

# Back to the Future: Introducing Constructive Feminism for the Twenty-First Century— A New Paradigm for the Family and Medical Leave Act

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## INTRODUCTION

This past year has seen an upsurge in legislation aiming to provide a better balance between family and work obligations across America.<sup>1</sup> At least ninety percent of American parents, both mothers and fathers, say they are experiencing an acute shortage of time spent with family and an intense work-family conflict.<sup>2</sup> There is a growing interest in Congress to enhance the current measures to ameliorate work-family conflict,<sup>3</sup> primarily the Family and Medical Leave Act of 1993 (FMLA).<sup>4</sup> On the other hand, the United States Supreme Court recently weakened the FMLA in the case of *Coleman v. Court of Appeals of Maryland*.<sup>5</sup> It is high time to extend the discourse on work-family imbalance to a conversation that draws on history to answer what is owed to the legal subject as a worker and a family member, and to provide an analytical framework with which to evaluate and design future work-family policies. This Article does that.

Work-family imbalance has grown as more dual-earner families and single-parent families become the majority of families in the United States.

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<sup>1</sup> See, e.g., CONN. GEN. STAT. §§ 31-51kk–qq (2012) (Connecticut's recent amendment including paid leave in its Family and Medical Leave Act); SEATTLE, WASH., MUNICIPAL CODE ch. 14.16 §§ 020–130 (2011) (effective Sept. 1, 2012) (Seattle's establishment of "Paid Sick Time and Paid Safe Time"); see also Coal. for Healthy Families & Workplaces, *Paid Sick Days: Recapping 2011 and Looking Forward to 2012*, EARNED SICK DAYS PHILA. (Jan. 5, 2011, 2:28 PM), <http://www.earnedsickdaysphilly.com/2012/01/paid-sick-days-recapping-2011-and.html> (identifying 2011 as "a banner year for paid sick days throughout the country").

<sup>2</sup> See JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 2 (2010) [hereinafter WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*].

<sup>3</sup> See *infra* Part I.

<sup>4</sup> 29 U.S.C. §§ 2601–54 (2006).

<sup>5</sup> 132 S. Ct. 1327 (2012). The Justices' opinions in this case merit analysis that is beyond the scope of this article. For the purposes of this article, *Coleman* serves as an indicator that congressional action is further needed and supports the importance and timeliness of the multidimensional paradigm put forth.

As will be shown, most family work (caretaking) is still done by women. It is not surprising, then, that while women are graduating from the best schools, some ten or fifteen years later, we find that many are still far behind their male counterparts in job promotion and salaries, and far behind where they had wished to be professionally.<sup>6</sup> A major reason is the lack of societal support for reconciling work with family. Scholars have argued for some time now that workplace structures perpetuate the economic inequality of caregivers,<sup>7</sup> that the workplace must be changed to solve the work-family conflict,<sup>8</sup> and that law must be a component in restructuring the relationship between work and family.<sup>9</sup> Current scholarship on work and family reconciliation usually focuses on changing current (mostly lack of) policies, and on specific reform measures used in other countries that ought to be adopted by the United States.<sup>10</sup> These include suggestions for extending parental leaves, providing pay for such leaves, and subsidizing childcare. Justifications given for such measures are usually based on gender equality (antidiscrimination)<sup>11</sup> and, to a lesser extent, on communitarian approaches<sup>12</sup> or dignity.<sup>13</sup>

This Article adds a history and a theory through which to analyze existing measures aimed to reconcile the work-family conflict and from which to design future public policy. I would like us to recover a lost chapter in feminist legal history, and to extrapolate from this history legal principles that have important relevance for today's law of work and family. The history related henceforth carries significant implications for contemporary legal and political debates, and provides guidelines for the future of work-family regulation design and interpretation.

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<sup>6</sup> See WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*, *supra* note 2, at 12–41.

<sup>7</sup> See JOAN C. WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2* (2000) [hereinafter WILLIAMS, *UNBENDING GENDER*].

<sup>8</sup> See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1233 (1989).

<sup>9</sup> See Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 474 (1990).

<sup>10</sup> See generally JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* (2003) [hereinafter GORNICK & MEYERS, *FAMILIES THAT WORK*]; JANET C. GORNICK & MARCIA K. MEYERS, *GENDER EQUALITY: TRANSFORMING FAMILY DIVISIONS OF LABOR* (2009) [hereinafter GORNICK & MEYERS, *GENDER EQUALITY*]; Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005).

<sup>11</sup> See, e.g., WILLIAMS, *UNBENDING GENDER*, *supra* note 7, at 85–86; Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CIN. L. REV. 433, 433 (2004); Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse Over Work and Family Conflict*, 34 PEPP. L. REV. 313, 313–14 (2007) [hereinafter Kessler, *Keeping Discrimination Theory*].

<sup>12</sup> See Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 U. KAN. L. REV. 355, 358–59 (2010).

<sup>13</sup> See Maxine Eichner, *Families, Human Dignity, and State Support for Caretaking: Why the United States’ Failure to Ameliorate the Work-Family Conflict Is a Dereliction of the Government’s Basic Responsibilities*, 88 N.C. L. REV. 1593, 1595 (2010) [hereinafter Eichner, *State Support*].

Part I offers a current description of work-family conflict and the legal measures taken by states and the federal government to ameliorate the conflict. It shows that, on the one hand, reformers and legislatures around the country and in Congress are working to enhance the FMLA and the current law of work and family. On the other hand, it points to the recent *Coleman* case, which limits the self-care provision offered in the FMLA.

