 51(a) (designing the work opportunity tax credit as a part of the general business credit). The WOTC grew out of the earlier Targeted Jobs Tax Credit. S. REP. NO. 104-281, at 33 (1996), as reprinted in 1996 U.S.C.C.A.N. 1474, 1507.

¹³⁰ S. REP. NO. 104-281, at 32 (emphasis added).

¹³¹ See generally *SNAP Eligibility*, U.S. DEP’T OF AGRIC., <https://www.fns.usda.gov/snap/recipient/eligibility> [<https://perma.cc/Va6L-WHFJ>] (Oct. 1, 2021) (discussing state agency involvement in discussing process).

vantage.¹³² State agencies certify millions of workers, the majority through the SNAP recipient category,¹³³ increasing employment of targeted groups.¹³⁴ The Equal Employment Opportunity Commission (EEOC) clarified that so long as completion of the WOTC eligibility form is voluntary and its results confidential and meant to “benefit” individuals, such pre-employment queries should not violate antidiscrimination law.¹³⁵

The WOTC provides a useful but limited model for more general need-based employment. In providing a publicly funded monetary incentive, up to a few thousand dollars per job-year, the WOTC models employment-based redistribution to the needy.¹³⁶ Second, in relying on state agency certification, the WOTC also models the leveraging of bureaucracy and balancing of privacy interests to determine eligibility.¹³⁷ Information from public agencies, including the Internal Revenue Service (IRS), could be useful. WOTC eligibility is often tied to existing public benefits eligibility such as for SNAP. Need-based employment could instead expand to include the middle-class or noncitizens who face limitations on benefits eligibility.

Third and finally, WOTC’s targeted categories center consideration of economic disadvantage, which lies at the heart of need-based employment.¹³⁸ The WOTC’s focus on economic disadvantage, however, has limits. Under earlier versions of the tax credit, “ex-felons” needed to be “qualified,” which required an express showing of economic disadvantage beyond a criminal record.¹³⁹ Under the current credit, the second requirement for felons was eliminated.¹⁴⁰ This may seem trivial in light of the correlation between a criminal record and eco-

¹³² *Work Opportunity Tax Credit*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit> [<https://perma.cc/LEJ4-BZ55>].

¹³³ EMP. & TRAINING ADMIN., DEP’T OF LAB., WORK OPPORTUNITY TAX CREDIT (2020), https://www.doleta.gov/business/Incentives/opptax/docs/wotc_fact_sheet.pdf [<https://perma.cc/QJC4-HVBA>]; CONG. RSCH. SERV., R43729, THE WORK OPPORTUNITY TAX CREDIT 6 (2018), <https://fas.org/sgp/crs/misc/R43729.pdf> [<https://perma.cc/Q6QM-JWTK>].

¹³⁴ See, e.g., PAUL HEATON, RAND CORP., THE EFFECTS OF HIRING TAX CREDITS ON EMPLOYMENT OF DISABLED VETERANS 2, 7–8 (2012), <https://apps.dtic.mil/sti/pdfs/ADA585435.pdf> [<https://perma.cc/3338-MKWB>] (describing earlier empirical scholars’ mixed findings of the efficacy of “employer hiring incentives for disadvantaged groups” and estimating that the WOTC improved employment among disabled veterans).

¹³⁵ U.S. Equal Emp. Opportunity Comm’n, Opinion Letter on Federal Work Opportunity Tax Credit Form 8850 (Apr. 29, 2020), https://www.eeoc.gov/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850#_ftnref5 [<https://perma.cc/5NCU-WEDT>].

¹³⁶ CONG. RSCH. SERV., *supra* note 133, at 1 (discussing the “Calculation of Credit and Maximum Credits”).

¹³⁷ *Id.* at 4 (discussing the role of state workforce agencies in determining eligibility).

¹³⁸ 26 U.S.C. § 51(d)(1).

¹³⁹ Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 105(b), 120 Stat. 2922, 2936 (amending Work Opportunity Tax Credit to allow “ex-felons” to be determined eligible “without regard to family income”).

¹⁴⁰ *Work Opportunity Tax Credit*, *supra* note 132.

nomic and employment disadvantage.¹⁴¹ Yet it contrasts with a vision of need-based employment based on demonstrated, rather than presumed, need.

3. Government Contracting

Need-based employment also appears in conditions for public contracts. At the federal level, section 3 of the Housing and Urban Development Act of 1968 incorporates need-based hiring principles for Department of Housing and Urban Development (HUD) projects.¹⁴² Section 3 requires that public housing agencies and their contractors “make their best efforts . . . to give to low- and very low-income persons the training and employment opportunities generated by” HUD projects.¹⁴³ Agencies and contractors must prioritize residents of affected subsidized housing, followed by a preference for (very) low-income residents of the general area.¹⁴⁴

At the local level, these requirements often comprise community benefits agreements (CBAs). CBAs may mandate local hiring and restrict such hiring further by household income.¹⁴⁵ In California’s Alameda County, for example, contractors for public construction projects must agree to hire disadvantaged workers, the number of which increases based on the expense of the project.¹⁴⁶ An earlier version of the agreement expressly defined the “disadvantaged” as County residents who “me[t] at least one of the following criteria: household income below 50% of the Alameda County median, non-minor dependent youth (AB-12 youth—emancipated foster youth), homeless, welfare recipients, have a history of involvement with the criminal justice system, are unem-

¹⁴¹ See, e.g., ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 174–78* (2016) (describing the late twentieth century connection between race; prison populations and projections; and poverty and unemployment); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 148 (2007) (discussing how ex-offenders’ anxieties and unease “can translate into poor interactions with the employer”).

¹⁴² 12 U.S.C. § 1701u.

¹⁴³ *Id.* § 1701u(c)(1)(A). The statute also requires that housing agencies prioritize companies that hire low-income individuals in the contracting process. *Id.* § 1701u(d).

¹⁴⁴ *Id.* § 1701u(c)(1)(B). Funding recipients must file reports detailing their efforts to comply with the hiring and training requirements on a regular basis. *Id.*

¹⁴⁵ The term “targeted hiring” may describe both community benefits agreements and their more geographically focused counterparts, first-source hiring. Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROBS. 115, 126 (2016).

¹⁴⁶ FIRST AMENDED AND RESTATED PROJECT STABILIZATION/COMMUNITY BENEFITS AGREEMENT FOR THE COUNTY OF ALAMEDA 5, 24 (2020), <https://www.acpwa.org/acpwa-assets/docs/document-library/codes/EXECUTED-Alameda-County-PSCBA-20201006-FINAL.pdf> [<https://perma.cc/JEX2-Q2KN>].

ployed, or a single parent.”¹⁴⁷ Similar “first source hiring” programs grew in major American cities including Chicago and Portland.¹⁴⁸

As discussed at length below, income is an intuitive but incomplete proxy for economic need. A wealthy but low-income Berkeley artist-homeowner might qualify as disadvantaged, while a married parent with no assets, a household income of \$50,000 and rent struggles might not.¹⁴⁹ For public contracts to comprise “regulatory levers to advance [economic] equality,” they must be carefully designed.¹⁵⁰

4. Donating Leave

Need-based pay partly occurs through donated leave, a system whereby an employee or employer donates paid leave to a “needy” employee.¹⁵¹ While focused on medical need, donated leave implicates economic need. The high-income and wealthy can more easily take unpaid leave¹⁵² even as more of them have access to paid leave.¹⁵³ Donated leave fills a gap amidst the ongoing absence of paid leave laws.¹⁵⁴

¹⁴⁷ DOC. NO. 007349B, PROJECT STABILIZATION/COMMUNITY BENEFITS AGREEMENT FOR THE COUNTY OF ALAMEDA 5 (2013), <https://permits.acgov.org/pwa/library/ordinances.htm> [<https://perma.cc/F72Q-PR5H>].

¹⁴⁸ See generally Greg Schrock, *Remains of the Progressive City? First Source Hiring in Portland and Chicago*, 51 URB. AFFS. REV. 649 (2015) (describing the rise and fall of redistributive employment mandates from the 1970s through the end of the twentieth century).

¹⁴⁹ The median household income in Alameda County according to the Census Bureau was under \$100,000, so \$50,000 would be greater than fifty percent of the median household income. See U.S. CENSUS BUREAU, *QuickFacts: Alameda County, California*, <https://www.census.gov/quickfacts/alamedacountycalifornia> [<https://perma.cc/D2FP-UYRB>]. The median rent in Alameda County was more than \$1,900 between 2016 and 2020. *Id.*

¹⁵⁰ Olatunde C.A. Johnson, *Equality Law Pluralism*, 117 COLUM. L. REV. 1973, 2000 (2017).

¹⁵¹ See, e.g., IOWA ADMIN. CODE r.11-63.19(8A) (2021) (“Employees are eligible to donate or receive donated leave hours for catastrophic illnesses ‘Donated leave’ means vacation leave (hours) donated to employees as a monetary benefit only.”).

¹⁵² See, e.g., Judy Jou, Katy B. Kozhimannil, Jean M. Abraham, Lynn A. Blewett & Patricia M. McGovern, *Paid Maternity Leave in the United States: Associations with Maternal and Infant Health*, 22 MATERNAL & CHILD HEALTH J. 216, 223 (2018) (using a national survey of mothers to find that women in the lowest income group tend to take no leave, while women with mid-level incomes tend to take unpaid leave).

¹⁵³ U.S. BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES: MARCH 2019, at 119 (2019), <https://www.bls.gov/ncs/ebs/benefits/2019/employee-benefits-in-the-united-states-march-2019.pdf> [<https://perma.cc/P7HC-V88A>] (showing how the top half of wage earners report more paid leave across all types—sick, holiday, personal, etc.—as compared to the bottom half).

¹⁵⁴ Molly Weston Williamson, *The Meaning of Leave: Understanding Workplace Leave Rights*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 197, 198 (2019) (disaggregating “leave” into six unique types based on existing federal and state laws and describing the increasing national pressure for rights to paid leave).

Three actors are generally involved: the donee-recipient, a donor willing to give their leave, and an employer intermediary. Programs differ: some programs allow for leave donation to specific employees,¹⁵⁵ whereas others require that the leave be donated to a general bank.¹⁵⁶ Programs may also require an individual to have previously donated leave himself to be eligible to later receive leave, with some even soliciting leave on behalf of a leave-needy employee.¹⁵⁷

Federal employees have access to the Voluntary Leave Transfer and Bank Programs established by Congress.¹⁵⁸ As their respective names suggest, the transfer program allows for peer-to-peer giving, while a board runs and intermediates the bank.¹⁵⁹ Leave recipients must first furnish “medical emergency” documentation.¹⁶⁰ Federal agencies must verify this “medical emergency” as a “medical condition of an employee or a family member . . . likely to require an employee’s absence from duty for a prolonged period of time and to result in a substantial loss of income”¹⁶¹ These donated leave programs thus expressly require emergency circumstances and economic loss for eligibility. The medical aspect notwithstanding, donated leave still focuses on pay during leave, which the high-income can more easily forego.¹⁶²

¹⁵⁵ As an example of the operation of such a peer-to-peer system, including the tensions it may engender, see *Gentry v. City of Russellville*, 406 F. Supp. 3d 1231 (N.D. Ala. 2019). The plaintiff in that case sought donated leave from her co-workers to allow her to take medical leave during her pregnancy, but they refused. *Id.* at 1237–39. The court rejected her allegations that her employer had instructed her coworkers against donating leave, much less as retaliation for her prior charges of discriminatory treatment. *Id.* at 1242.

¹⁵⁶ See *infra* note 159 and accompanying text (describing the role of intermediaries in the federal leave bank); see also Martha M. Ertman, *The Cost of Non-billable Work*, 98 TEX. L. REV. ONLINE 184, 196 (2020), <https://texaslawreview.org/wp-content/uploads/2020/05/Ertman-TLRO-V98-FINAL.pdf> [<https://perma.cc/TX7R-JBZF>] (defining non-billable “[g]lue work” as including “contributing to leave banks . . . and covering for coworkers when illness or family care responsibilities arose”).

¹⁵⁷ See, e.g., *Carby v. Holder*, No. 11 Civ. 5775, 2013 WL 3481722, at *2–3 (S.D.N.Y. July 10, 2013).

¹⁵⁸ 5 C.F.R. §§ 630.901, 630.1001 (2021).

¹⁵⁹ *Id.* § 630.901 (relating the purpose and applicability of a voluntary leave transfer program, including to establish a “program under which the unused accrued annual leave of one agency officer or employee” can be transferred to another); *id.* § 630.1001 (outlining the purpose and applicability of a “voluntary leave bank program”).

¹⁶⁰ *Id.* §§ 630.904(b), 630.905(a), 630.909(a).

¹⁶¹ *Id.* § 630.902.

¹⁶² See, e.g., Megan Shepherd-Banigan & Janice F. Bell, *Paid Leave Benefits Among a National Sample of Working Mothers with Infants in the United States*, 18 MATERNAL & CHILD HEALTH J. 286, 287, 289 (2014) (noting that generally, “increases in leave are seen primarily among economically advantaged groups . . . who can afford to take unpaid leave” and using a national survey of English-speaking mothers to find that “high income women also tended to take more weeks of total (paid and unpaid) maternity leave compared with other working women” (first citing Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents’ Leave Taking*, 40 DEMOGRAPHY 191 (2003); and then citing Wen-Jui Han, Christopher Ruhm & Jane Waldfogel, *Parental Leave Policies and Parents’ Employment and Leave-Taking*, 28 J. POL’Y ANALYSIS & MGMT. 29 (2009))).

Donated leave sparked confrontation between one of the world's richest men, Amazon founder Jeff Bezos, and two-time democratic socialist presidential candidate, Bernie Sanders.¹⁶³ Amidst a global pandemic, luxury grocer Whole Foods instructed employees to donate leave to their colleagues facing medical emergencies.¹⁶⁴ As one former Whole Foods employee and union organizer summarized, "You've got the richest man in the world asking people who are living paycheck to paycheck to donate to each other."¹⁶⁵ Senator Bernie Sanders tweeted, "Amazon paid \$0 in taxes on \$11 billion in annual profits. But it asks workers to 'donate' their paid leave to others who are sick."¹⁶⁶

Internal Revenue Service regulations govern leave donation programs. Donor employees are not subject to income or payroll taxes on the leave that they donate only if the leave is donated through a program that meets IRS requirements.¹⁶⁷ Most notably, the leave may be donated only for recipients who are experiencing a "medical emergency" or affected by a Presidentially declared "major disaster."¹⁶⁸ The IRS rejected one employer's attempt to expand leave bank eligibility to other employees who experience short-term crises that would require time off, such as a house fire.¹⁶⁹ Although employees could still donate leave to their coworkers, such leave would be treated as earned wages.

Donated leave provides a sometimes-controversial model for individuals to redistribute pay to coworkers deemed needy. Although utilized by private and public employers, the leave-donation model embraces a narrow (and often temporary) definition of "need."¹⁷⁰

The New Deal's need-based employment survives in muted ways. Four areas of law—federal work-study, Work Opportunity Tax Credits, government contracting, and donated leave—often prioritize employees deemed needy. Federal work-study deploys the literal term "need-based employment." The

¹⁶³ Lauren Kaori Gurley, *Whole Foods Suggests That Workers Share Paid Time Off During Coronavirus*, VICE (Mar. 13, 2020), https://www.vice.com/en_us/article/93988v/whole-foods-suggests-that-workers-share-paid-time-off-during-coronavirus [https://perma.cc/DF56-YFTQ].

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (quoting Matthew Hunt).

¹⁶⁶ Senator Bernard Sanders (@SenSanders), TWITTER (Mar. 13, 2020, 6:30 PM), <https://twitter.com/SenSanders/status/1238638606257971200> [https://perma.cc/T66R-ZTBX].

¹⁶⁷ See, e.g., Treatment of Amounts Paid to Section 170(c) Organizations Under Employer Leave-Based Donation Programs to Aid Victims of the Coronavirus Disease (Covid-19) Pandemic, I.R.S. Notice 2020-46, 2020-27 IRB 7 (June 29, 2020) (describing the conditions under which "[c]ash payments an employer makes to . . . organizations in exchange for vacation, sick, or personal leave that its employees elect to forgo will not be treated as wages (or compensation, as applicable) to the employees or otherwise be included in the gross income of the employees").

¹⁶⁸ I.R.S. Notice 2006-59, 2006-28 IRB 60 (July 10, 2006) (allowing untaxed leave donation for "major disasters"); Rev. Rul. 90-29, 1990-1 C.B. 11 (same for "medical emergencies").

¹⁶⁹ I.R.S. Priv. Ltr. Rul. 200720017 (Feb. 9, 2007).

¹⁷⁰ Leave donation serves as a reminder that need could be taken into account on shorter time frames, including in the allocation of annual bonuses.

medically ailing can draw upon donated leave if coworkers and/or employers deem them needy enough. A returning citizen with a previous felony conviction formerly needed to demonstrate economic disadvantage for the WOTC but no longer must do so. Similarly, that ex-felon, regardless of economic need, could help an employer meet the hiring criteria of a community benefits agreement. Need-based employment surfaces in patchwork ways, and within these examples, the contours and primacy of need vary.

III. (RE)DEFINING NEED-BASED EMPLOYMENT

Although need-based employment can be found in history, folk wisdom, and modern law, need's definitions vary. This Part articulates four intuitive but fraught principles for need-based employment's definition of economic need. Section A begins with a discussion of objective rather than subjective assessments.¹⁷¹ Section B discusses household income and internalizing spousal contributions.¹⁷² Section C details the recognition of dependents beyond just children in a household.¹⁷³ Finally, Section D explains the measurement of wealth, not simply income.¹⁷⁴ These principles provide structure but still accommodate different forms of need-based employment.

In advancing these principles, this Part draws upon American law's existing definitions of need, including need outside of employment, to better define *need*-based employment. These definitions arise in federal welfare programs and tax law—both the Earned Income Tax Credit (EITC), and, as relevant to more affluent workers, the “hardship” standard for early withdrawals of retirement savings for economic “necessity.”¹⁷⁵ As with the WPA, such definitions offer lessons rather than wholesale models.

Before elaborating upon guiding principles, an implementation question persists: how will employers obtain the information to make determinations of need, beyond the current and more casual forms? Although this Article begins to unpack and legally defend the phenomenon, it leaves the details for subse-

¹⁷¹ See *infra* notes 183–198 and accompanying text.

¹⁷² See *infra* notes 199–215 and accompanying text.

¹⁷³ See *infra* notes 216–226 and accompanying text.

¹⁷⁴ See *infra* notes 227–242 and accompanying text. These factors may help identify those whom others have called “high-surplus” workers. Zachary Liscow & William Woolston, *Who's In, Who's Out? Policy to Address Job Rationing During Recessions*, 70 TAX L. REV. 627, 629–30 (2017) (“[A]n individual with a mortgage to pay, a nonworking spouse, and three children may really need a job; this is a high-surplus worker.”).

¹⁷⁵ See *infra* notes 184–185, 210 and accompanying text (describing the conditions under which people may withdraw from their retirement accounts without facing financial penalty).

quent research.¹⁷⁶ But one thing is clear: American employers possess significant discretion as to the information they obtain from employees.¹⁷⁷

Although there is no federal categorical prohibition precluding employers from soliciting and using tax return information, certain states have banned the use of employee salary history.¹⁷⁸ The en banc Ninth Circuit also held that “an employee’s prior pay cannot serve as an affirmative defense to a prima facie showing of an [Equal Pay Act] violation,” raising further questions about the practice’s viability.¹⁷⁹ Nonetheless, employers using tax returns or other documents to establish income and wealth, including income earned by a joint-filer rather than the employee, are not using indicia of “prior pay” per se.

Additionally, although salary history bans may prevent perpetuating past discrimination in compensation,¹⁸⁰ need-based employment presumably privileges employees for having earned less in the past. The EEOC’s aforementioned guidance on tax credit-related pre-employment queries emphasized how antidiscrimination law’s information greenlight hinged on the query’s purpose to “benefit” respondents.¹⁸¹

Finally, whether these guiding principles are applied unilaterally or as a result of collective bargaining, they apply best where employees are similarly skilled or productive.¹⁸² To overweigh need-based employment would be unwise and risk liability for discrimination.

¹⁷⁶ These details include considering: (i) how making calculations over longer time horizons may prevent needs assessments from becoming overly sensitive to transient income and (ii) how the optionality of information provision allows needier people to forgo benefits from need-based employment if they value their privacy more.

¹⁷⁷ Cf. Joni Hersch & Jennifer Bennett Shinall, *Something to Talk About: Information Exchange Under Employment Law*, 165 U. PA. L. REV. 49, 56–57 (2016) (arguing “that the EEOC guidance discouraging pre-employment questions about family matters has outlived its value,” and “suppresses information, which disparately harms women’s employment prospects”). Hersch & Shinall’s apt criticism notwithstanding, the EEOC guidance remains. *Pre-employment Inquiries and Marital Status or Number of Children*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, http://www.eeoc.gov/laws/practices/inquiries_marital_status.cfm [<https://perma.cc/FW6M-2X5G>].

¹⁷⁸ Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 567–71 (2020) (overviewing state limitations on the solicitation and use of salary history by employers and a related federal proposal).

¹⁷⁹ *Rizo v. Yovino*, 950 F.3d 1217, 1219–20 (9th Cir. 2020).

¹⁸⁰ See Lobel, *supra* note 178, at 549 (characterizing “[t]he new path of pay equity” as including “reducing information that reflects existing biases by preventing employers from relying on, or even asking about, salary histories of new hires”).

¹⁸¹ U.S. Equal Emp. Opportunity Comm’n, *supra* note 135.

¹⁸² See *infra* note 366 and accompanying text (considering how need might be invoked pretextually and discriminatorily where workers are not similarly productive).

A. Objective Assessments

Need-based employment must be guided by objective needs assessments. Although objectivity has intuitive appeal, other areas of law appear solicitous to subjective self-certification. Consider how tax law privileges retirement savings on the condition of deferred withdrawal, with exceptions for self-certified need.¹⁸³ The “hardship” exception allows for an early distribution without a tax penalty,¹⁸⁴ with certification shifting away from employer or plan administrator certification to employee certification.¹⁸⁵ In contrast, need-based employment should require a more active role for employers or third parties for the reasons noted below.¹⁸⁶

Self-certification can selectively obscure current economic advantage or emphasize past disadvantage.¹⁸⁷ Consider an immigrant child focusing on the fact that their parents arrived with empty pockets, without acknowledging their parents’ educational credentials and current affluence, all of which now pay for that child’s graduate education, housing down payment, and lavish wedding.¹⁸⁸

Those who meet need-based criteria might not view themselves as “needy.” Contrast recipients of the work-based EITC, which benefits higher-income families, with those of canonical need-based programs like the New Deal era-Aid to Families with Dependent Children (AFDC)¹⁸⁹ and its successor, Temporary Assistance for Needy Families (TANF).¹⁹⁰ Interviews reveal how EITC recipients view the credit as socially “incorporating,” “a just reward

¹⁸³ 26 U.S.C. § 401(k)(14).

¹⁸⁴ *Id.* (describing “rules relating to hardship withdrawals”).

¹⁸⁵ 26 C.F.R. § 1.401(k)-1(d)(3)(iii)(B)(2)–(3) (2021) (discussing employee’s self-certification).

¹⁸⁶ *It’s Up to Plan Sponsors to Track Loans, Hardship Distributions*, INTERNAL REVENUE SERV., <https://www.irs.gov/retirement-plans/its-up-to-plan-sponsors-to-track-loans-hardship-distributions> [<https://perma.cc/N36N-RQ9L>] (Apr. 27, 2022) (describing IRS audits’ uncovering of improper self-certification).

¹⁸⁷ Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333, 1352–53 (2016). Such identity entrepreneurialism can divide “out-group members who choose to leverage identity for personal gain and those who do not or cannot.” *Id.* at 1367.

¹⁸⁸ Indeed, many migrants who are seemingly poor by American standards may have been more advantaged than their emigrating-country peers. See Cynthia Feliciano & Yader R. Lanuza, *An Immigrant Paradox? Contextual Attainment and Intergenerational Educational Mobility*, 82 AM. SOCIO. REV. 211, 214–217 (2017) (discussing how *pre*-migration socioeconomic status (SES), not just post-migration SES, can help explain educational mobility among immigrants). Moreover, even high-income Asian immigrants may be disadvantaged relative to their longer-residing white peers, because their similarly-valued assets are nonetheless subject to higher annual taxation. See Shayak Sarkar & Josh Rosenthal, *Exclusionary Taxation*, 53 HARV. C.R.-C.L. L. REV. 619, 670 (2018) (discussing how “Asian-American homeowners may be able to show that California’s system leads to higher property taxes for them as compared to their white neighbors,” in violation of the Fair Housing Act).

¹⁸⁹ Title IV of the Social Security Act of 1935 created AFDC. Pub. L. No. 74-271, §§ 401–406, 49 Stat. 620, 627–29 (current version at 42 U.S.C. §§ 601–606).

¹⁹⁰ 42 U.S.C. § 601.

for their labor as workers,” and distinct from direct relief programs like AFDC and TANF.¹⁹¹ As the EITC elevates working families out of poverty, its recipients view themselves as deserving rather than in need.¹⁹²

Subjective understandings of “need” mask privileged choices in the language of necessity. Consider two affluent coworkers named Val. Both live in pricy but modestly sized three bedroom houses near their workplace.¹⁹³ One lives on Vallejo Street in Emeryville, California and purchased the home for \$800,000 with his spouse, a daycare provider; the other’s home is on San Francisco’s Vallejo Street, purchased for \$3 million, with his spouse, a dermatologist.¹⁹⁴ Facing a decline in clients, their employer seeks to cut payroll expenses—but which of the Vals should it dismiss or offer a salary reduction, if their productivity is roughly equivalent? San Francisco Val expresses a real concern of losing his modest-sized home if he is terminated, despite being significantly more privileged on every axis.¹⁹⁵ His perception is not unfounded: people across the economic spectrum are afraid of losing their foothold in local communities due to “super-gentrification,” as the 0.1% begin to displace the 1%.¹⁹⁶ Some super-gentrifiers invoke the placid language of “needing” space for children to launder multimillion dollar purchases of homes in urban cores.¹⁹⁷ Later, I address directly how primary equity residence exemptions might objectively validate San Francisco Val’s anxieties, even if Emeryville

¹⁹¹ Jennifer Sykes, Katrin Križ, Kathryn Edin & Sarah Halpern-Meekin, *Dignity and Dreams: What the Earned Income Tax Credit (EITC) Means to Low-Income Families*, 80 AM. SOCIO. REV. 243, 244 (2015). Some respondents thus internalized express policy goals of the late twentieth century, when work-based tax relief replaced a more stigmatized direct relief program from the Great Depression. Marianne Bitler, *The EITC and the Social Safety Net in the Great Recession*, 70 TAX L. REV. 533, 533–36 (2017) (describing the policy goals of the EITC in the context of welfare reform).

¹⁹² On the other hand, as tax credits—including the federal EITC and pandemic relief programs—have excluded certain immigrant statuses and families, tax law has limited who may even view themselves as deserving. See generally Shayak Sarkar, *Tax Law’s Migration*, 62 B.C. L. REV. 2209, 2228–33, 2250 (2021) (discussing these exclusions).

¹⁹³ *Characteristics of New Housing: Highlights*, U.S. CENSUS BUREAU, <https://www.census.gov/construction/chars/highlights.html> [<https://perma.cc/6GWG-SQ37>]. For new housing constructed in 2021, the “median size of a completed single-family house was 2,273 square feet.” *Id.* Both sample homes mentioned in the following footnote are smaller.

¹⁹⁴ *Compare 5560 Vallejo St*, REDFIN, <https://www.redfin.com/CA/Oakland/5560-Vallejo-St-94608/home/536231> [<https://perma.cc/EGX4-XFHB>] (stating that the property was purchased for \$837,000 in 2016), *with 1960 Vallejo St #8*, REDFIN, <https://www.redfin.com/CA/San-Francisco/1960-Vallejo-St-94123/unit-8/home/12400243> [<https://perma.cc/7LV6-JDUJ>] (stating the property was purchased for \$3.2 million in 2019).

¹⁹⁵ See Liscow & Woolston, *supra* note 174, at 629–30 (connecting need to having “a mortgage to pay”).

¹⁹⁶ See generally Loretta Lees, *Super-gentrification: The Case of Brooklyn Heights, New York City*, 40 URB. STUD. 2487, 2487 (2003) (defining super-gentrification); Tim Butler & Loretta Lees, *Super-Gentrification in Barnsbury, London: Globalization and Gentrifying Global Elites at the Neighbourhood Level*, 31 TRANSACTIONS INST. BRITISH GEOGRAPHERS, 467, 469 (2006) (same).

¹⁹⁷ Lees, *supra* note 196, at 2504.

Val appears, on first impression, needy. For now, need-based employment may redistribute across a broader economic spectrum, but objective criteria prevent strained self-understandings from distorting the process.¹⁹⁸

B. Household Resources

The example of the two Vals brings us to the second principle: basing need on household income, including that of spouses.¹⁹⁹ The Supreme Court has recognized that “spouses typically possess assets and income jointly and bear financial responsibility for each other”²⁰⁰ Although marriage is an imperfect criterion for determining obligations and supports, it is a common one.²⁰¹

Tax law provides precedent for considering broad household income measures in determining need. First, the EITC conditions eligibility on household income,²⁰² reflecting the aspiration that “if you work, you[r family]

¹⁹⁸ Michelle Goldberg, Opinion, *The New Great Depression Is Coming. Will There Be a New Deal?*, N.Y. TIMES (May 2, 2020), <https://www.nytimes.com/2020/05/02/opinion/sunday/corona-virus-new-deal-ubi.html> [<https://perma.cc/EQP7-T48T>] (discussing the societal shifts in how we perceive work and workers in the wake of the COVID-19 pandemic); Dan Price, *My Employees Took Pay Cuts Instead of Layoffs. We're Doing Better Than Ever*, WASH. POST (Aug. 12, 2020), <https://www.washingtonpost.com/outlook/2020/08/12/employees-pay-cuts-productivity/> [<https://perma.cc/T83V-DSPZ>] (describing how, “[b]y the end of the conversation [about the company’s worsened economic position], 98 percent of our employees volunteered to temporarily cut their pay by anywhere from 5 to 100 percent”); see also Jennifer S. Hendricks, Opinion, *CU-Boulder Pay Cuts Are Unjust and Regressive*, DAILY CAMERA (June 24, 2020), <https://www.dailycamera.com/2020/06/24/guest-opinion-jennifer-s-hendricks-cu-boulder-pay-cuts-are-unjust-and-regressive/> [<https://perma.cc/6J8W-C2ZJ>] (canvassing progressive pay cuts in response to pandemic losses across American universities).