Part II enriches feminist legal history by pointing to a group of working-class social feminists in the early twentieth century. It uses novel historical research to illustrate their actions and ideology, and conceptualizes the particular feminism they advocated, which I term “constructive feminism,” as distinct from other well-known strands. Working-class social feminists have received less than their share of scholarly attention. Women like Mary Anderson, Rose Schneiderman, and Pauline Newman worked to promote women’s employment conditions and opportunities during the Progressive Era and the New Deal. However, if ever mentioned, they are usually lumped up ideologically with their better-known middle-class social feminist matrons.<sup>14</sup> Working-class women who were affiliated with social feminism, however, developed a nuanced approach to the questions of work and family that, I claim, casts their ideology as distinct from their middle-class matrons. Thus, working-class social feminism, as I term it,<sup>15</sup> is a neglected branch of social feminism and feminist jurisprudence, and is the focus of this Article. Part II thus illustrates working-class social feminists’ backgrounds, ideological influences, and actions. In short, working-class social feminists believed in two important tenets: (1) that women should work in whichever field they choose and that opportunities for such employment should be developed, and (2) that workers, men and women, should be offered decent pay as well as the ability to take meaningful parts in experiences outside the world of work—in the family, in civic associations, and in culture and the arts. This Part also theorizes working-class social feminism as constructive feminism. It distills the conceptual uniqueness of this branch of feminism, and shows working-class social feminists’ firm belief that the way to achieve equality is

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<sup>14</sup> See NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* (1987); see also Arianne Renan Barzilay, *Women at Work: Toward an Inclusive Narrative of the Rise of the Regulatory State*, 31 HARV. J.L. & GENDER 169 (2008) [hereinafter Renan Barzilay, *Women at Work*]. I use the terms “working-class” to refer to workers in industry and “middle-class” to refer to the more formally educated reformers. See MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920*, at 16–17, 43–45 (2003).

<sup>15</sup> They often conceived of themselves as “practical feminists.” See Mary Anderson, *Should There Be Labor Laws for Women? Yes*, GOOD HOUSEKEEPING, Sept. 1925, at 53, 53, *microformed on* Mary Anderson Papers (1918–1960), in Papers of the Women’s Trade Union League and Its Principal Leaders (N.Y. Univ. Library) [hereinafter Anderson Papers]. They have been named “industrial feminists,” ANNELISE ORLECK, *COMMON SENSE AND A LITTLE FIRE: WOMEN AND WORKING CLASS POLITICS IN THE UNITED STATES, 1900–1965*, at 6, 88 (1995), and also “working-class feminists,” Maurine Weiner Greenwald, *Working-Class Feminism and the Family-Wage Ideal: The Seattle Debate on Married Women’s Right to Work 1914–1920*, 76 J. AM. HIST. 118, 119 (1989). Because their feminism aimed to benefit society at large, the close connection with social feminism, and the working class background’s influence on their ideology, I have termed them “working-class social feminists.”

by “constructive regulation”: working-class social feminists demanded “constructive legislation for constructive equality.”<sup>16</sup> They demanded government intervention in the labor market in accordance with the three principles of their approach. According to the first principle, which I term “multidimensionalism,” a person is entitled to take meaningful parts in work, family, culture, and civic participation. The second principle, which I term “feminizing by regulating,” holds that multidimensionalism can be sustained through legal regulation. It holds that we should regulate with attention to women’s actual lives, and replace the (usually male) rule or standard prevalent in the marketplace with a new rule or standard that is sensitive to women’s lives on the one hand, and that is also sensitive to the quest for multidimensionalism on the other. The third principle holds that such legal reforms should apply to men and women, since applying them to all would be most beneficial to equality and would serve to raise legal standards for all workers.

In Part III, the Article extends constructive feminism’s principles to theorize a current feminist approach for today’s law of work and family. The multidimensional approach I propose is comprised of “internal” and “external” multidimensionalism. “External multidimensionalism” signifies recognition of different dimensions in a person’s life, especially work, family, culture, public life, and leisure (those dimensions important to working-class social feminists). These dimensions represent different roles that continue to exist alongside one another. External multidimensionalism deals with the relationship between the different dimensions. “Internal multidimensionalism” deals with each dimension internally. In this case, it is concerned with the dimension of work and the dimension of family, dealing with the internal meanings of each dimension.

Finally, Part IV puts the multidimensional framework into action. It takes pains in analyzing the FMLA under the multidimensional framework, and concludes that it only partially adheres to the multidimensional approach. Legal measures can be developed to better consist with this approach. This Part suggests designing measures to enhance the FMLA’s external and internal multidimensionalism, and points to specific policies that have special salience under the multidimensional framework, such as some limitation on work hours, paid leave, and “daddy quotas.” It concludes by evaluating *Coleman* under the multidimensional paradigm, and suggests a robust reform of the FMLA, the centerpiece of U.S. work-family regulation, in light of this historically conscious narrative and the multidimensional paradigm.

#### PART I: (THE LAW OF) WORK-FAMILY CONFLICT TODAY

The conflict between work obligations and family responsibilities has become more and more strenuous for millions of families. The difficulty

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<sup>16</sup> See *infra* Part II.

Americans encounter in balancing work and family is not surprising considering these three facts: The first is that the vast majority of working Americans are responsible for providing care to their children, elderly parents, or disabled family members.<sup>17</sup> The current workforce includes roughly ninety percent of fathers and seventy percent of mothers with children under eighteen.<sup>18</sup> Single-parent families are led predominantly by females.<sup>19</sup> The second is the workplace culture and practice of working extremely long hours, even in comparison with other industrialized countries.<sup>20</sup> The hours now worked by the average American worker equate to roughly five extra workweeks a year for the Swedish worker, and are substantially more than those worked by workers in Canada, the United Kingdom, Germany, or France.<sup>21</sup> American job structures have largely remained premised on the male-breadwinner family model, assuming a caregiver at home.<sup>22</sup> Thus, a perceived “ideal worker” is a full-time worker who does not have obligations or responsibilities outside of marketplace labor, is unencumbered by childcare or other experiences, and is free to labor for long hours at any time.<sup>23</sup> Part-time work and flexible work are severely penalized financially, are often unaccompanied by benefits, and are unavailable for many rewarding jobs.<sup>24</sup> Finally, work-family conflict is much higher in the United States than elsewhere in the developed world because Americans work with fewer laws to support working families than other industrialized nations.<sup>25</sup> All too often, American parents who need time off from work to care for their children may risk demotion or even termination. It is not surprising, then, that a majority of Americans support changing their predicament, and specifically support government policies that meaningfully help working parents make good on their familial and work commitments.<sup>26</sup>

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<sup>17</sup> Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 306 (2004). The lack of federal or state sponsored childcare only enhances the economic liability families endure when “outsourcing” care. While work-family conflict affects parents and nonparents, the focus of this article is on parents of children under eighteen.