¹⁹⁹ See Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 67 (1993) (noting how the Census Bureau’s definition of “household . . . encompasses people who physically live together, but who may not be an economic unit because they do not pool resources”); *id.* at 73 (noting how “[i]ncome pooling can occur within a multiplicity of living arrangements, . . . underscore[ing] the growing under-inclusiveness of allowing only marital units to file joint returns”).

²⁰⁰ Wis. Dep’t of Health & Fam. Servs. v. Blumer, 534 U.S. 473, 479 (2002).

²⁰¹ Courtney G. Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153, 160–61 (2015), <https://wp0.vanderbilt.edu/lawreview-new/wp-content/uploads/sites/278/2015/04/Family-Support-and-Supporting-Families.pdf> [<https://perma.cc/6KYZ-Q352>]; Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661, 664–65 (2015) (drawing definitional lines between marital and nonmarital relationships); cf. Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1838 (2014) (describing federal-state divides in defining marriage and family); Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1281 (2014) (defining “deprivative recognition” as “when neither partner will benefit from recognition and yet the state still recognizes the relationship, a recognition that results in deprivation”).

²⁰² Kerry A. Ryan, *EITC as Income (In)stability?*, 15 FLA. TAX REV. 583, 585, 613 (2014); Jeffrey B. Liebman, *Who Are the Ineligible EITC Recipients?*, 53 NAT’L TAX J. 1165, 1165 (2000) (noting how twentieth century “[r]esearch on the EITC suggests that the program succeeds in transferring

should not be poor.”²⁰³ Its phase-in and phase-out structure provides an initially increasing and then decreasing economic bonus, until recipients’ greater income renders them no longer sufficiently needy for the EITC.²⁰⁴ Second, for hardship withdrawals from tax-preferred savings accounts, the withdrawer must demonstrate need to avoid the penalty.²⁰⁵ For assessing need, the IRS explains that “reasonably available” resources may include “assets of the employee’s spouse and minor children”²⁰⁶ Tax law, in multiple arenas, looks to spousal income and beyond in determining need.

Just as the law acknowledges spousal obligations, it must symmetrically consider spousal resources. Marriage facilitates pooling resources and economies of scale,²⁰⁷ facilitating mutual aid rather than a simple roommate arrangement.²⁰⁸ The law also links workplace benefits to spouses, from nontaxable health benefits to protected leave.²⁰⁹ In programs such as Medicaid, where formerly “each spouse was treated as a separate household,”²¹⁰ statutory reforms shifted that paradigm to better protect some “from ‘pauperization’ while preventing financially secure couples from obtaining” public benefits.²¹¹ Medicaid evolved to prevent privileged households from gaining improper bene-

income to needy families while maintaining low administrative costs, [and] encouraging the labor force participation of single parents”).

²⁰³ David T. Ellwood, Opinion, *If You Work, You Should Not Be Poor*, WASH. POST (Apr. 4, 1989), <https://www.washingtonpost.com/archive/opinions/1989/04/04/if-you-work-you-shouldnt-be-poor/4a572f25-5117-41c9-a1d2-d8f2ab546f30/> [https://perma.cc/W3G7-8KMR]; Sykes et al., *supra* note 191, at 245.

²⁰⁴ The value of the EITC increases for an eligible household as earnings increase up to a point, but then begins to gradually decrease as earnings become even more substantial. More precisely, this is referred to as the non-linear structure of the EITC as a function of adjusted gross income (AGI).

²⁰⁵ *Supra* notes 184–185 and accompanying text.

²⁰⁶ Hardship Distributions of Elective Contributions, Qualified Matching Contributions, Qualified Nonelective Contributions, and Earnings, 84 Fed. Reg. 49651, 49652 (Sept. 23, 2019). A qualifying withdrawal must be “necessary to satisfy” a “heavy financial need,” as clarified by the retirement plan standards. 26 C.F.R. § 1.401(k)-1(d)(3)(i) (2021). By regulation, necessity means there must be “[n]o alternative means reasonably available” to meet the needs, and that determination takes account of family assets. *Id.* § 1.401(k)-1(d)(3)(iii)(B). Without meaningful caselaw on the question, the IRS’s statement in the Federal Register constitutes primary guidance.

²⁰⁷ Gary S. Becker, *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813, 819 (1973) (“[T]wo or more males or females could equally well take advantage of these economies . . .”).

²⁰⁸ *Id.* But see Alejandrina Salcedo, Todd Schoellman & Michèle Tertilt, *Families as Roommates: Changes in U.S. Household Size from 1850 to 2000*, 3 QUANTITATIVE ECON. 133, 134 (2012) (describing the general drop in the size of households as people can afford and value privacy).

²⁰⁹ See, e.g., 29 U.S.C. § 2611(7), (12)–(13) (recognizing protected leave for family members including spouses).

²¹⁰ *Morris v. Okla. Dep’t of Hum. Servs.*, 685 F.3d 925, 928 (10th Cir. 2012) (quoting *Johnson v. Guhl*, 91 F. Supp. 2d 754, 761 (D.N.J. 2000)).

²¹¹ *Id.* (citing H.R. REP. NO. 100-105, pt. 2, at 65 (1987)).

fit.²¹² Measuring need requires accounting for spouses, whose needs we also acknowledge and aid.

Although common, including household income is not without controversy or disparate impact. Need-based employment would likely disadvantage, for example, a worker who is married to an engineer or financier vis-à-vis a worker married to an English teacher or food service worker. In light of the general “marital wealth gap”²¹³ and the specific marriage patterns that continue to surface, people married to men, whether women or gay men, may have more money than their unmarried coworkers. Need-based employment would identify those married to high-income spouses as less needy.²¹⁴ I turn to a deeper discussion of this phenomenon and its intersection with antidiscrimination law in the following Part. For now, it is worth simply remarking that marriage has become a “hallmark of privilege” and is privileged by the law.²¹⁵

C. Dependents Beyond Children

This brings us to the third principle: need should reflect dependents beyond children and spouses.²¹⁶ This principle legitimizes traditional conceptions of family and dependency while also recognizing economic commitments to grandparents or other relations of lesser legal privilege.²¹⁷ For example, although the Family Medical Leave Act (FMLA) recognizes unpaid leave for oneself, spouses, and children, it does not for paramours, in-laws, or grandparents, even if they are cohabitants.²¹⁸ Focusing on narrow conceptions of the

²¹² Disability scholars, among others, have criticized some of the eligibility losses “when disabled individuals marry non-disabled individuals.” Rabia Belt, *Disability: The Last Marriage Equality Frontier* 2 (Stan. Pub. L. Working Paper, Paper No. 2653117, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653117 [https://perma.cc/76YA-GCZU].

²¹³ Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1, 2 (2018) (describing married couples as “the wealthiest family structure in the United States”).

²¹⁴ See *infra* notes 296–322 and accompanying text.

²¹⁵ JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 19–20 (2014); see also Mayeri, *supra* note 30, at 1279 (using the language of “supremacy” to describe marriage); Courtney G. Joslin, *Discrimination In and Out of Marriage*, 98 B.U. L. REV. 1, 4 (2018) (describing the growing numbers of people living outside of marriage, particularly the nonwhite and the poor).

²¹⁶ Trina Jones, *Single and Childfree! Reassessing Parental and Marital Status Discrimination*, 46 ARIZ. ST. L.J. 1253, 1256–57 (2014) (critiquing the legal privileges that accrue to the married, particularly with children, vis-à-vis single people without children).

²¹⁷ See Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1284 (2011) (cautioning against the “agnosticism” of “universal rules” that “fail to protect caregiving responsibilities any better than leisure pursuits”).

²¹⁸ 29 U.S.C. §§ 2611(7), (12)–(13), 2612; see also Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1, 37 (2013) (problematizing the selective recognition of relationships in the FMLA). But see 26 U.S.C. § 152(d)(1) (defining “qualifying relative” under tax law more broadly).

family echoes historical state exclusions of “illegitimate” children from welfare, in response to which modern critics have asserted that “[n]eed, not [relationship] status, was the appropriate criterion”²¹⁹ More generally, defining dependents broadly comports with “the ‘new kinship’—intimate associations, parental relationships, and affective ties increasingly forged outside of traditional marriage and amidst dramatic demographic shifts in the family”²²⁰ Some state laws follow this more inclusive path.²²¹

Tax law contains both the narrow and broad definitions of “dependent.” The EITC focuses exclusively on, and increases non-linearly in the number of, children. Despite beginning with a uniform credit only for those with children, it created a more generous category for two children in 1990;²²² one for those without children in 1993;²²³ and in 2009, a third category for those with three or more.²²⁴ The EITC thus grew to provide a more valuable benefit to families with more children, but not proportionally so.²²⁵ In the retirement savings context, tax law recognizes a broader family for assessing need. The presence of family affects the hardship determination in two ways, both in establishing examples that give rise to the requisite financial need and in determining if the withdrawal is necessary to satisfy that need. For the former, the requisite need examples include education, medical, and funeral expenses for the employee or other dependent.²²⁶

²¹⁹ Mayeri, *supra* note 30, at 1286–87.

²²⁰ R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071, 2075 (2017); *see also* Jones, *supra* note 216, at 1269 (describing an urgent need to address “the perception that family-friendly benefits are only available to workers with traditional family responsibilities”).

²²¹ Deborah A. Widiss, *Chosen Family, Care, and the Workplace*, 131 YALE L.J.F. 215, 230–35 (2021), <https://www.yalelawjournal.org/forum/chosen-family-care-and-the-workplace> [<https://perma.cc/KA2Y-FLV5>] (describing emerging state leave laws’ “recognition of nonmarital partners, extended family, and other chosen family” in contrast to FMLA).

²²² Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11111, 104 Stat. 1388, 1388–408; (current version at 26 U.S.C. § 32(b)(1)).

²²³ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13131, 107 Stat. 312, 433 (current version at 26 U.S.C. § 32(b)(1)).

²²⁴ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1002, 123 Stat. 115, 312 (current version at 26 U.S.C. § 32(b)(1)).

²²⁵ *Earned Income and Earned Income Tax Credit (EITC) Tables*, INTERNAL REVENUE SERV., <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/earned-income-tax-credit-income-limits-and-maximum-credit-amounts> [<https://perma.cc/D9XD-AWVR>] (Aug. 30, 2022) (noting that the maximum credit is lowest for those with zero children and highest for those with three or more qualifying children).

²²⁶ 26 C.F.R. § 1.401(k)-1(d)(3)(ii)(B)(1), (3), (5) (2021); 26 U.S.C. § 213 (cross-reference for medical expenses). Parental funeral expenses are also expressly included. 26 C.F.R. § 1.401(k)-1(d)(3)(ii)(B)(5); 26 U.S.C. § 213. Employees may designate primary beneficiaries for Employee Retirement Income Security Act-governed accounts, as governed by federal law. ERISA thus may first, preempt “antilapse statutes, as well as state statutes that revoke beneficiary designations on divorce” and second, grant “survivorship rights to an employee’s spouse,” which requires the spouse’s waiver, as opposed to only the plan participant’s unilateral action. *See, e.g.*, Stewart E. Sterk & Mela-

D. Wealth

The fourth principle reflects how wealth beyond income cushions adverse employment decisions. Incorporating wealth into need, however, raises both logistical and design issues. Wealth itself is difficult to measure.²²⁷ More generally, wealth tests can be difficult to administer and may create complicated incentives. For example, Medicaid funds long-term care for many Americans, and in addition to contemplating income, Medicaid contemplates wealth through the statutory term “resources.”²²⁸ Individuals’ resources may include their spouse’s resources.²²⁹ Some will “spend down,” or liquidate assets, in pursuit of program eligibility.²³⁰

The EITC’s needs assessment also indirectly considers wealth via investment income.²³¹ The EITC permits only a modest amount of investment income without altogether foregoing eligibility.²³² As such, savvy investors with otherwise low income may lose their EITC eligibility, creating a disincentive to save and invest.²³³ Any wealth-based test justifies the investment disincentive as a way to exclude high-wealth but low-income people.²³⁴ For example, a jewelry designer may make very little money, but if inherited wealth provides

nie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 186 (2014).

²²⁷ Gabriel Zucman, *Global Wealth Inequality*, 11 ANN. REV. ECON. 109, 110–11 (2019) (noting how “financial globalization makes it increasingly hard to measure wealth at the top”).

²²⁸ 42 U.S.C. § 1382.

²²⁹ This is overlaid by state laws because of Medicaid’s cooperative federalism structure. *Wis. Dep’t of Health & Fam. Servs. v. Blumer*, 534 U.S. 473, 479 (2002) (discussing the incorporation of spousal resources in states’ eligibility determinations and citing to *Schweiker v. Gray Panthers*, 453 U.S. 34, 44–48 (1981)); 42 U.S.C. § 1396p(h)(1) (defining, for Medicaid purposes, an individual’s “assets” as “includ[ing] all income and resources of the individual and of the individual’s spouse”). *But see* Thomas E. Simmons, *Medicaid as Coverture*, 26 HASTINGS WOMEN’S L.J. 275, 312 (2015) (describing this “view of spousal wealth [as] reminiscent of the fictional marital unity of coverture” (emphasis omitted)).

²³⁰ Simmons, *supra* note 229, at 314 (citing 42 U.S.C. § 1396p(b)(4)(A)–(B)).

²³¹ CONG. BUDGET OFF., PUB. NO. 54667, OPTIONS FOR REDUCING THE DEFICIT: 2019 TO 2028, at 247 (2018), <https://www.cbo.gov/system/files/2019-06/54667-budgetoptions-2.pdf> [<https://perma.cc/RZ3Q-PF5X>] (“[Asset] tests would be difficult for the IRS to administer because the agency does not collect information on the amount of assets held by individuals. . . . [But] the IRS does have extensive information on taxpayers’ income from bank accounts and most other types of investments . . .”).

²³² *Id.* (explaining that investment income was restricted to \$3,500 or less for the year in 2018).

²³³ Vada Waters Lindsey, *Encouraging Savings Under the Earned Income Tax Credit: A Nudge in the Right Direction*, 44 U. MICH. J.L. REFORM 83, 85 (2010) (critiquing how “recipients currently are not encouraged to save or invest the increase in the after-tax income resulting from the receipt of the EITC”). In fact, the EITC discourages such use by denying taxpayers with excessive investment income access to the credit.

²³⁴ *See, e.g.,* Didem M. Bernard, Jessica S. Banthin & William E. Encinosa, *Wealth, Income, and the Affordability of Health Insurance*, 28 HEALTH AFFS. 887, 893 (2009) (explaining how “income-based affordability thresholds do not sufficiently reflect [asset-based] differences in total economic resources”).

him with annual returns, he may still be excluded from the EITC despite his low-income status.

A common but contested wealth-test feature is the primary residence exclusion, which might appeal to some need-assessing employers. The Social Security Act, in the innocuous words of the Ninth Circuit, “allows needy people to receive SSI benefits *and* maintain a home.”²³⁵ The Social Security Administration’s manual excludes “[a]n individual’s home, *regardless of value*”²³⁶ Universities diverge in their primary residence exclusions. Since its 1992 inception, the Free Application for Federal Student Aid (FAFSA) considers household income and assets but not primary residence equity, abandoning a different, earlier formula.²³⁷ Some private institutions have been slow to follow FAFSA’s exclusion. Stanford, for example, only recently removed home equity from financial aid calculations,²³⁸ following in the narrower footsteps of Occidental, which had removed home equity but only for California residents with household incomes below \$150,000.²³⁹ In benefiting people who objectively appear to be, but “don’t necessarily feel wealthy,”²⁴⁰ such home equity exclusions have been criticized as a “mask” for white families’ capital.²⁴¹

The existence of a wealth test still leaves open design options. Thinking back to the two Vals of Vallejo Street(s), imagine that they have now paid off their mortgages. Whereas San Francisco Val has only his home, worth \$3 million, Emeryville Val has his home, worth \$800,000, plus another \$800,000 in savings. Without a primary residence exclusion, Emeryville Val is needier; but excluding the residence, San Francisco Val possesses greater need. The ceiling

²³⁵ *Hart v. Bowen*, 799 F.2d 567, 569 (9th Cir. 1986) (citing 42 U.S.C. § 1382b).

²³⁶ *Program Operations Manual System (POMS): SI 01130.100 The Home Exclusion*, SOC. SEC. ADMIN. (emphasis added), <https://secure.ssa.gov/poms.nsf/lnx/0501130100> [<https://perma.cc/NT3S-VBGR>] (July 22, 2022).

²³⁷ BENJAMIN COLLINS, CONG. RSCH. SERV., R44503, *FEDERAL STUDENT AID: NEED ANALYSIS FORMULAS AND EXPECTED FAMILY CONTRIBUTION*, 33 (2016), <https://fas.org/sgp/crs/misc/R44503.pdf> [<https://perma.cc/27K6-QDCP>]; see also *Dozier v. Loop Coll.*, 776 F.2d 752, 754 (7th Cir. 1985) (“[T]he pooling of income on the basis of familial relations is established in the law of taxation and the rules of welfare programs, and there is no reason to treat student aid differently.” (citing *Califano v. Jobst*, 343 U.S. 47 (1977))).

²³⁸ John Stafford, *Stanford Expands Financial Aid for Middle-Income Families as Trustees Set 2019–20 Tuition*, STANFORD NEWS (Dec. 4, 2018), <https://news.stanford.edu/2018/12/04/stanford-expands-financial-aid-middle-income-families-trustees-set-2019-20-tuition/> [<https://perma.cc/X6X8-TGJK>].

²³⁹ Scott Jaschik, *Taking Home Value Out of the Equation*, INSIDE HIGHER ED (Nov. 6, 2017), <https://www.insidehighered.com/admissions/article/2017/11/06/how-occidental-changed-its-aid-formula-attract-middle-class> [<https://perma.cc/M836-LX87>].

²⁴⁰ *Id.*

²⁴¹ Osamudia R. James, *Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 IND. L.J. 851, 874 (2010); DOROTHY A. BROWN, *THE WHITENESS OF WEALTH* 87–91 (2021).

on a primary residence exclusion might vary geographically, depending on cost of living.²⁴²

These four principles—emphasizing objective rather than subjective assessments; incorporating household rather than individual incomes; recognizing dependents beyond children; and measuring wealth in addition to income—provide a template for need-based employment.

IV. ANTIDISCRIMINATION LAW’S PARADOX

Need-based employment’s lineage includes histories of discrimination along racial and gender lines.²⁴³ An employer that assessed need through simplistic sex- or race-based stereotypes, rather than thoughtfully designed needs assessments, would violate federal antidiscrimination law through their “disparate treatment.”²⁴⁴ Disparate treatment based on sex may involve an employer paying a woman less than her similarly situated peers, presuming her marriage to a rich husband, in line with assumptions of heterosexuality and beliefs “that men ‘need’ their jobs more than women do and should therefore be given preference.”²⁴⁵ Notably, courts have not always deemed such sexist comments legally actionable.²⁴⁶ Through Title VII of the Civil Rights Act, “Congress in-

²⁴² Amy K. Glasmeier, Mass. Inst. of Tech., *LIVING WAGE CALCULATOR*, <https://livingwage.mit.edu> [<https://perma.cc/3UAX-37E9>] (estimating “the cost of living in your community or region based on typical expenses”).

²⁴³ *See supra* notes 183–198 and accompanying text (describing racial and gender dynamics in government employment programs).

²⁴⁴ *See, e.g.,* Int’l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 204, 211 (1991) (explaining that “permissible distinctions based on sex must relate to ability to perform the duties of the job” and holding that “fetal-protection policies that mandate particular standards for pregnant or fertile women” violate Title VII).

²⁴⁵ Olga Popov, Note, *Towards a Theory of Underclass Review*, 43 STAN. L. REV. 1095, 1120–21 (1991); *see also* David Fontana & Naomi Schoenbaum, *Unsexed Pregnancy*, 119 COLUM. L. REV. 309, 311 (2019) (arguing that “[u]nsexed the law of caregiving has been crucial to dismantling the separate sex-based spheres that pigeonhole women as caregivers and men as breadwinners”); Noya Rimalt, *The Maternal Dilemma*, 103 CORNELL L. REV. 977, 1008 (2018) (discussing how treating an employee with family responsibilities adversely “amounts to sex discrimination when the employer resorts to gender stereotypes about caregivers” (citing EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 2 (2007), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities> [<https://perma.cc/QB95-TJNH>])); *cf.* Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 115 (2019) (describing how “[c]redit practices presumed women’s dependence and perpetuated the common law of coverture well into the 1970s (and beyond)”).

²⁴⁶ *See, e.g.,* Rodriguez-Coss v. Sessions, No. 3:16-cv-00633, 2018 WL 3213290, at *15 (D. Conn. June 29, 2018) (finding that even though an employee of the defendant-Department of Justice “once said that ‘women only go to law school to find rich husbands,’” these comments did not rise “to the [level] of invective held to be sufficient to constitute discriminatory intent [under Title VII]”); Jones v. Unified Gov’t of Wyandotte Cnty./Kansas City, 552 F. Supp. 2d 1258, 1265 (D. Kan. 2008) (finding

tended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”²⁴⁷

Even absent intentional disparate treatment, federal law prohibits employment practices that have an unjustified disparate impact on protected groups.²⁴⁸ The Supreme Court explained the purpose of disparate impact in 1971 in *Griggs v. Duke Power Co.*, noting that Title VII “proscribes not only overt discrimination but also practices that are . . . discriminatory in operation.”²⁴⁹ Congress requires removing “artificial, arbitrary, and unnecessary barriers to employment” when the barriers effectively discriminate on the basis of an impermissible classification.²⁵⁰ Even if need-based employment reflected employees’ desires for fair treatment, perhaps proposed by a union in collective bargaining, it could still face challenges based on disparate impact.²⁵¹ Yet the available defenses insulate certain disparities from liability. These include the business necessity defense, as well as its less noticed peer, the defense available for employment and compensation systems based on quantity or quality.

Beyond Title VII, other antidiscrimination statutes, including the Equal Pay Act (EPA) and state antidiscrimination analogs, also police unintentional effects.²⁵² For example, the EPA adopts a strict-liability approach to sex-based

that even if plaintiff’s supervisor “excluded her from . . . classes and told her to marry a rich man” there was “no evidence which links these actions to [promoting someone else] instead of plaintiff”).

²⁴⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (quoting L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)); see also Brian Soucek & Vicki Schultz, *Sexual Harassment by Any Other Name*, 2019 U. CHI. LEGAL F. 227, 247, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1650&context=uclf> [<https://perma.cc/B5P9-AUYU>] (“Disrupting such gender boundaries has always been part of the contested meaning of Title VII.” (emphasis omitted) (first citing Brian Soucek, *Hively’s Self-Induced Blindness*, 127 YALE L.J. F. 115, 125 (2017), <https://www.yalelawjournal.org/forum/hivelys-self-induced-blindness> [<https://perma.cc/8MWF-L28T>]; and then citing Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1014–46 (2015))). But see Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 66 (2010) (questioning American antidiscrimination doctrine’s “preoccup[ation] with combating gender stereotypes” since “the [European] legal regimes that protect maternity based on gender stereotypes produce higher levels of female labor market participation and a lower gender wage gap”).

²⁴⁸ 42 U.S.C. § 2000e-2(k).

²⁴⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); Katie Eyer, *The Return of the Technical McDonnell Douglas Paradigm*, 94 WASH. L. REV. 967, 975 (2019) (describing *Griggs* as “the foundational case for disparate impact doctrine” and noting its numerous citations).

²⁵⁰ *Griggs*, 401 U.S. at 431.

²⁵¹ A union demand will not insulate an employer from Title VII liability, and a union and employer can be jointly liable for discriminatory policies. See, e.g., *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1015–16 (11th Cir. 1982) (holding union and employer jointly liable for a discriminatory promotion policy).

²⁵² Kim Forde-Mazrui, *Why the Equal Rights Amendment Would Endanger Women’s Equality: Lessons from Colorblind Constitutionalism*, 16 DUKE J. CONST. L. & PUB. POL’Y 1, 6 (2021) (describing the EPA and Title VII as among “[s]everal federal laws [that] expressly aim to advance women’s equality”).

pay differentials, although the employer may avoid liability where a differential is “based on any other factor other than sex”²⁵³ This defense, deemed by one scholar to be an “Any Reason Under the Sun” defense, has led courts to examine the legitimacy of business reasons and their job-relatedness, echoing the language of Title VII doctrine.²⁵⁴ For example, an intervening revenue decline satisfied the “any other factor” defense against a plaintiff offered a lower salary than her male immediate predecessor.²⁵⁵

This Part charts how need-based employment’s consideration of personal relationships may create a disparate impact. Section A first canvases nepotism law, which has long confronted the tension between employer consideration of personal relationships and subsequent sex-based disparities.²⁵⁶ Need-based employment’s disparate impact analysis echoes doctrinally relevant predecessors such as nepotism. Next, Section B turns to general trends of household formation.²⁵⁷ Although women are generally more likely to have higher-earning spouses than men, racial disparities surface. Black women, including those with college educations, confront less economically advantageous trajectories in marriage than white women. A small but often affluent group of gay, white married men may possess the most resources of all married peers. Need-based employment could thus benefit Black women and gay men even as it adversely impacts white women and gay men. After exploring these demographic trends and the disparate impacts they may create, Section C considers the defenses that an employer could offer in support of need-based employment.²⁵⁸

A. Beyond Worker Productivity: Relationships

Need-based employment and nepotism intellectually inform one another in that both reach beyond one’s production to one’s personal relationships.²⁵⁹ When employment privileges inhere from certain relationships, rather than

²⁵³ 29 U.S.C. § 206(d)(1).

²⁵⁴ Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMU L. REV. 17, 57–59 (2010).

²⁵⁵ *Brokaw v. Weiser Sec.*, 780 F. Supp. 2d 1233, 1252 (S.D. Ala. 2011). Despite the district court’s recognition of deteriorating employer finances, other courts have cabined and scrutinized defenses predicated on general market forces. *See Eisenberg, supra* note 254, at 55 (canvassing “EPA cases [that] have rejected market defenses where employers failed to show how they used market information”).

²⁵⁶ *See infra* notes 259–295 and accompanying text.

²⁵⁷ *See infra* notes 296–342 and accompanying text.

²⁵⁸ *See infra* notes 343–379 and accompanying text.

²⁵⁹ *See generally* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1814 (2020) (characterizing “[t]he conceit that market order could provide sufficiently fair and acceptable outcomes” as plausible immediately after World War II but not in the twenty-first century).

from productivity, those privileges comprise “nepotism.”²⁶⁰ The dictionary defines nepotism as “favoritism (as in appointment to a job) based on kinship.”²⁶¹ From Industrial Revolution factories²⁶² to construction unions²⁶³ to government employment, nepotism surrounds us. The Supreme Court wrote that “nepotism in appointing public servants has been a subject of controversy . . . throughout our history.”²⁶⁴ Many public employers are subject to antinepotism state statutes, which vary widely across jurisdictions.²⁶⁵

The spectrum of nepotism law, from antinepotism mandates to formalizing nepotistic preferences, reflects how employment has reached beyond productivity into our personal lives.²⁶⁶ So might a robust conception of need-based employment.

1. Antinepotism

Employment law permits constraining people’s opportunities based on their personal relationships. These include both no-spouse policies and corporate anti-favoritism policies that regulate romantic, non-marital relationships between managers and subordinates.²⁶⁷ Beyond romance, some states prohibit hiring based on various levels of consanguinity (from first-degree, including sib-

²⁶⁰ Empirically, economists have shown nepotism’s value by cleverly uncovering how the death of a patriarch can diminish men’s income prospects in China. See Shing-Yi Wang, *Marriage Networks, Nepotism, and Labor Market Outcomes in China*, AM. ECON. J. APPLIED ECON., July 2013, at 91, 102–05. Wang’s analysis uncovers a particularly acute loss from the passing of a father-in-law in pre-reform era state-owned enterprises where nepotism more easily thrived. *Id.*

²⁶¹ *Nepotism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/nepotism> [<https://perma.cc/D352-3ATE>]. Kinship is defined broadly. *Infra* notes 268–269 and accompanying text.

²⁶² Worried that familial loyalty would jeopardize corporate loyalty, factories during the Industrial Revolution sought children and unmarried women as workers. Rosabeth Moss Kanter, *Work and Family in the United States: A Critical Review and Agenda for Research and Policy*, 2 FAM. BUS. REV. 77, 79–80 (1989).

²⁶³ See, e.g., Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 516 (2007) (noting nepotism as among the “informal practices of exclusion” operating in the “building trade unions” (citing MARK ERLICH, WITH OUR HANDS: THE STORY OF CARPENTERS IN MASSACHUSETTS 18–19 (1986))).

²⁶⁴ *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552, 563 (1947).

²⁶⁵ *Nepotism Restrictions*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 24, 2021), <https://www.ncsl.org/research/ethics/50-state-table-nepotism-restrictions.aspx> [<https://perma.cc/W98H-UH8K>] (describing how states, including California, Colorado, Virginia, and Washington, have “[n]o explicit prohibition against nepotism in the legislative branch . . . [despite] other rules or conflict of interest provisions”).

²⁶⁶ I discuss nepotism in two niche but legally significant professions: those who physically steward our streams—river pilots—and those who intellectually steward young people—professors. See *infra* notes 284–287 (discussing legality of nepotism in river piloting); *infra* notes 291–292 (discussing legality of nepotism in academic hiring).

²⁶⁷ *Andy v. United Parcel Serv., Inc.*, No. Civ. A. 02-8231, 2003 WL 22697194, at *1 (E.D. Pa. Oct. 28, 2003).

lings, to multiple degrees, such as more distant cousins).²⁶⁸ Some use the term “affinity” to distinguish marital relationships from sanguine, or blood relations, and impose stricter requirements for affinity-based relationships than for sanguine ones.²⁶⁹ Antinepotism laws limit employment across various blood lines and intimate relationships.