<sup>18</sup> See HILDA L. SOLIS & KEITH HALL, U.S. DEP’T OF LABOR & U.S. BUREAU OF LABOR STATISTICS, REPORT NO. 1018, WOMEN IN THE LABOR FORCE 13 (2009), available at <http://www.bls.gov/cps/wlf-databook-2009.pdf>; U.S. DEP’T OF COMMERCE & EXEC. OFFICE OF THE PRESIDENT, WOMEN IN AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING 27 (2011) [hereinafter WHITE HOUSE REPORT ON WOMEN], available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/Women\\_in\\_America.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf).

<sup>19</sup> WHITE HOUSE REPORT ON WOMEN, *supra* note 18, at 13.

<sup>20</sup> See GORNICK & MEYERS, FAMILIES THAT WORK, *supra* note 10, at 59.

<sup>21</sup> ORG. FOR ECON. CO-OPERATION & DEV., OECD.STATEXTRACTS (2012), available at <http://stats.oecd.org/Index.aspx?DataSetCode=ANHRS>.

<sup>22</sup> For discussion of the development of this model, see generally Arianne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 BERKELEY J. EMP. & LAB. L. (forthcoming 2012) [hereinafter Renan Barzilay, *Decent Families*], and NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000).

<sup>23</sup> See WILLIAMS, UNBENDING GENDER, *supra* note 7, at 20.

<sup>24</sup> See GORNICK & MEYERS, FAMILIES THAT WORK, *supra* note 10, at 23–24.

<sup>25</sup> See WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE, *supra* note 2, at 6–8.

<sup>26</sup> See JODY HEYMANN, THE WIDENING GAP: WHY AMERICA’S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT 164 (2000) (noting that such support is widespread among Republicans, Democrats, and Independents).

Scholars agree that a robust work-family law has potential to enhance gender equality by increasing the workforce participation of those who bear the principal obligations associated with caregiving—women—and thus increasing their economic opportunities and social powers associated with marketplace labor.<sup>27</sup> Similarly, work-family law may also destabilize current gender norms pertaining to men by redefining their traditional, gendered breadwinning roles and normalizing male caretaking.<sup>28</sup>

The only statutory protection explicitly granted by federal law to protect caretaking when in conflict with market work is the Family and Medical Leave Act of 1993 (FMLA).<sup>29</sup> The Act's preamble emphasizes the importance of parenting,<sup>30</sup> noting that appropriate accommodation of working parents is necessary so that parents do not have to choose between job security and parental responsibility.<sup>31</sup> By promoting accommodation for parents within a gender-neutral framework, the FMLA has important potential to protect childbearing women's ability to maintain labor force attachment, without further stigmatizing women as a subordinate class of workers.<sup>32</sup> As other scholars have noted, however, the actual protections provided by the FMLA fall short of the interests discussed in the preamble.<sup>33</sup> Not surpris-

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<sup>27</sup> See Lester, *supra* note 10, at 2.

<sup>28</sup> See WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*, *supra* note 2, at 79–90.

<sup>29</sup> See Eichner, *State Support*, *supra* note 13, at 1602. Indeed, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–e-17 (2010), and the FMLA constitute the bulk of the U.S. maternity and parental leave policies. See Kessler, *Keeping Discrimination Theory*, *supra* note 11, at 325. But Title VII does not explicitly protect caretaking when it conflicts with work. *Id.* at 324. Title VII prohibits employment discrimination on the basis of pregnancy, but courts generally refuse to apply it to ongoing caregiving responsibilities beyond medical emergency-like situations. See Kaminer, *supra* note 17, at 328–30; Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Theory*, 34 U. MICH. J.L. REFORM 371, 391–419 (2001) [hereinafter Kessler, *The Attachment Gap*]. Courts have similarly rejected disparate impact claims challenging policies that disproportionately negatively affect workingwomen caregivers, like long hours, strict limits on absenteeism, or extended travel requirements. See Kaminer, *supra* note 17, at 330; Kessler, *The Attachment Gap*, *supra*, at 414–15. But see MARY C. STILL, *LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 2* (2006), available at [http://www.uhastings.edu/site\\_files/WLL/FRD\\_report.pdf](http://www.uhastings.edu/site_files/WLL/FRD_report.pdf) (reporting a growing number of suits filed on the grounds of “family responsibility cases”); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 90–102 (2003). For a history of the Pregnancy Discrimination Act of 1978 (PDA), which supports its wider interpretation to include structural changes in the marketplace, see Deborah Dinner, *The Cost of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415 (2011). Recently, the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–39 (1938), has been amended by the Patient Protection and Affordable Care Act, Pub. Law No. 111-148 § 4207, 124 Stat. 119 (2010), to allow breastfeeding breaks for new mothers at work. 29 U.S.C. § 207(r) (2010); see also Renan Barzilay, *Decent Families*, *supra* note 22.

<sup>30</sup> 29 U.S.C. § 2601(a)(2) (2006).

<sup>31</sup> *Id.* § 2601(a)(3).

<sup>32</sup> See Dinner, *supra* note 29, at 441.

<sup>33</sup> See Kaminer, *supra* note 17, at 323; see also Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 148–50 (1998) (claiming the FMLA fails to protect a broader concept of parenting); Kessler, *The Attachment Gap*, *supra* note 29, at 419–30 (describing the FMLA's limitations).

ingly, the FMLA, under its current form, has not significantly ameliorated the work-family conflict.