But private employers’ antinepotism policies—often no-spouse policies—potentially conflict with statutory protections against marital status discrimination.²⁷⁰ In New York, a pizzeria employee married her manager and was thereafter terminated based on a company policy prohibiting working under a relative.²⁷¹ In finding the termination outside statutory “marital status” protection, the New York Court of Appeals reasoned through counterfactual: had the plaintiff been married to anyone other than her supervisor, no discharge would have occurred—the “supervisory authority over the other was undesirable.”²⁷²

Hawaii’s Supreme Court took a different path.²⁷³ Many years after two hotel employees married, new owners decided to enforce a rule against married coworkers, first offering a transfer, which both employees declined, and then terminating one.²⁷⁴ In finding that the termination violated the statutory “marital status” protection²⁷⁵ in contrast to New York’s decision, the court acknowledged that “reasonable minds may differ.”²⁷⁶ When employer policies mechanically punish people based on their loved ones’ identity, states differ on the policies’ legality.

²⁶⁸ Compare ALA. CODE § 41-1-5 (2022) (reaching to fourth degree of affinity or consanguinity, such as a great-grand-nephew), with N.D. CENT. CODE ANN. § 44-04-09 (2021) (limited to more direct relations). See generally *Nepotism Restrictions*, *supra* note 265.

²⁶⁹ See, e.g., TEX. GOV’T CODE ANN. § 573.002 (West 2021) (making it unlawful for certain public officials to appoint, or vote to appoint, those connected by consanguinity up to the third degree or by affinity up to the second degree); MONT. CODE ANN. § 2-2-302 (2021) (making it unlawful for certain public officials to appoint those connected by consanguinity up to the fourth degree or by affinity up to the second degree).

²⁷⁰ *Sloan v. Tri-Cnty. Elec. Membership Corp.*, No. M2000-01794-COA-R3-CV, 2002 WL 192571, at *5 n.2 (Tenn. Ct. App. Feb. 7, 2002) (remarking that “very few [of the many marital discrimination] laws have provided employees protection against anti-nepotism rules,” and explaining how “[b]road interpretation of marital status enables courts to find discrimination where an employee would not have been fired but for his or her marriage to a co-worker”).

²⁷¹ *Manhattan Pizza Hut, Inc. v. N.Y. State Hum. Rts. Appeal Bd.*, 415 N.E.2d 950, 952 (N.Y. Ct. App. 1980).

²⁷² *Id.* at 954.

²⁷³ *Ross v. Stouffer Hotel Co. (Haw.) Ltd.*, 816 P.2d 302, 304 (1991) (finding discriminatory an employer’s rule against hiring married coworkers).

²⁷⁴ *Id.* at 303.

²⁷⁵ *Id.* In doing so, the court emphasized that “continued cohabitation without going through a marriage ceremony would not have been a violation of the policy.” *Id.*

²⁷⁶ *Id.* at 304. The marital status prohibition had exceptions, including for a bona fide occupational qualification (BFOQ). Because no such exception applied, the Court found the termination unlawful. *Id.* (citing HAW. REV. STAT. § 378-3).

Antinepotism policies raise federal constitutional and statutory claims of sex discrimination, foreshadowing need-based employment's challenges. For example, in 1995 in *Parks v. City of Warner Robins*, an officer was to marry her superior despite the department's no-spouse policy.²⁷⁷ Postponing the wedding to avoid termination, the officer alleged unconstitutional sex discrimination. The Eleventh Circuit upheld the anti-nepotism policy, but only after acknowledging the policy's disparate impact.²⁷⁸ Because "eighty-four percent of [defendant's] supervisory employees are men," the plaintiff argued that those employees forced to change departments or quit would be disproportionately women.²⁷⁹

Although constitutional discrimination claims require discriminatory intent, sex-based statutory claims often proceed on disparate impact.²⁸⁰ In 1977 in *Yuhas v. Libbey-Owens-Ford Co.*, the plaintiff, echoing *Parks*, argued the no-spouse rule's discriminatory effect: "seventy-one women, compared to three men, had been denied employment for the reason that their spouses were already . . . employees."²⁸¹ The Seventh Circuit upheld the termination and found the no-spouse rule job-related because it "plausibly improves the work environment" and "does not penalize women on the basis of their environmental or genetic background"²⁸²

Just as antinepotism policies consider workers' personal relationships and survive sex-based disparate impact challenges, so might need-based employment practices.²⁸³ Both antinepotism and need-based employment prioritize broader employer goals and limit people's employment based on their relationships.

²⁷⁷ *Parks v. City of Warner Robins*, 43 F.3d 609, 611 (11th Cir. 1995).

²⁷⁸ *Id.* The Equal Protection claim was in addition to failed constitutional Due Process and intimate association arguments.

²⁷⁹ *Id.* at 617.

²⁸⁰ *Id.* ("Assuming arguendo that *Parks* has demonstrated disparate impact, her equal protection claim must still fail for lack of a showing of discriminatory intent." (citing *Pers. Adm'r v. Feeney*, 442 U.S. 256, 274 (1979))). To be clear, disparate impact as a constitutional claim may proceed where invidious intent can be inferred. Compare *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (finding an equal protection violation), with *Feeney*, 442 U.S. at 274–275 (failing to find "invidious gender-based discrimination" behind an adverse effect).

²⁸¹ *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496, 497 (7th Cir. 1977).

²⁸² *Id.* at 500. One scholar criticized *Yuhas*'s absence of an empirical showing of the rule's "positive effects on productivity, morale or other business interests." Sharon Rabin-Margalioth, *Love at Work*, 13 DUKE J. GENDER L. & POL'Y 237, 241–42 (2006).

²⁸³ When terminations are premised on antinepotism policy violations, the employers need not demonstrate *actual* favoritism, even as favoritism concerns motivate antinepotism policies. Rabin-Margalioth, *supra* note 282, at 238.

2. Nepotism

Courts have been similarly mixed in their treatment of nepotism, even as the practice persists in academic hiring pools. Most prominently, in *Kotch v. Board of River Port Pilot Commissioners*, the Supreme Court approved Louisiana's system for licensing river pilots amid accusations of nepotistic exercise of discretion, explaining that the Constitution did not require "a competitive test" focused on productivity or merit.²⁸⁴ In applying a rational basis test, the Court deferred to the legislature's equation of nepotism with "morale," "esprits de corps," and "neighborly tradition"²⁸⁵ Some employers adopt legally permissible nepotism, purportedly for morale and tradition.²⁸⁶

Although *Kotch* allowed "state-sponsored hereditary privilege" to displace measured productivity,²⁸⁷ lower courts have not always followed. Considering a fire department's familial preference, the Eighth Circuit in *Backlund v. Hessen* opined that favoritism to relatives in hiring was constitutional in *Kotch*'s specific circumstances, not that such favoritism "could *never* violate the Equal Protection Clause."²⁸⁸ The *Backlund* court found that "the record contain[ed] nothing about the culture of firefighting and of firefighters, or the unique requirements, if any, of the job," thus rendering an insufficient nexus between the challenged nepotism and the job duties.²⁸⁹ Beyond constitutional

²⁸⁴ *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 553, 564 (1947) (analyzing the constitutionality of a nepotistic system whereby "seagoing vessels moving between New Orleans and foreign ports must be navigated through the Mississippi River" by state officers).

²⁸⁵ The Court "assume[d] that the Louisiana legislature weighed the obvious possibility of evil against whatever useful function a closely knit pilotage system may serve." *Id.* at 563–64. Because the Court could not say that Louisiana's method of pilot selection was unrelated to these objectives, it affirmed, but reserved judgment on "any similar system of selection . . . practiced in other [state-regulated] professions" *Id.* at 564.

²⁸⁶ An exception implies only permission, for example when "the employment of near relatives in the same department . . . is justified and in the best interests of the [employer]." UNIV. OF CAL., ACADEMIC PERSONNEL MANUAL, at APM-520: RECRUITMENT, EMPLOYMENT OF NEAR RELATIVES (2009), <https://www.ucop.edu/academic-personnel-programs/academic-personnel-policy/recruitment/index.html> [<https://perma.cc/KA5J-VEJZ>].

²⁸⁷ Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U. L. REV. 1375, 1411–12 (2006).

²⁸⁸ *Backlund v. Hessen*, 104 F.3d 1031, 1033 (8th Cir. 1997) (emphasis added).

²⁸⁹ *Id.* at 1034. Scholars have similarly criticized and tried to cabin *Kotch*. See James W. Torke, *Nepotism and the Constitution: The Kotch Case—a Specimen in Amber*, 47 LOY. L. REV. 561, 562 (2001) (describing *Kotch* as a "specimen caught in amber" because the precedent has survived despite "uniformly unfavorable" commentary); Larson, *supra* note 287, at 1411 ("From a modern perspective, *Kotch* is puzzling."). Larson also argues that the case appears "ineptly briefed," as plaintiffs "barely focused on the hereditary aspects of the case" and that the case should therefore be limited to its specific facts. *Id.* at 1411–12.

law, the Supreme Court explained that nepotism could violate federal statutory law *if* it disparately impacted minorities.²⁹⁰

Adjacent to caselaw protecting nepotism lie the formal programs of nepotistic university employment, partly motivated by the dearth of women academics.²⁹¹ According to a report by a National Science Foundation funded program to increase and promote women at a major research university, such “dual hiring” programs are prolific at major universities.²⁹²

This form of relationship-based, nepotistic employment is often surprisingly formal and publicly documented.²⁹³ As one self-identifying “trailing spouse” explained in response to being introduced to employment opportunities by his marriage, “[M]y own abilities had been incidental to the arrangement. I really *had* come to them through my wife.”²⁹⁴ Often the trailing spouse’s hiring department will pay only one-third of the spouse’s salary, with the “first” spouse’s department and the university administration, respectively, each paying one-third.²⁹⁵ This is a narrow nepotistic subsidy for spousal hiring. Ameri-

²⁹⁰ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 n.9 (1989) (emphasis added); see also *Holder v. City of Raleigh*, 867 F.2d 823, 825–26 (4th Cir. 1989) (“To hold that favoritism toward friends and relatives is *per se* violative of Title VII would be, in effect, to rewrite federal law.”). *Holder* also went on to explain that “[a] clannish preference for relatives” might support an inference for intentional race discrimination. 867 F.2d at 827 (citing *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1436 (9th Cir.1984)).

²⁹¹ See, e.g., Kristen Monroe, Saba Ozyurt, Ted Wrigley & Amy Alexander, *Gender Equality in Academia: Bad News from the Trenches, and Some Possible Solutions*, 6 PERSPS. ON POL. 215, 230 (2008) (recommending “spousal hiring” programs to improve gender diversity).

²⁹² ROCHESTER INST. TECH., ADVANCERIT DUAL HIRE EMPLOYMENT ASSISTANCE PROGRAM 7–8 (2015), <https://www.rit.edu/advance/sites/rit.edu/advance/files/docs/nsfadvanceritdualhireemploymentassistanceprogrambenchmarking.pdf> [<https://perma.cc/P2JJ-DHC9>]. “AdvanceRIT’s mission is to enable all faculty at RIT, particularly women, to contribute their full potential, to increase their representation and retention, and to advance their careers.” *Advance RIT*, ROCHESTER INST. TECH., <https://www.rit.edu/advance/> [<https://perma.cc/959C-PNX5>].

²⁹³ Courts have permitted employer nepotism and “patronage” against general discrimination, just as courts upheld antinepotism policies against sex-based disparate impact claims. *Goostree v. Tennessee*, 796 F.2d 854, 862 (6th Cir. 1986) (quoting *Avery v. Jennings*, 786 F.2d 233, 237 (6th Cir. 1986)) (rejecting plaintiff’s Title VII claim based on a permissible “patronage system that relies on family, friends, and political allies”); *Amini v. Oberlin Coll.*, 440 F.3d 350, 354–55 (6th Cir. 2006) (rejecting an unsuccessful faculty applicant’s Title VII claims based on sex, race, and religion). The court repeated a committee member’s concern that the successful candidate “had been a student here [and] his father had taught here” (in the very position for which the school was hiring), which “created a more complicated situation.” *Amini*, 440 F.3d at 355.

²⁹⁴ Mark Purcell, “*Skilled, Cheap, and Desperate*”: *Non-tenure-track Faculty and the Delusion of Meritocracy*, 39 ANTIPODE 121, 133 (2007). The administration paid his full salary and the department where he and his wife taught paid only her salary. *Id.* at 134.

²⁹⁵ See, e.g., *Faculty Spousal and Partner Hiring Assistance Program*, UNIV. OF N. CAROLINA AT CHAPEL HILL, <https://academicpersonnel.unc.edu/policies-and-procedures/faculty-recruitment/faculty-spousal-and-partner-hiring-assistance-program/> [<https://perma.cc/8SH4-82JE>]; *Dual Career Academic Hire Procedures*, UNIV. OF FLORIDA, <http://aa.ufl.edu/resources/dual-career-services/dual-career-academic-hire-procedures/> [<https://perma.cc/U998-32GC>]; *Dual Career Faculty Hiring Procedures*,

can universities do not seem to allow individuals to assign the incentive to non-spouse kin, whether beloved parents or a child, much less a good friend; nor do spousal benefits generally extend to lower-earning, non-tenure track faculty and staff.

B. Disparate Impact from Need-Based Employment

Relationships clearly affect employment decisions, which are not solely based on productivity. Consideration of personal relationships gives rise both to claims of sex discrimination, as with no-spouse laws that disproportionately affect women, and to targeted programs like university spousal hiring incentives, designed to benefit women. Marital patterns may interact with need-based employment by disparately impacting not only women, but also gay men.

1. Sex

Need-based hiring may produce a disparate impact on sex, stemming from sex-based disparities in having higher-income spouses.²⁹⁶ In fact, if the household income distribution of a workplace mirrors that of the country, married female employees may have higher household incomes than their married male colleagues. Consider the preceding example and discussion of academic spousal hiring. High-earning spouses could render female academics less needy than their male colleagues, so need-based employment in a struggling university could produce a disparate impact based on sex. This subsection begins by considering different-sex marriages and proceeds to same-sex ones.

Hypergamy—defined as the heterosexual pairing of women with men of higher economic or educational status—is an aspiration for some and a repulsion for others.²⁹⁷ Although “The Hypergamous Life,” a website and lifestyle

CLEMSON UNIV., <https://www.clemson.edu/provost/faculty-affairs/faculty-recruitment.html> [<https://perma.cc/G8J3-T4RW>].

²⁹⁶ Chetty et al., *supra* note 31, at 747. See generally *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977) (“[Statistics] come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.” (citing *Hester v. S. Ry. Co.*, 497 F.2d 1374, 1379–81 (5th Cir. 1974))); *N.A.A.C.P. v. N. Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 477 (3d Cir. 2011) (“Statistical disparities alone can raise an inference of causation, but only when those disparities are substantial and the statistical evidence is reliable.” (citing *Newarl Branch, N.A.A.C.P. v. City of Bayonne*, 134 F.3d 113, 121 (3d Cir. 1998))).