The FMLA grants covered male and female employees the right to twelve weeks of unpaid leave annually to care for a child following birth or adoption, to care for a seriously ill spouse, parent, or child (family care), or to seek care for one's own serious illness (self-care), and guarantees the right to return to one's job following leave.<sup>34</sup> The FMLA creates a private right of action for equitable relief or money damages against an employer that denies its employees FMLA rights.<sup>35</sup> However, a significant downside is that while the FMLA provides job security to some employees who need leave in case of childbirth or serious illness, it does not protect workers who have ongoing, continuous family caregiving obligations.<sup>36</sup> The Act's restrictive definition of "serious health condition" excludes numerous childhood ailments, such as an ear infection or a common cold, for which parents are most likely to require leave.<sup>37</sup> Thus, under the FMLA, parents who deal with mundane caretaking needs, from a child's stomachache to a meeting with a child's teacher, are left to fend for themselves.<sup>38</sup> These caretaking needs are still usually handled by women.<sup>39</sup>

Moreover, the terms of FMLA's coverage strictly restrict the application of the guarantees it does afford. First, the statute applies only to employees working for companies with fifty or more employees.<sup>40</sup> Second, an employee eligible for leave must have been employed by the covered employer for at least a year prior to taking leave, and must have worked at least 1250 hours annually.<sup>41</sup> Moreover, highly salaried employees may be excluded from its application.<sup>42</sup> Roughly half of the workforce (sixty-five million employees) are ineligible for leave.<sup>43</sup>

Furthermore, of particular significance is that the FMLA does not provide paid leave or wage replacement, but only guarantees that a worker can

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<sup>34</sup> 29 U.S.C. § 2612(a)(1) (2010). The U.S. Code also provides the right to continued benefits during leave, *id.* §§ 2614(a)(2)–(c)(1), and the right not to suffer employment retaliation for taking unauthorized leave, *id.* § 2615(a)(1).

<sup>35</sup> *Id.* § 2615(a). *But see* *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012) (limiting State's liability for damages suits under the self-care provision).

<sup>36</sup> *See* Eichner, *State Support*, *supra* note 13, at 1602; Kaminer, *supra* note 17, at 307; *see also* Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193 (2004).

<sup>37</sup> *See* Kaminer, *supra* note 17, at 324.

<sup>38</sup> *See* Eichner, *State Support*, *supra* note 13, at 1603.

<sup>39</sup> *See* Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MARRIAGE & FAM. 1208, 1208 (2000); Katharine B. Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 8–10 (1996); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 520 n.18 (1998).

<sup>40</sup> 29 U.S.C. § 2611(2)(B).

<sup>41</sup> *Id.* § 2611(2)(A).

<sup>42</sup> *See id.* § 2614(b).

<sup>43</sup> Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35,550, 35,551 (proposed June 28, 2007), available at <http://www.dol.gov/whd/FMLA2007FederalRegisterNotice/07-3102.pdf>.

return to her job after the leave.<sup>44</sup> So even those who are eligible under the FMLA to take medical, emergency-oriented leave, simply cannot afford to take it. By one account, seventy-eight percent, the vast majority of covered employees, cannot afford to make use of the available leave.<sup>45</sup> Most single working parents, who are predominately women and disproportionately members of minority groups, cannot afford to take leave.<sup>46</sup> Lower-income employees cannot take leave even in dual income households.<sup>47</sup> Furthermore, the unpaid provision makes it more likely that in dual-earner households, women (who often bring in the lower salary) will be the parents taking leave,<sup>48</sup> thus perpetuating their second-class status in the workforce. Nonetheless, at least for those workers who can and must take leave, the FMLA guarantees them a right to return to work.

Some states are trying to make up for the FMLA's shortcomings. Since the passage of the federal FMLA, a number of states have expanded access to unpaid leave either by extending coverage to more workers or by increasing the length of the FMLA leave.<sup>49</sup> As explained, the FMLA applies to employers with fifty or more employees. Because of this threshold requirement, forty percent of private workers are not covered by the FMLA, and several states have enacted their own FMLA-type statutes, lowering their threshold to cover more workers.<sup>50</sup> Also, as noted, the FMLA allows a worker to take leave to care for immediate family members—a child, a parent, and a spouse.<sup>51</sup> Some state FMLA-type laws have expanded the definition of family to include a wider range of family members, such as domestic

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<sup>44</sup> See 29 U.S.C. § 2614(a).

<sup>45</sup> U.S. DEP'T OF LABOR, *Foreword* to DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS vii, x (2001), available at <http://www.dol.gov/whd/fmla/foreword.pdf>.

<sup>46</sup> See Nancy E. Dowd, *Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL'Y 219, 238 n. 84 (citing DEP'T OF LABOR, COMM'N ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 65, 198 (1997)).

<sup>47</sup> Kaminer, *supra* note 17, at 324 n.128.

<sup>48</sup> See Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 341 (1993).

<sup>49</sup> See NAT'L P'SHIP FOR WOMEN & FAMILIES, EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF PARENTAL LEAVE PROGRAMS (2005), available at <http://www.nationalpartnership.org/site/DocServer/ParentalLeaveReportMay05.pdf?docID=1052>.

<sup>50</sup> See, e.g., D.C. CODE § 32-516(2) (2001); ME. REV. STAT. ANN. tit. 26, §§ 843(3)(A), (C) (2011); MINN. STAT. § 181.940 Subd. 3 (2012); OR. REV. STAT. § 659A.153(1) (2009); R.I. GEN. LAWS §§ 24-48-1(3)(i), (iii) (2012); VT. STAT. ANN. tit. 21, §§ 471(3)–(4) (2012); WASH. REV. CODE §§ 49.78.020(5), 49.86.010(6)(a), 50.50.080(1) (2012).