²⁹⁷ Albert Esteve, Joan García-Román & Iñaki Permanyer, *The Gender-Gap Reversal in Education and Its Effect on Union Formation: The End of Hypergamy?*, 38 *POPULATION & DEV. REV.* 535, 537 (2012) (“When a woman marries up, a hypergamic couple is formed.”); see also *FAMILY, KINSHIP, AND MARRIAGE IN INDIA* 231 (Patricia Uberoi ed., 1994) (“Hypergamy contrasts with ‘hypogamy,’ a stigmatized form of marriage where the bride’s family is of superior status to the groom’s”); Alaka Malwade Basu, *Fertility Decline and Increasing Gender Imbalance in India, Including a Possible South Indian Turnaround*, 30 *DEV. & CHANGE* 237, 241 (1999) (“[H]ypergamy refers to the tendency for individual families and larger groups to . . . marry[] their daughters ‘upwards’”).

brand, hopes “to better pinpoint the magic of creating chemistry with high value men,”²⁹⁸ many others reject such values.²⁹⁹ In the famous words of The Combahee River Collective, the short-lived but influential Black lesbian Marxist collective: “We reject pedestals [and] queenhood To be recognized as human, levelly human, is enough.”³⁰⁰ The Collective’s call to de-“pedestal” women echoes those of jurists, including the late Justice Ginsburg and the Hon. Burnita Matthews, the first woman appointed to a federal district court.³⁰¹

Whatever one’s thoughts about hypergamy “magic” and pedestals, American hypergamy in income has proved resilient, even as hypergamy in education wanes. Husbands possessing more education than their wives—educational hypergamy—was “one of the most enduring forms of gender inequality in heterosexual romantic relationships.”³⁰² As women surpass men in higher education completion, traditional marriage practices recede.³⁰³ There now appear to

“[M]arriage markets will naturally tend to be hypergamous—that is, a marriage is more likely to be beneficial to both parties relative to remaining single, the greater the man’s human capital, and the lower the woman’s human capital.” Gilles Saint-Paul, *Genes, Legitimacy and Hypergamy: Another Look at the Economics of Marriage*, 81 J. DEMOGRAPHIC ECON. 331, 331 (2015).

²⁹⁸ *About Chloe*, THE HYPERGAMOUS LIFE, <https://www.thehypergamouslife.com/p/blog-page.html> [https://perma.cc/NK6J-WTME]. But see Chanté Joseph, “Marry Rich”: Love Coaches Are Telling Women to Channel Feminine Energy, REFINERY29, <https://www.refinery29.com/en-gb/2021/06/10503519/what-is-a-love-coach> [https://perma.cc/6PEF-Y4DV] (June 6, 2021) (critiquing “YouTube femininity coaches . . . [who] create content that specifically targets Black women, encouraging them to embrace femininity to counteract our historical masculinisation”).

²⁹⁹ See, e.g., Lisa Eklund, *The Sex Ratio Question and the Unfolding of a Moral Panic? Notions of Power, Choice, and Self in Mate Selection Among Women and Men in Higher Education in China* (“[O]ther women see [hypergamy] as harmful [and are] concerned about the power relationships within the family.”), in SCARCE WOMEN AND SURPLUS MEN IN CHINA AND INDIA 105, 114 (Sharada Srinivasan & Shuzhuo Li eds., 2018).

³⁰⁰ COMBAHEE RIVER COLLECTIVE, THE COMBAHEE RIVER COLLECTIVE STATEMENT 4, 5, https://americanstudies.yale.edu/sites/default/files/files/Keyword%20Coalition_Readings.pdf [https://perma.cc/45XU-BE3L] (“[Marx’s] analysis must be extended further in order for us to understand our specific economic situation as Black women.”).

³⁰¹ Katy Steinmetz, *How Ruth Bader Ginsburg Found Her Voice*, TIME, <https://time.com/ruth-bader-ginsburg-supreme-court/> [https://perma.cc/A2JN-FJUL] (“[A] gender line . . . helps to keep women not on a pedestal, but in a cage.” (quoting Ruth Bader Ginsburg, oral argument at 34:26, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (No.73-1892), <https://www.oyez.org/cases/1974/73-1892>)); Burnita Shelton Matthews, The Equal Rights Amendment, Speech Made at the Council Meeting of the General Federation of Women’s Clubs, Hot Springs, Arkansas (May 1934) (“The pedestal in Georgia is not high enough to prevent the husband from climbing it to collect his wife’s earnings.”), in EQUAL RIGHTS, Aug. 18, 1934, at 4, 4, https://search.alexanderstreet.com/view/work/bibliographic_entity%7Cbibliographic_details%7C3926929/equal-rights-vol-20-no-29-august-18-1934#page/51mode/1/chapter/bibliographic_entity%7Cdocument%7C3926934 [https://perma.cc/9E92-XVQS?type=image].

³⁰² See Albert Esteve et al., *The End of Hypergamy: Global Trends and Implications*, 42 POPULATION & DEV. REV. 615, 618 (2016).

³⁰³ *Id.* at 617. Legal historian Reva Siegel has contrasted colonial America’s agrarian economies and their more visible women’s labor with the nineteenth century when, “[w]ith the spheres of work and family gendered male and female, marriage was redefined as an exchange of material sustenance

be more couples in which the wife is more educated than the reverse.³⁰⁴ As some have argued, hypergamy may animate the aforementioned academic hiring programs.³⁰⁵ The vast majority of married women in male-dominated fields (such as academic mathematics and physics) appear to be married to other scientists, usually within their own disciplines, which is less true of their male colleagues.³⁰⁶ Akin to these highly educated scientists, the least educated Americans increasingly marry one another, when they marry at all.³⁰⁷ Spousal hiring incentive programs—a narrow preference usually limited to marriage—thus respond to existing, if not future, gender-based demography.

for spiritual sustenance . . .” Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1093 (1994).

³⁰⁴ Pierre-André Chiappori, Bernard Salanié & Yoram Weiss, *Partner Choice, Investment in Children, and the Marital College Premium*, 107 AM. ECON. REV. 2109, 2116 (2017) (“Not coincidentally, the proportion of marriages in which the husband is more educated than the wife has fallen quite dramatically.”); Wendy Wang, *A Record Share of Men Are “Marrying Up” Educationally*, INST. FOR FAM. STUD. (Nov. 7, 2017), <https://ifstudies.org/blog/a-record-share-of-men-are-marrying-up-educationally> [<https://perma.cc/DCY8-UZZ7>].

³⁰⁵ One author of a noted study contextualized dual-career academic couples by explaining that heterosexually partnered “women tend to practice ‘hypergamy,’ . . . due partly to the fact that women’s social status was determined historically through marriage . . .” Londa Schiebinger, *Getting More Women into Science: Knowledge Issues*, 30 HARV. J.L. & GENDER 365, 371 (2007); Monroe et al., *supra* note 291, at 230 (discussing how the spousal hiring “proposal recognized that professional women tend to marry other professionals, and hence need jobs for spouses in order to move.”). The study also suggests that for “dual hiring,” the majority of “first” hires are men, and the majority of “second” hires are women. LONDA SCHIEBINGER, ANDREA DAVIES HENDERSON & SHANNON K. GILMARTIN, DUAL-CAREER ACADEMIC COUPLES: WHAT UNIVERSITIES NEED TO KNOW 5 (2008), <https://web.stanford.edu/dept/HPS/DualCareerFinal.pdf> [<https://perma.cc/6EC3-6522>]. Same-sex data tends to be very small in the samples.

³⁰⁶ Schiebinger, *supra* note 305, at 371. Such intradisciplinary romance—“disciplinary endogamy”—appeared to be more prevalent among women; male scientists married a broader, often less-educated group of women. SCHIEBINGER ET AL., *supra* note 305, at 5 (noting how “[f]ully 83 percent of women scientists in academic couples are partnered with another scientist, compared with 54 percent of men scientists” in their cross-institutional sample).

³⁰⁷ Consider a definition of heterosexual “assortative mating.” First, one can calculate a threshold probability that a college-educated man will randomly match with a college-educated woman. Lasse Eika, Magne Mogstad & Basit Zafar, *Educational Assortative Mating and Household Income Inequality*, 127 J. POL. ECON. 2795, 2796 (2019). If the actual probability exceeds this random chance-threshold, the excess probability represents educational assortative mating. As women surpass men in higher education, the actual and threshold probability may increase in parallel even if the excess probability—the assortative mating—does not. *Id.* (“One challenge is to determine whether the increase in educational homogamy arises from secular changes in educational attainment of men and women, or because of shifts in educational assortative mating.”). As economists calculated, “[i]n the early 1960s, Americans without a high school degree were 1.6 times as likely to be married to one another as compared to the probability with random mating” while in 2013, they were 7.2 times as likely. *Id.* at 2797. In contrast, people with graduate degrees appear to (perhaps surprisingly) exhibit a decline in assortative mating. Researchers found that “[i]n 1962, Americans with a graduate degree were 8.4 times more likely to be married to one another as compared to the probability with random mating” while in 2013, they were 3.1 times as likely. *Id.* at 2817.

As hypergamy in education ebbs, hypergamy in income persists, as might need-based employment's sex-based disparities. Husbands remain the primary income earners even when their wives surpass them in education.³⁰⁸ The unique persistence of hypergamy in income may partly reflect gendered preferences pertaining to financial security and partnership. Heterosexual women may express greater desire for men with stable employment, whereas men may prioritize physical attraction and caregiving traits.³⁰⁹ Earning more than one's spouse may produce a unique "psychological dividend" for men but not women,³¹⁰ who instead may value scheduling conventionality and control.³¹¹ Hypergamy can comprise a "vicious circle,"³¹² whereby lower-earning wives and mothers leave the workplace, and are perceived differently than men for doing so.³¹³ Regardless, income-based hypergamy means married female employees

³⁰⁸ Wang, *supra* note 304 ("In 2015, more than 7-in-10 married men (73%) had a higher income than their spouse, although the share was down from 91% in 1960."). "[A]mong all married men with less education than their wives in 2015, nearly 60% earned more money than their spouses." *Id.* In the Nordic countries, researchers find that lower-earning women may possess both higher social class background and occupational prestige than higher-earning male partners. Margarita Chudnovskaya & Ridhi Kashyap, *Is the End of Educational Hypergamy the End of Status Hypergamy? Evidence from Sweden*, 36 EUR. SOCIO. REV. 351, 362 (2020).

³⁰⁹ Wang, *supra* note 304 (describing women's prioritization of men with a "steady job"). See generally Thao Ha, Judith E.M. van den Berg, Rutger C.M.E. Engels & Anna Lichtwarck-Aschoff, *Effects of Attractiveness and Status in Dating Desire in Homosexual and Heterosexual Men and Women*, 41 ARCHIVES SEXUAL BEHAV. 673 (2012).

³¹⁰ See, e.g., Vanessa Gash & Anke C. Plagnol, *The Partner Pay Gap: Associations Between Spouses' Relative Earnings and Life Satisfaction Among Couples in the UK*, 35 WORK EMP. & SOC'Y 566, 575–79 (2021). Strikingly, the norms of hypergamy may be so powerful as to influence the survey data often used to analyze hypergamy. See Marta Murray-Close & Misty L. Heggeness, *Manning Up and Womaning Down: How Husbands and Wives Report Earnings When She Earns More* 4 (Opportunity & Inclusive Growth Inst., Working Paper No. 28, 2019), <https://www.minneapolisfed.org/research/institute-working-papers/manning-up-and-womaning-down-how-husbands-and-wives-report-earnings-when-she-earns-more> [<https://perma.cc/JPE6-X3RY>] (using matched data between the Current Population Survey Annual Social and Economic Supplement and W-2 tax filings to estimate that "survey respondents are 15.9 percentage points more likely to under-report the wife's share of a couple's earnings when her true share is just over half than when it is just under half").

³¹¹ See, e.g., Valentin Bolotnyy & Natalia Emanuel, *Why Do Women Earn Less Than Men? Evidence from Bus and Train Operators*, 40 J. LAB. ECON. 283, 284 (2022) (using administrative data to understand the gender gap in earnings). Recent evidence also suggests that in certain workplaces, the higher effect of pay raises on women's rather than men's productivity makes gender pay gaps even more surprising. Natalia Emanuel & Emma Harrington, *The Payoffs of Higher Pay: Elasticities of Productivity and Labor Supply with Respect to Wages 2–5* (Jan. 12, 2020) (unpublished paper), https://scholar.harvard.edu/files/nataliaemanuel/files/emanuel_jmp.pdf [<https://perma.cc/P7LS-AG3E>].

³¹² Lobel, *supra* note 178, at 558; Jennifer Safstrom, *Salary History and Pay Parity: Assessing Prior Salary History as a "Factor Other Than Sex" in Equal Pay Act Litigation*, 31 YALE J.L. & FEMINISM 135, 160 (2019) (making a similar argument).

³¹³ See, e.g., Beth A. Burkstrand-Reid, *"Trophy Husbands" & "Opt-Out" Moms*, 34 SEATTLE U. L. REV. 663, 666, 670 (2011) (arguing that while "trophy husbands" are portrayed more positively than "opt-out" moms, both suffer from policies that were not conducive to family life or formation).

likely have higher household income than their straight male equivalents, threatening a disparate impact for consideration of household income.

2. Sexual Orientation

Need-based hiring may also produce a disparate impact on sexual orientation, particularly for married gay men.³¹⁴ Marriage and cohabitation are not the default for gay men.³¹⁵ Participation coincides with prosperity, as married gay men congregate in expensive cities—San Francisco, New York, and Washington, D.C.—and often earn more than both their lesbian and different-sex couple peers.³¹⁶ In one narrative of “commerce-driven acceptance of queerness,” a commentator conceded, “I sold out. . . . I married a corporate lawyer. I moved into a condo building with a doorman”³¹⁷ Whereas some gay men who prioritize family and community compensate for their sexualities by marrying women,³¹⁸ for others, wealth becomes a way to compensate for queer marriage.³¹⁹ Even as the queer community experiences disproportionate poverty, many same-sex male married couples are economically advantaged.³²⁰

³¹⁴ See, e.g., Pamela J. Smock & Christine R. Schwartz, *The Demography of Families: A Review of Patterns and Change*, 82 J. MARRIAGE & FAM. 9, 12 (2020) (noting that “married same-gender couples have higher levels of schooling than their different-gender counterparts” and are “somewhat more likely to self-identify as White . . . [and] less likely to self-identify as Black, Asian, or Hispanic . . .”). Additionally, “[t]he male income advantage among same-gender couples also holds among same-gender cohabiting couples.” *Id.* at 13.

³¹⁵ See Ryan Finnigan, *Rainbow-Collar Jobs? Occupational Segregation by Sexual Orientation in the United States*, SOCIUS, Sept. 9, 2020, at 1, 10 (noting that while “the majority of straight men and women are married or cohabiting, . . . the majority of gay and bisexual men are not”), <https://journals.sagepub.com/doi/epdf/10.1177/2378023120954795> [<https://perma.cc/DN3B-MBX5>].

³¹⁶ *Where Same Sex Couples Live*, U.S. CENSUS BUREAU, <https://www.census.gov/library/stories/2019/09/where-same-sex-couples-live.html> [<https://perma.cc/MK2F-ACXT>]; Fisher et al., *supra* note 32, at 1437–39; see also *Gay Male Couples Have the Highest Incomes*, CBS NETHERLANDS (Nov. 10, 2019), <https://www.cbs.nl/en-gb/news/2019/41/gay-male-couples-have-the-highest-incomes> [<https://perma.cc/US54-G2JJ>] (“Of all registered cohabiting couples [in the Netherlands], same-sex male couples have the highest combined income from work or business . . .”).

³¹⁷ Camille Perri, *It’s Not a Bad Time to Be Queer, if You’re Rich and White*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/camille-perri-queer-money.html> [<https://perma.cc/H3KL-RYJK>].