<sup>51</sup> In 2008, the FMLA was amended to allow for twenty-six weeks of leave for military family members caring for wounded service-members. For this military family expansion, the definition of “family” has been increased to include next of kin. See 29 U.S.C. § 2612(a)(1)(E) (2012); see also NAT'L P'SHIP FOR WOMEN & FAMILIES, STATE FAMILY AND MEDICAL LEAVE LAWS THAT ARE MORE EXPANSIVE THAN THE FEDERAL FMLA (2005), available at <http://www.nationalpartnership.org/site/DocServer/StatesandunpaidFMLLaws.pdf?docID=968>. For a critique of the limited concept of family in the FMLA, see Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77 (2000).



partner, grandparents, and parents-in-law.<sup>52</sup> In addition, several states have passed FMLA-type statutes to give parents unpaid leave to attend their children's school activities,<sup>53</sup> and a few states have passed FMLA-type statutes to give workers unpaid leave to take family members to routine medical visits.<sup>54</sup>

Still, juggling work and family responsibilities is a challenge for millions of families.<sup>55</sup> Low-wage workers can find this balancing act especially difficult since they are more likely to work in jobs with few benefits and limited flexibility.<sup>56</sup> Paid leave or wage replacement can better support both caretaking and economic security.<sup>57</sup> States such as California,<sup>58</sup> New Jersey,<sup>59</sup> and Connecticut<sup>60</sup> have already passed laws providing employees (usually partial) paid leave for caretaking,<sup>61</sup> and state legislatures in other jurisdictions are considering doing the same. There is also a returning interest by Congress to enhance the current measures to ameliorate work-family conflict and reinvigorate the FMLA.<sup>62</sup>

On the other hand, at least one gain of the FMLA has recently been limited by the U.S. Supreme Court in *Coleman v. Court of Appeals of Maryland*: the possibility to invoke the self-care provision to recover damages from a state entity as an employer. Daniel Coleman was an employee at the Maryland Court of Appeals from 2001 until he was terminated in 2007.<sup>63</sup> Coleman claimed, *inter alia*, that he sought sick leave for a personal illness, and his employer retaliated against him by termination,<sup>64</sup> in violation of the FMLA. He brought suit against his employer, the Court of Appeals of the

<sup>52</sup> See, e.g., CAL. FAM. CODE § 297.5 (West 2012); CONN. GEN. STAT. § 31-51kk(7) (2012); D.C. CODE § 32-501(A)–(C); HAW. REV. STAT. §§ 398-1, 3 (2012); ME. REV. STAT. ANN. tit. 26, § 843(4)(D); N.J. STAT. ANN. §§ 34:11B(3)(h), 37:1-31 (West 2012); OR. REV. STAT. § 659A.150(4); R.I. GEN. LAWS § 24-48-1(5); VT. STAT. ANN. tit. 21, §§ 471(3)(B), 1204(a); WIS. STAT. § 103.10(1)(f) (2012).

<sup>53</sup> See, e.g., CAL. LAB. CODE. § 230.8; D.C. CODE § 32-1202; MASS. GEN. LAWS ch. 149, § 52(D)(b)(1) (2012); MINN. STAT. § 181.9412; R.I. GEN. LAWS § 24-48-12; VT. STAT. ANN. tit. 21, § 472a(a)(1).

<sup>54</sup> See, e.g., MASS. GEN. LAWS ch. 149, §§ 52(D)(b)(2)–(3); VT. STAT. ANN. tit. 21, § 472a(a)(2).

<sup>55</sup> See WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*, *supra* note 2, at 2, 8.

<sup>56</sup> See generally *id.*

<sup>57</sup> Lester, *supra* note 10, at 3.

<sup>58</sup> CAL. UNEMP. INS. CODE § 3301(a)(1) (West 2012).

<sup>59</sup> N.J. STAT. ANN. § 43:21-26 (West 2012).

<sup>60</sup> CONN. GEN. STAT. § 31-51kk–qq (2012).

<sup>61</sup> SARAH FASS, NAT'L CTR. FOR CHILDREN IN POVERTY, *PAID LEAVE IN THE STATES, A CRITICAL SUPPORT FOR LOW-WAGE WORKERS AND THEIR FAMILIES* (2009), available at <http://www.paidfamilyleave.org/pdf/PaidLeaveinStates.pdf>.

<sup>62</sup> See, e.g., Family and Medical Leave Inclusion Act of 2011, H.R. 2364, 112th Cong. (1st Sess. 2011); Family and Medical Leave Enhancement Act of 2011, H.R. 1140, 112th Cong. (1st Sess. 2011); Federal Employees Paid Parental Leave Act of 2011, H.R. 616, 112th Cong. (1st Sess. 2011); *Importing Success: Why Work-Family Policies From Abroad Make Economic Sense for the United States: Hearing Before the Joint Economic Committee*, 110th Cong. (2007).

<sup>63</sup> Brief of Appellees at 3, *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012) (No. 10-1016), 2011 WL 3754058.

<sup>64</sup> *Id.* at 3–4.

State of Maryland (an entity of the State for these purposes). The U.S. District Court for the District of Maryland held that Coleman's claim must fail because Congress unconstitutionally abrogated state sovereign immunity with respect to FMLA's self-care provision.<sup>65</sup> It therefore dismissed Coleman's FMLA claim as barred by the Eleventh Amendment to the U.S. Constitution. The U.S. Court of Appeals for the Fourth Circuit affirmed.<sup>66</sup> It held that the Eleventh Amendment bars suit in federal court against a non-consenting state and government unit unless Congress has abrogated the immunity by unequivocally declaring its intent to abrogate and pursuant to a valid exercise of power.<sup>67</sup> Coleman appealed to the U.S. Supreme Court.<sup>68</sup>

Congress can validly abrogate a state's immunity from private suit under the Fourteenth Amendment as "no State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person . . . equal protection of the laws,"<sup>69</sup> and under the Section Five power to enforce the Fourteenth Amendment.<sup>70</sup> In fact, Congress did so, according to the U.S. Supreme Court, in *Nevada Department of Human Resources v. Hibbs*,<sup>71</sup> the previous FMLA case considered by the Court. *Hibbs* involved a lawsuit brought by a male employee who took leave under the FMLA's provision to care for his ill wife. In that case, the Supreme Court held that Congress acted within its powers under Section Five of the Fourteenth Amendment by enacting the provision in order to prevent gender discrimination in the workplace due to caretaking.<sup>72</sup>

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<sup>65</sup> *Coleman*, 132 S. Ct. at 1333.

<sup>66</sup> *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 193 (4th Cir. 2010).

<sup>67</sup> *Id.* at 191.

<sup>68</sup> Petition for Writ of Certiorari, *Coleman v. Md. Court of Appeals*, 132 S. Ct. 1327 (2012) (No. 10-1016), 2011 WL 480590.

<sup>69</sup> U.S. CONST. amend. XIV, § 1.

<sup>70</sup> Section Five authorizes Congress to enact "appropriate legislation" to enforce Fourteenth Amendment guarantees. *Id.* § 5. Legislation that deters or remedies constitutional violations can fall within its sweep. However, there must be "congruence and proportionality" between the means used by Congress and the ends to protect the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

<sup>71</sup> 538 U.S. 721 (2003).

<sup>72</sup> Writing for the majority, Chief Justice Rehnquist stated:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination

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. . . . By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employer's incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

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However, the plurality in *Coleman* distinguished *Coleman* from *Hibbs* on the ground that the Court's analysis in *Hibbs* focused on the gender-related nature of the family-care provisions in the FMLA, and not the self-care provision at issue in *Coleman*, which, the *Coleman* Court held, was not sufficiently related to gender discrimination.<sup>73</sup> According to *Coleman*, the self-care provision is distinguishable from family-care provisions in that it lacks "evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations."<sup>74</sup> It therefore held that the self-care provision is not a valid abrogation of the states' immunity from suit. By contrast, the dissent noted that the self-care provision is inextricably intertwined with gender antidiscrimination. It found that in enacting the FMLA, Congress acknowledged that without the across-the-board gender-neutral provisions for leave, including *Coleman*'s self-care leave, women would incur increased penalties in the workforce.<sup>75</sup> Therefore, according to the dissent, the provision satisfies the Section Five requirement of showing a "congruence and proportionality" between the legislation and the enforcement of gender equal protection in the Fourteenth Amendment and is a valid exercise of Congress's powers.<sup>76</sup> In sum, while the plurality opinion does not authorize state employers to violate the FMLA, it does block injured employees from suing for monetary relief, thus weakening the FMLA.

Post-*Coleman*, and given legislatures' increased interest in responding to the work-family conflict, congressional measures to enhance the FMLA are particularly warranted. Normatively, they may be supported by the historical narrative put forth regarding a specific understanding of "liberty" in the Fourteenth Amendment. This understanding, articulating a feminist vision of what is generally owed to the worker and the family member to ensure liberty, as well as the proper mechanism for its advancement, should inform future measures to ameliorate the work-family conflict and enhance

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. . . [T]he FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest . . . .

*Id.* at 736–38 (citation omitted).

<sup>73</sup> The Court rejected *Coleman*'s claims that the self-care provision addresses sex discrimination and sex stereotyping and is a necessary adjunct to the family-care provisions. *Coleman*, 132 S. Ct. at 1334–37 (plurality opinion).

<sup>74</sup> *Id.* at 1334.

<sup>75</sup> The dissent specifically noted that the self-care provision "prescribes comprehensive leave for women disabled during pregnancy or while recuperating from childbirth—without singling out pregnancy or child-birth . . . [and] is an appropriate response to pervasive discriminatory treatment of pregnant women." *Id.* at 1342, 1345 (Ginsburg, J., dissenting) (citation omitted). Additionally, it asserted that because of "sex-role stereotypes that caring for family members is women's work," weakening the self-care provision would increase workplace discrimination. *Id.* at 1345 (citation omitted). It found that since men are perceived to take self-care leaves, the self-care provision reduces employers' incentives to discriminate against women. *Id.* at 1348–49.

<sup>76</sup> *Id.* at 1347. See also Brief for the Petitioner, *Coleman*, 132 S. Ct. 1327 (No. 10-1016), 2011 WL 4427081; Transcript of Oral Argument at 7, *Coleman*, 132 S. Ct. 1327 (No. 10-1016), 2012 WL 80337.

the entitlements granted by the FMLA.<sup>77</sup> The Article now turns to the historical record to learn about constructive feminism's understanding of liberty as a right to participate in the multidimensions of life: work, family, culture, and civic participation.

## PART II: WORKING-CLASS SOCIAL FEMINISM AS CONSTRUCTIVE FEMINISM

### A. *Introducing Working-Class Social Feminism*

In talking about feminism and feminist jurisprudence in particular, scholars usually discuss the major strands: liberal feminism (sameness), difference feminism, dominance feminism, non-essentialism (intersectional feminism, primarily gender and its relation to race, sexual orientation, disability, or class), autonomy, and post-modern feminism (including queer theory).<sup>78</sup> Social feminism is often mentioned, however, in passing.<sup>79</sup>

Social feminism developed around the turn of the twentieth century. Social feminists, such as Jane Addams and Florence Kelley, were part of the mostly middle-class Progressive movement and moved to create a “decent” society through legal measures for children, women, and men.<sup>80</sup> Social feminists were themselves mostly middle-class, educated women who sought to ameliorate the dangers to society caused by industrialization on the one hand and *laissez-faire* economics on the other.