³¹⁸ See generally Eyal Zack & Adital Ben-Ari, “Men Are for Sex and Women Are for Marriage”: On the Duality in the Lives of Jewish Religious Gay Men Married to Women, 15 J. GLBT FAM. STUD. 395 (2019).

³¹⁹ “Homonormativity,” whereby affluence and privilege limit couples’ “potential to generate public disruption,” reflects a narrow challenge to individualized discrimination, abandoning structural engagement. Andrew Gorman-Murray, *Que(e)rying Homonormativity: The Everyday Politics of Lesbian and Gay Homemaking*, in *SEXUALITY AND GENDER AT HOME: EXPERIENCE, POLITICS, TRANSGRESSION* 149, 155 (Brent Pilkey, Rachael M. Scicluna, Ben Campkin & Barbara Penner eds., 2017).

³²⁰ See generally Schneebaum & Badgett, *supra* note 28. The phenomenon does not always replicate transnationally. See Cevat G. Aksoy, Christopher S. Carpenter & Jeff Frank, *Sexual Orientation and Earnings: New Evidence from the United Kingdom*, 71 ILR REV. 242, 244 (2017) (describing

Amidst these marriage patterns, an employer's need-based employment policies may disparately impact women and gay men. Even absent viable anti-discrimination litigation, disparate impact merits scrutiny. Need-based employment conceives of "work for practical reasons," generating income for a household unit, troublingly offering workers with high-income partners "more leniency to divest from their careers."³²¹ Need-based employment also does not do much for high-income parents in "up-or-out" professions.³²²

Need-based employment's normatively appealing foundations do not eliminate its potentially disparate and troubling impacts. By considering access to spousal wealth, need-based employment focuses on each worker's actual household economy. These practices may therefore even benefit some high-earning women and gay men, who may retain priority based on more dependents and less household income. Even as sex-based disparate impacts reflect averages rather than a universal workplace experience, they raise antidiscrimination concerns.

3. Race and Intersectionality

Intersectionality complicates disparate impact analysis and our understanding of need-based employment.³²³ This subsection considers the potential

how, outside London, there appears to be a lesbian advantage and gay male disadvantage in comparisons that are based on couples in the United Kingdom).

³²¹ See Jane R. Bambauer & Tauhidur Rahman, *The Quiet Resignation: Why Do So Many Female Lawyers Abandon Their Careers?*, 10 U.C. IRVINE L. REV. 799, 803 (2020); see also Suk, *supra* note 247, at 56–57 (describing how "[w]ell-intentioned, 'benevolent' stereotyping is actionable as caregiver discrimination" and how antidiscrimination law may compel employers "to offer nothing to both men and women, especially in a tough economy" (citing EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 245, at 17–18)).

³²² In such professions, including academia, gender-neutral parenting leave policies may worsen gender disparities. Heather Antecol, Kelly Bedard & Jenna Stearns, *Equal but Inequitable: Who Benefits from Gender-Neutral Tenure Clock Stopping Policies?*, 108 AM. ECON. REV. 2420, 2421, 2439 (2018) (finding that "gender-neutral clock stopping policies [in top economics departments] decrease female tenure rates . . . while increasing male tenure rates" because men, but not women, published more in top journals after the policies' implementation). In a contrasting arena, Jenna Stearns's study of wage replacement policies for pregnant women under Temporary Disability Insurance finds the largest health effects "for the children of unmarried and black mothers. . . . [T]hese women may be less able to afford to take unpaid time off from work, especially in the period before birth." Jenna Stearns, *The Effects of Paid Maternity Leave: Evidence from Temporary Disability Insurance*, J. HEALTH ECON., Sept. 2015, at 85, 99. By some measures, well-paid, and very skilled women face the largest parenting disadvantages due to the high value of their time and the missed experience during leave. See generally Paula England, Jonathan Bearak, Michelle J. Budig & Melissa J. Hodges, *Do Highly Paid, Highly Skilled Women Experience the Largest Motherhood Penalty?*, 81 AM. SOCIO. REV. 1161 (2016).

³²³ See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 608 (1990) (describing how "black women . . . help us move beyond [feminist theory's] essentialism and toward multiple consciousness"); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality,*

benefits of need-based employment for Black women and gay men, even as it may negatively affect their white counterparts.

In recent years, college-educated Black women have not experienced the same economically advantageous marriages and household wealth available to even their non-college educated white peers. As an analysis of census data revealed, “when part of a married couple, [black mothers] are more likely to earn as much as or more than their husbands.”³²⁴ In asymmetrically educated couples, Black men are more likely than white men to marry more highly educated women, partly reflecting the state of American schooling and the carceral state.³²⁵ By some estimates, a Black woman with an undergraduate degree is now fifteen percentage points less likely to be married than a white woman *without* an undergraduate degree.³²⁶ Black household patterns, including never marrying, could be understood as “violations of patriarchal norms” that in other contexts, have been deemed “reprehensible” and led to Black women’s dis-

Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1242 (1991) (describing the racism-sexism nexus); Devon W. Carbado & Kimberlé W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond “Either/or” Approaches to Equal Protection*, 129 YALE L.J. F. 108, 117–18 (2019), https://www.yalelawjournal.org/pdf/CarbadoCrenshaw_AnIntersectionalCritiqueofTiersofScrutiny_t1657eh9.pdf [<https://perma.cc/ENP9-E2A7>] (arguing that the law recognizes “white women [as] the ‘natural’ embodiment of women” and describing how a Supreme Court Justice’s reasoning “consigns Black women to a separate sphere in which their race undermines their claim to a female identity”). Additionally, many have thoughtfully chronicled the elective facets of race. *See, e.g.*, Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1568 (2014) (describing a conflict between an employer interest in “counting raced bodies” and employees’ “identity-performance interests”); Ariela J. Gross, *“The Caucasian Cloak”: Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337, 343 (2007) (arguing that twentieth-century Mexican Americans “who articulated more than one version of self-identification might have themselves moved among different and inconsistent notions of their own identity, depending on the context”).

³²⁴ SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, BREADWINNING MOTHERS CONTINUE TO BE THE U.S. NORM 11 (2019), <https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/> [<https://perma.cc/5YE4-6JZB>] (discussing income). Because of this and “because a higher percentage are single mothers,” “[b]lack mothers are by far the most likely to be the primary economic support for their families . . .” *Id.*

³²⁵ Chiappori et al., *supra* note 304, at 2115, 2117 fig.3, 2120 fig.8 (describing growth in prison population). *See generally* Derek Neal & Armin Rick, *The Prison Boom and the Lack of Black Progress After Smith and Welch* (Nat’l Bureau of Econ. Rsch., Working Paper No. 20283, 2014) (summarizing the literature and presenting new evidence on black-white inequality and the role of the “prison boom” in the late twentieth century).

³²⁶ Richard V. Reeves & Katherine Guyot, *Black Women Are Earning More College Degrees, but That Alone Won’t Close Race Gaps*, BROOKINGS INST. (Dec. 4, 2017), <https://www.brookings.edu/blog/social-mobility-memos/2017/12/04/black-women-are-earning-more-college-degrees-but-that-alone-wont-close-race-gaps/> [<https://perma.cc/RXP4-QCXL>]. These statistics focus on women aged between thirty-five and forty-five. *Id.*

advantage.³²⁷ Education has not eliminated Black women's difficulties accessing economically and socially advantageous marriages.³²⁸

Need-based employment in majority-women workplaces, including legal aid, may illustrate intersectional effects.³²⁹ By one legal historian's account, as early as 1905, "legal aid had become deeply associated with women [lawyers, benefactors, and clients]."³³⁰ More than a century later, directors of legal services organizations have opined about managing a "low paid 'pink collar' workplace" where low salaries are "de facto subsidized by a spouse/partner"³³¹ These workplaces often face layoffs.³³² Hypergamy disparities across races could mean spousal subsidies are more available to white women and gay men than their Black counterparts.³³³ Need-based layoffs might lead to a less white workforce.³³⁴

Need-based employment's sidelining of well-to-do couples may be most concentrated among gay white men. Although late twentieth century scholars argued that there was little evidence that the right to marry would be more frequently "exercised by rich [white] gay men than by men and women of col-

³²⁷ Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1100 (2017).

³²⁸ White college educated women have not increased their participation in marriage so much as preserved it over the past decades, as participation of less educated white women and most significantly, equally educated Black women, has fallen. Reeves & Guyot, *supra* note 326; Chiappori et al., *supra* note 304, at 2117 fig.3, 2120 fig.8. See generally RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE (2012) (analyzing the decline in marriage among middle-class African American men and women).

³²⁹ INST. FOR INCLUSION IN THE LEGAL PRO., IILP REVIEW 2019–2020: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 26–29 (2019), http://www.theiilp.com/resources/Documents/IILP_2019_FINAL_web.pdf [<https://perma.cc/XZW9-93P7>] (documenting race and gender disparities in public interest employment immediately following graduation); Katie Dilks, *Why Is Nobody Talking About Gender Diversity in Public Interest Law?*, NALP BULL. (June 2010), https://www.nalp.org/uploads/0610_Gender_Diversity_in_Public_Interest_Law.pdf [<https://perma.cc/X5MD-5P8K>].

³³⁰ Felice Batlan, *The Birth of Legal Aid: Gender Ideologies, Women, and the Bar in New York City, 1863–1910*, 28 LAW & HIST. REV. 931, 933, 969 (2010).

³³¹ Dilks, *supra* note 329, at 1 (first quoting Catherine Carr, *Fairness and Justice in Setting Legal Services Attorney Salaries: Finding the Will to Get There*, MGMT. INFO. EXCH. J., Summer 2007, at 20; and then quoting John Tobin, *Urgent Memo to Ourselves: Legal Services Is Not the Peace Corps (Addressing the Salary Chasm Now)*, MGMT. INFO. EXCH. J., Spring 2003).

³³² Press Release, Legal Serv. Corp., Staff Reductions Hit Legal Aid Programs (Jan. 26, 2012), <https://www.lsc.gov/media-center/press-releases/2012/staff-reductions-hit-legal-aid-programs> [<https://perma.cc/ZYD8-9EKB>] (reporting survey results on anticipated layoffs from LSC-funded programs).

³³³ No empirical data on hypergamy specific to legal services is known to the author.

³³⁴ Atinuke O. Adediran & Shaun Ossei-Owusu, *The Racial Reckoning of Public Interest Law*, CALIF. L. REV. ONLINE, June 2021, at 1, 11, <https://californialawreview.org/wp-content/uploads/2021/05/2021.05.28-AdediranOssei-Owusu-formatted-1.pdf> [<https://perma.cc/AY26-3KEM>] (arguing that, "[d]espite the serious need for data, available data points to the importance of increasing racial and ethnic diversity in the public interest sector").

or,”³³⁵ the selective exercise appears real.³³⁶ The geography of gay marriage reveals how many less affluent cities with significant nonwhite populations—Brownsville, Texas or Greenville, South Carolina, for example—have the lowest rates of married, same-sex couples based on joint-filing statistics.³³⁷ Although the connection between the gay-marriage right and “white privilege” has been debated,³³⁸ the statistics suggest the racialized exercise of the right, itself perhaps forged by “wealthy donors and foundations who represent the interests of elite white gays”³³⁹

Black people generally also face wealth disparities.³⁴⁰ Beyond exclusion from the economic advantages of marriage, households headed by a Black college graduate are less wealthy than even those headed by white non-college graduates.³⁴¹ Because Black college-educated women and gay men may lack the household economic resources of even less-educated white women and gay men, they could disproportionately benefit from need-based employment.

In sum, need-based employment in a workplace may disparately and adversely affect white women and gay men while potentially benefitting Black counterparts. As such, need-based employment incorporates those both non-white and poor: to deny them need-based employment’s benefits based on a

³³⁵ William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1492 (1993).

³³⁶ Even for cohabitation, this racialized pattern appears. *Compare LGBT Proportion of Population*, WILLIAMS INST. (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#demographic> [<https://perma.cc/H72P-9KMU>] (using Gallup self-identification data to find that fifty-eight percent of the LGBT population is white), *with Same-Sex Couple Data and Demographics*, WILLIAMS INST. (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=SS#density> [<https://perma.cc/YKK9-H3MT>] (using Gallup self-identification data to find that seventy-four percent of the LGBT population in coupled household are white).

³³⁷ Fisher et al., *supra* note 32, at 1438.

³³⁸ Alexander Nourafshan & Angela Onwuachi-Willig, *From Outsider to Insider and Outsider Again: Interest Convergence and the Normalization of LGBT Identity*, 42 FLA. ST. U. L. REV. 521, 545 (2015) (arguing that “the gay rights movement reject colorblindness as a solution to the racialized problems that need to be addressed within the community, particularly given the unspoken role [of] white privilege”).

³³⁹ See Dean Spade, *Under the Cover of Gay Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 79, 82 n.12 (2013).

³⁴⁰ See, e.g., *Wealth, Asset Ownership & Debt of Households Detailed Tables: 2019, Table 1: Median Value of Assets for Households, by Type of Asset Owned and Selected Characteristics*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2019/demo/wealth/wealth-asset-ownership.html> [<https://perma.cc/3PPF-4LMU>] (Feb. 22, 2019).

³⁴¹ Lisa J. Dettling, Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore & Jeffrey P. Thompson, *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, FED. RESRV., tbl.3, <https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm> [<https://perma.cc/S8XU-2YYA>] (Sep. 27, 2017). This racial disadvantage vis-à-vis whites is not as robust for non-white Hispanics: the median college graduate-headed Hispanic household is less wealthy than the median white non-college graduate household, but this is not true when comparing *mean* households. *Id.*

narrow understanding of disparate impact could render “antidiscrimination law today . . . a racial entitlement—for whites,” particularly white women and gay men.³⁴²

C. Defenses

This Section considers the defenses available to an employer whose need-based employment practices disparately impact protected groups. The first defense, business necessity, could be interpreted to incorporate the ideas of need recognized in other areas of law. Business necessity has been described as the “crux” of disparate impact analysis.³⁴³

The second defense is “quantity and quality of production,” business necessity’s oft-overlooked sibling.³⁴⁴ When less resourced workers produce the same with less, the “quantity and quality of production” defense may insulate employers from liability for hiring the needier but equally productive employee.

1. Business Necessity

The business necessity defense arose alongside the disparate impact theory itself in 1971 in *Griggs v. Duke Power Co.*³⁴⁵ Just prior to the holding’s late twentieth century codification,³⁴⁶ Justice Blackmun wrote in a concurrence that business necessity was not “a scientific formula, for it necessarily involves a case-specific judgment” of the particular business and job.³⁴⁷ Moreover, even after a defendant’s showing of business necessity, a plaintiff could prevail by offering an “equally valid, less-discriminatory alternative” that serves the defendant’s need.³⁴⁸

³⁴² Tristin K. Green, *Rethinking Racial Entitlements: From Epithet to Theory*, 93 S. CAL. L. REV. 217, 220 (2020); see also Priscilla A. Ocen, *Pregnant While Black: The Story of Ferguson v. City of Charleston* (arguing that law, even in seemingly plaintiff-protective decisions, may neglect the “interests of poor black women who are among the most vulnerable”), in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 161, 163 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019).

³⁴³ Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671, 702 (2016).

³⁴⁴ 42 U.S.C. § 2000e-2(h).