There has been even less scholarly attention, however, specifically to working-class reformers, usually lumped up ideologically with their middle-class matrons. Working-class women, however, affiliated with social feminism, developed a nuanced approach to the questions of work and family that, I claim, casts their ideology as distinct from their middle-class affiliates. Thus, working-class social feminism, as I term it, is an overlooked branch of social feminism, feminist legal history, and feminist jurisprudence, and is the focus of this Article.

Working-class social feminism developed as a result of industrialization, urbanization, and immigration in the United States circa 1910. Among the most notable working-class social feminists were Mary Anderson, Rose Schneiderman, and Pauline Newman (hereinafter the three leaders). The three leaders emigrated from Europe at the turn of the century to the American reality of sweatshops and booming factories, like many working-class women of their era. Indeed, between 1880 and 1930, the female participa-

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<sup>77</sup> This understanding may have broad implications that are outside the scope of this article. For now, it is possible to say that this notion of liberty may impact the congruence and proportionality analysis: As the scope of the Fourteenth Amendment widens so may the appropriate means to enforce it.

<sup>78</sup> See generally KATHARINE T. BARTLETT ET AL., *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (3d ed. 2002); MARY BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* (3d ed. 2006).

<sup>79</sup> See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 241–57 (1990).

<sup>80</sup> See Renan Barzilay, *Women at Work*, *supra* note 14, at 14–19.

tion in the marketplace labor force quadrupled, and was heavily made up of migrant young women.<sup>81</sup> Mary Anderson immigrated to the United States in 1889 from Sweden, at age sixteen, with her sister. Anderson worked as a domestic servant for several years until turning to industrial work in a Chicago shoe-factory, in which she subsequently labored for over a decade.<sup>82</sup> Pauline Newman was born in Lithuania in 1890 to a Jewish family, in which her mother was the primary breadwinner, and she emigrated at age ten. At twelve, she began working for wages at the infamous Triangle Shirtwaist Factory.<sup>83</sup> Rose Schneiderman was born in a Polish village in 1882, and left for America along with her mother and brothers when she was eight. As a female-headed, single-parent family, Rose's household needed extra income, so Rose quit school to make caps on Manhattan's Lower East Side. These factory women, and many like them, worked from an early age, in terrible safety conditions, for extremely long hours (fourteen a day), and at meager pay.<sup>84</sup>

Three influential ideologies shaped their vision of social justice: socialism, feminism, and progressivism. First, the socialist discourse, taking place in Europe, exposed some of them even before immigration to writings of Karl Marx. Once in the immigrant quarters in America, in garment factories, and Jewish communities, the socialist discourse figured prominently in workers' sense of solidarity, in organization of strikes and consumer bans, to which the three were exposed.<sup>85</sup> The three began to organize and unionize workers in the factories in which they worked. Anderson organized workers in the International Boot and Shoe Workers Union in Chicago, and represented women union workers vis-à-vis their employers.<sup>86</sup> Newman recruited women to join the International Women's Garment Union.<sup>87</sup> Schneiderman, a dynamic orator and persuasive speaker who was prominent in the Cap Worker's Union,<sup>88</sup> mobilized strikes.<sup>89</sup> At first, they believed that the way to better working conditions was through their unions, but quickly they realized that the powerful unions, such as the American Federation of Labor (AFL), comprised of male workers, were refusing to accept women to their ranks for

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<sup>81</sup> See JOANNE J. MEYEROWITZ, *WOMEN ADRIFT: INDEPENDENT WAGE EARNERS IN CHICAGO, 1880–1930*, at xvii (1988).

<sup>82</sup> See Renan Barzilay, *Women at Work*, *supra* note 14, at 10.

<sup>83</sup> For more on the Triangle Fire and its effect on social policy, see generally LEON STEIN, *THE TRIANGLE FIRE* (2001).

<sup>84</sup> Arianne Renan Barzilay, *Women at Work: The Rise of the Regulatory State Revisited* (Feb. 28, 2008) (unpublished J.S.D. dissertation, New York University) (on file with School of Law Library, New York University) [hereinafter Renan Barzilay, *Regulatory State Revisited*].

<sup>85</sup> See ORLECK, *supra* note 15, at 17–35 (without substantial formal education, Schneiderman and Newman often took classes given under the auspices of the Socialist Party).

<sup>86</sup> See MARY ANDERSON, *WOMAN AT WORK: THE AUTOBIOGRAPHY OF MARY ANDERSON, AS TOLD TO MARY N. WINSLOW* 21–60 (1951).

<sup>87</sup> ORLECK *supra* note 15, at 3.

<sup>88</sup> *Id.* at 37.

<sup>89</sup> *Id.* at 2, 37, 43.

fear of diminishing their own power and since the unions believed women were mere temporary and ancillary workers.<sup>90</sup>

The second ideology influencing the three leaders was feminism.<sup>91</sup> Suffrage was a major tenet of feminism. A staunch debate on women's right to vote was going on, and the three took part in the campaign, marching the streets for the vote.<sup>92</sup> The fight for the ballot, at the time, however, represented more than the quest to take part in and influence politics. Rather, it symbolized the quest for equality in the family,<sup>93</sup> and was more generally a vehicle for women's self-realization.<sup>94</sup> A feminist agenda at the time included a variety of issues, such as women's financial independence, free choice of occupation, endowment of motherhood, and reproductive freedom.<sup>95</sup> It aimed to "realize personality": achieve self-determination through life, growth, and experience.<sup>96</sup>

Finally, progressivism had significant influence on the three leaders' vision and politics. Amid the extremes of wealth and poverty in America at the time, middle-class reformers argued that excessive poverty and dreadful working conditions could not produce contributing members to society. These reformers believed in the state's duty to move society towards a brighter future,<sup>97</sup> and thus were interested in enlisting the state to ameliorate poverty. Middle-class women reformers were central to such progressive activism.<sup>98</sup> Women Progressives, stemming from respectable, white, Christian, middle-class families, the first generation of college graduates, engaged in community outreach activities they believed would alleviate the burdens of poverty. They volunteered in charities and formed settlement houses in poor neighborhoods in which they offered educational, cultural, and recreational activities for their working-class neighbors.<sup>99</sup> As they investigated the working conditions in factories and discussed reform initiatives in settlement houses, middle-class women created a cross-class alliance with their working-class women neighbors, providing a network for political reform.<sup>100</sup>

<sup>90</sup> See Renan Barzilay, *Decent Families*, *supra* note 22.