³⁴⁵ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

³⁴⁶ Craig R. Senn, *Accommodating Good-Faith Employers in Title VII Disparate Impact Cases*, 94 TUL. L. REV. 639, 647–48 (2020).

³⁴⁷ *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 1005 (1988) (Blackmun, J., concurring in part). Nonetheless, “[t]o be justified as a business necessity an employment criterion must bear more than an indirect or minimal relationship to job performance.” *Id.* (first citing *Dothard v. Rawlinson*, 433 U.S. 321, 331–32 (1977); then citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); and then citing *Washington v. Davis*, 426 U.S. 229, 247 (1976)).

³⁴⁸ *Ricci v. DeStefano*, 557 U.S. 557, 587 (2009) (citing 42 U.S.C. § 2000e-2(k)(1)(A), (C)); see also *N.A.A.C.P. v. N. Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 482 (3d Cir. 2011) (rejecting business-necessity defense for a residency requirement where defendants said they needed to employ a

Scholars have characterized “business necessity” as increasingly defendant-friendly amidst the Supreme Court’s drift from a literal necessity requirement to a looser definition of job-relatedness.³⁴⁹ The business-necessity standard reached a particularly weak point in 1989 in *Wards Cove Packing Co. v. Atonio*.³⁵⁰ The Court rejected a “requirement that the challenged practice be ‘essential’ or ‘indispensable,’” reasoning that “this degree of scrutiny would be almost impossible for most employers to meet.”³⁵¹ The *Wards Cove* opinion itself used the term “business justification” rather than hewing to “business necessity” and spurred legislative intervention.³⁵² Congress incorporated the business-necessity test into the statutory text of Title VII itself, allowing a plaintiff to establish discrimination upon a showing that an employment practice “causes a disparate impact . . . and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity”³⁵³ Congress also expressly adopted an “interpretive memorandum” instructing courts to ignore the business-necessity standard articulated in *Wards Cove*.³⁵⁴

Precisely because of the defense’s continued elasticity, need-based hiring could fall within the business necessity doctrine in some circuit courts of appeal. Even before *Wards Cove*, courts adopted a broad interpretation of what decision-making criteria may be “job-related.” Consider the business “necessity” analysis in 1977 in *Yuhas v. Libbey-Owens-Ford Co.*, in which the U.S. Court of Appeals for the Seventh Circuit upheld an antinepotism rule, despite a disparate impact against women, because the rule “plausibly improve[d] the work environment” in facially sex-neutral ways and was therefore “job-related.”³⁵⁵ Criticism of the holding emphasized that disparate impact requires that the rule be “a valid ‘business necessity,’” rather than a rule “the decision-

“certain number of Spanish-speaking firefighters in a region that is 69% Hispanic”). The Court explained that “[r]ather than seek out Spanish-speakers by making the imprecise assumption that North Hudson residents are more likely to speak Spanish, North Hudson could, and actually does, seek out bilingual candidates.” *N. Hudson Reg’l Fire & Rescue*, 665 F.3d at 482.

³⁴⁹ Barocas & Selbst, *supra* note 343, at 702.

³⁵⁰ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

³⁵¹ *Id.*

³⁵² *Id.* at 660; *see also* Barocas & Selbst, *supra* note 343, at 703 (noting this semantic replacement). The dissenters contrasted disparate-treatment cases requiring an employer to marshal “evidence of legitimate business purpose” with disparate-impact cases requiring “proof of an affirmative defense of business necessity,” a line that “the majority’s opinion blurs.” *Wards Cove Packing Co.*, 490 U.S. at 668 (Stevens, J., dissenting).

³⁵³ 42 U.S.C. 2000e-2(k)(1)(a)(i).

³⁵⁴ Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 1981 note).

³⁵⁵ *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496, 500 (7th Cir. 1977).

maker can do without.”³⁵⁶ To that end, job-relatedness appears to have supplanted the strict interpretation of necessity.³⁵⁷

Doctrinally, using need-based employment among comparably productive employees could be considered “job-related” and sufficiently connected to permissible business goals. This could be particularly intuitive for a not-for-profit organization addressing America’s growing economic inequality.³⁵⁸ Referring back to the example of legal aid, need-based employment may retain employees whose economic situations and experiences lie closer to those of their means-tested clients.³⁵⁹ Moreover, a disparate impact case that adversely impacts white women and gay men overall, while benefitting their Black counterparts, comports with ideas animating Title VII itself: “[f]or the coalition of civil rights activists and liberal policymakers responsible for [its] passage . . . Title VII was both to eradicate unequal treatment and to bring about black economic equality.”³⁶⁰

If applied to for-profit entities, however, such an inquiry broaches corporate law questions alongside those of employment law. Although I emphasize the difficulty of measuring worker productivity,³⁶¹ the neoclassical theory of a business enterprise and the threat of shareholder litigation urge the entity to focus on productivity and profit-maximization.³⁶² Caselaw remains attached to

³⁵⁶ Rabin-Margalioth, *supra* note 282, at 241–42 (citing Robert Belton, *A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431 (2005)).

³⁵⁷ See Emily Gold Waldman, *The Preferred Preferences in Employment Discrimination Law*, 97 N.C. L. REV. 91, 111 (2018) (noting that, despite Congress “reject[ing] *Wards Cove*’s softening of the standard[.] . . . two customer preferences . . . have been fairly successful in forming the bases of successful business necessity defenses: aesthetic appeal and English-speaking environment”). Certain Circuits take arguably stricter approaches, shaping need-based employment’s viability across regions. *Cf. Lanning v. Se. Pa. Transp. Auth.*, 308 F.3d 286, 287 (3d Cir. 2002) (reaffirming that “a discriminatory cutoff score on an entry level employment examination must be shown to measure the minimum qualifications necessary for successful performance of the job in question in order to survive a disparate impact challenge” (citing *Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478 (3d Cir. 1999))); *N.A.A.C.P. v. N. Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 481 (3d Cir. 2011) (“[W]e have interpreted the business-necessity defense to apply *only* when an employer can show that its challenged hiring criteria define minimum qualifications for the position.” (emphasis added) (citing *Lanning*, 181 F.3d at 489)).

³⁵⁸ SHRIDER ET AL., *supra* note 19, at 31–35 (reporting measures of household income dispersion, including the Gini index of income inequality).

³⁵⁹ See, e.g., 45 C.F.R. § 1611 (2021) (describing financial eligibility criteria for Legal Services Corporation-funded organizations).

³⁶⁰ Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, 75 U. CIN. L. REV. 87, 93–94 (2006) (emphasis omitted).

³⁶¹ *Supra* notes 57–60 and accompanying text.

³⁶² See generally Oliver Hart, *An Economist’s Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1758–65 (1989); R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

profit primacy,³⁶³ but business law scholars offer other perspectives, arguing for example that since shareholder welfare does not equal shareholder value, a business should pursue the former.³⁶⁴ As ideas of corporate purpose broaden, so might antidiscrimination law's recognition of "business necessity."³⁶⁵

At the limit, if an employer dismissed economically privileged women and gay men in favor of highly unproductive, heterosexually paired men with indisputably more need, the disparate impact might suggest pretext.³⁶⁶ Completely divorcing employment practices from productivity defies not only economic logic but also duties to shareholders under business law. The "business necessity" defense could protect need-based employment, but only to a limit.

2. Quantity or Quality of Production

Beyond business necessity, it remains lawful for an employer to base employment or compensation on "a system which measures earnings by quantity or quality of production"³⁶⁷ This defense also arises in Title VII's predecessor, the EPA.³⁶⁸

³⁶³ See, e.g., *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (reinforcing that "directors are bound by the fiduciary duties and standards that accompany that form . . . includ[ing] acting to promote the value of the corporation for the benefit of its stockholders); accord *Leo E. Strine, Jr., The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761 (2015); see also *Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

³⁶⁴ See generally *Oliver Hart & Luigi Zingales, Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247 (2017); *LYNN STOUT, THE SHAREHOLDER VALUE MYTH* (2012) (arguing that maximizing shareholder value is not legally paramount).

³⁶⁵ Others have taken the approach that corporate law can remedy discriminatory workplaces, particularly in light of antidiscrimination law's failures. *Daniel Hemel & Dorothy S. Lund, Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1610–12 (2018) (discussing Title VII's shortcomings and corporate law's promise).

³⁶⁶ Of course, irrationality is not sufficient to show pretext. If an employer's "actual motivation was what they say it was, irrational or not, it is not a pretext." *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994).

³⁶⁷ 42 U.S.C. § 2000e-2(h). Any differences produced by the system must not be "the result of an intention to discriminate because of race, color, religion, sex, or national origin" *Id.*

³⁶⁸ 29 U.S.C. § 206(d)(1) (prohibiting discrimination "between employees on the basis of sex by paying [different] wages . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility" subject to four exceptions, including "a system which measures earnings by quantity or quality of production"). See generally *Stephanie Bornstein, Equal Work*, 77 MD. L. REV. 581, 586, 609 (2018) (analyzing the use of the phrases "substantially similar," "comparable," and "equal" across state and federal equal pay laws, as well as describing how the fourth broad exception, a "factor other than sex," 29 U.S.C. § 206(d)(1), has been interpreted by federal courts to potentially include "the 'market value' of the job, an employee's prior salary, and 'management potential'").

The Supreme Court has not had occasion to analyze the scope of this defense, but lower courts have filled in gaps.³⁶⁹ These courts lean on the Supreme Court's analysis of other statutory defenses.³⁷⁰ In *Bence v. Detroit Health Corp.*, an Equal Pay Act case, the Sixth Circuit described the "quantity" test as referring to equal dollar per unit compensation rates and therefore found a violation where an employer "pay[s] women lower incentive rates than men for the same work."³⁷¹

Twenty-first century sex- and race-discrimination challenges to a Merrill Lynch compensation system engage the contours of the "quantity or quality of production" defense.³⁷² Rejecting the race-discrimination claim, the Seventh Circuit declined to limit the defense "to 'piecework' production systems, like the manufacture of physical products on an assembly line"³⁷³ Despite the effects of past discrimination on nonwhite brokers' production levels, the court applied the defense to a system that constituted "about as direct a measure of production as one could imagine in the financial-services industry"³⁷⁴ In the sex-discrimination case, the plaintiffs similarly characterized Merrill's system as "success breeds success" because "account distributions and partnership formations may have affected the plaintiff's overall production credits, thereby skewing the inputs"³⁷⁵ Nonetheless, because "the [program] itself remains

³⁶⁹ The Supreme Court has cited to the specific language of the statutory provision in passing but has not had occasion to delve into its meaning. *See, e.g.*, *County of Washington v. Gunther*, 452 U.S. 161, 181 (1981) (holding that "respondents' claims of discriminatory undercompensation are not barred by § 703(h) of Title VII merely because respondents do not perform work equal to that of male jail guards" without addressing "the precise contours of lawsuits challenging sex discrimination in compensation under Title VII"); *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 87 n.1 (1982) (Stevens, J., dissenting) (mentioning statutory provision).

³⁷⁰ *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 880–81 (7th Cir. 2012) (remarking that "the Supreme Court has more often interpreted and applied § 703(h) as it pertains to challenges to seniority and merit systems," distinct defenses under the same statutory section).

³⁷¹ *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029 (6th Cir. 1983).

³⁷² *McReynolds*, 694 F.3d at 873 (involving a race-based challenge); *Goodman v. Merrill Lynch & Co.*, 716 F. Supp. 2d 253, 262 (S.D.N.Y. 2010) (involving a sex-based challenge).

³⁷³ *McReynolds*, 694 F.3d at 882.

³⁷⁴ *Id.* at 880–81. Insofar as the production system perpetuated past discrimination, the Seventh Circuit rejected the argument by analogizing Merrill's production compensation system to seniority preference upheld by the Supreme Court against a similar challenge in *Teamsters v. United States*, 431 U.S. 324, 353–54 (1977). "The [Supreme] Court explained that employees who are the victims of intentional discrimination after Title VII was enacted are entitled to retroactive seniority as a remedy for the violation, but § 703(h) insulates the seniority system itself from challenge notwithstanding that the system locks in the effects of past discrimination." *McReynolds*, 694 F.3d at 880 (citations omitted).

³⁷⁵ *Goodman*, 716 F. Supp. 2d at 256, 261.

a protectable production-based compensation system,” the court insulated it from legal challenge, absent intentional discrimination.³⁷⁶

The “quantity or quality of production” defense might allow employers to consider workers’ productivity-enhancing resources and relationships. By accounting for past circumstances or inputs, employers might predict an even more productive future if the position offers new inputs to one candidate that a competing candidate already has.³⁷⁷ Recall the three professors from the introduction.³⁷⁸ Avi, a widower with dependents and limited financial resources, Rashelle, and Raul had comparable publications, but Avi had little financial security and considerable obligations. If all three applied for the same job, it would be reasonable to predict that Avi would be even more productive if provided the significant resources of the faculty position or promotion. It would be unreasonable however if he had benefited from existing assets, i.e., transfers from wealthy parents, allowing similar financial security to that experienced by Rashelle and Raul. If employers use a productivity-based strategy generally, they might avail themselves of the “quantity or quality of production” defense if a sex-based disparate impact arises.

This defense could thus permit employers to consider employee resource inputs in estimating past productivity. This would not fall under need-based employment’s umbrella per se, but rather the hiring or promotion of those able to do the same with less: needier, resource-scarce applicants with facially equivalent production. Such a policy would echo, for example, the University of California’s recent “achievement relative to opportunities” policy for promotion reviews, born out of the pandemic.³⁷⁹

Pure need-based employment would better define the situation where Avi, now with a new dependent in his care, would not be able to improve his productivity with the professorship but would instead remain on par with Rashelle and Raul. Yet if Avi does not obtain the job, his life, with a new dependent and a single income, would pose financial challenges. In the absence of a productivity advantage, his hiring would reflect the need-based employment at this Article’s center.

³⁷⁶ *Id.* at 261. The court allowed leave to replead while expressing “great skepticism” of “plaintiff’s ability to sufficiently allege that the ATP was adopted to intentionally discriminate against female FA’s.” *Id.* at 262.

³⁷⁷ That is not to deny that “[t]here is seldom, if ever, a perfect test of future performance.” Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1935 (1996).

³⁷⁸ *Supra* notes 22–25 and accompanying text.

³⁷⁹ See UNIV. OF CAL., MITIGATING COVID-19 IMPACTS ON FACULTY WORKING GROUP PRELIMINARY REPORT 1 (2021), <https://aadocs.ucdavis.edu/attachment-mcif-wg-preliminary-report-10-25-21.pdf> [<https://perma.cc/S4UJ-Q9N7>].

CONCLUSION

Employment practices often account for economic need. This Article provides a more systematic account of need-based employment and its governing law. That account ties its history to its current practice and its potential. It overlays the folk wisdom of providing work based on need with its legal challenges and possibilities. The four proposed principles, drawing upon centuries of both work relief and direct relief programs, should guide contemporary employers. However, antidiscrimination law compels us to acknowledge the winners and losers that emerge from employment-based redistributive choices. This Article analyzes the legality and promise of carefully designed need-based employment. As such, its goal is to describe what need-based employment looks like and what it *could* look like, rather than to provide a full-throated exhortation and legal defense of a particular form of need-based employment.

In the end, antidiscrimination doctrine could permit space to prioritize economic need and inequality even against commitments to other groups. Those commitments may not insulate a protected group's privileged at the cost of its needier elements.