<sup>91</sup> To use Cott's working definition, feminism has three components: (1) opposition to one sex's categorical control of the rights and opportunities of the other, (2) the idea that women's condition is socially constructed, and (3) women's perception of themselves as a social grouping. See COTT, *supra* note 14, at 4–5.

<sup>92</sup> *Id.*; see also Renan Barzilay, *Regulatory State Revisited*, *supra* note 84, at 57.

<sup>93</sup> See generally Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

<sup>94</sup> See COTT, *supra* note 14, at 3–9, 15, 36–37, 53, 75, 125, 134–135.

<sup>95</sup> See *id.* at 66–67.

<sup>96</sup> *Id.* at 36–37.

<sup>97</sup> See MCGERR, *supra* note 14, at 79–81.

<sup>98</sup> Kathryn K. Sklar, *The Historical Foundations of Women's Power in the Creation of the American Welfare State, 1830–1930*, in *MOTHERS OF A NEW WORLD, MATERNALIST POLITICS AND THE ORIGINS OF WELFARE STATES* 44–45 (Seth Koven & Sonya Michel eds., 1993).

<sup>99</sup> See Renan Barzilay, *Regulatory State Revisited*, *supra* note 84, at 63–80.

<sup>100</sup> See MINOW, *supra* note 79; Sklar, *supra* note 98, at 66; see generally JANE ADDAMS, *TWENTY YEARS AT HULL HOUSE* 77 (Signet Classics 1999) (1910); LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994); SUSAN WARE, *BEYOND SUFFRAGE: WOMEN IN THE NEW DEAL* (1981).

To promote better working conditions for women workers, the two groups formed the Women's Trade Union League (WTUL or the organization). The organization was created in response to male unions' refusal to accept women workers. To male unions, such as those represented by the dominant AFL, women's labor was not *real* work.<sup>101</sup> Women's work was usually characterized as a temporary detour until marriage, a frivolous choice derived out of a love of luxuries or excitement,<sup>102</sup> rather than based on economic necessity or personal fulfillment. Many voices were heard claiming that women worked for unnecessary "pin money" and that their employment displaced real workers (i.e., breadwinning male workers) out of work.<sup>103</sup> Going against this grain of thought, working-class women, who had experienced marketplace labor in factories, began to develop a feminist consciousness. They refused to accept the notion that a woman's place is *only* in the home. For them, work was first and foremost economically essential, but they had also gained personal rewards and formed meaningful social networks at work. These sentiments would become part of their broader ideology.

The organization had brought the three leaders together.<sup>104</sup> Anderson became a major actor in the Chicago WTUL, and Newman and Schneiderman were central figures in the New York office. The three thought the need for leisure, friendships, family time, and culture were important components of life, *alongside* marketplace labor. Newman argued that to ensure a brighter future a worker must be entitled to culture and leisure.<sup>105</sup> Anderson claimed that intensive work does not allow for other dimensions in life, and that work ought to be "spread" among several workers, while providing decent pay, so that all workers may have the necessary time for their development in other dimensions.<sup>106</sup> Schneiderman articulated a political vision entitled "Bread and Roses,"<sup>107</sup> claiming that the woman worker wants bread, but she wants roses too. Shorter hours, decent wages, and safe working conditions were the bread for which they fought. Meaningful work, education, culture, and egalitarian relationships between men and women and between husbands and wives were the roses.<sup>108</sup> They demanded a life filled with some leisure along with marketplace labor, specifically arguing for the opportunity to enjoy "beauty, friendships, books, arts, music, fresh air, and

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<sup>101</sup> See generally ALICE KESSLER-HARRIS, *OUT TO WORK, A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (1982).

<sup>102</sup> See ANDERSON, *supra* note 86.

<sup>103</sup> See KESSLER-HARRIS, *supra* note 101, at 153–59; LYNN Y. WEINER, *FROM WORKING GIRL TO WORKING MOTHER: THE FEMALE LABOR FORCE IN THE UNITED STATES FROM 1820 TO 1980*, at 41 (1985); MCGERR, *supra* note 14, at 132.

<sup>104</sup> See ORLECK, *supra* note 15, at 129.

<sup>105</sup> See *id.* at 133.

<sup>106</sup> This was also in line with middle-class reformer Florence Kelley. See Renan Barzilay, *Women at Work*, *supra* note 14. However, there were substantial differences between Kelley's approach and the working-class leadership's. See Renan Barzilay, *Regulatory State Revisited*, *supra* note 84, at 96–98.

<sup>107</sup> See COTT, *supra* note 14, at 23.

<sup>108</sup> ORLECK, *supra* note 15, at 6–8.

clean water,”<sup>109</sup> and they demanded such a life as “a right . . . not a luxury.”<sup>110</sup> As part of their roles in the organization they traveled the United States to convince women to unionize and lobby politicians for their support. In 1920, Schneiderman and Anderson were sent to represent the WTUL at the Versailles Peace Conference, where they learned from foreign women delegates of social reforms taking place in countries like England, Sweden, and Norway.<sup>111</sup>

Soon, working-class social feminists realized that organizing and unionizing were not enough to obtain decent working standards and that additional tools needed to be developed.<sup>112</sup> They believed that regulation would redress the power imbalances between workers and employers leading to the terrible working conditions experienced by workers. They wanted the states and the federal government to regulate labor. This turn towards regulation moved their struggle for better working conditions from a private one (vis-à-vis an employer) to a public, political one. The practical need for regulation was explained by Anderson, *inter alia*, by pointing to a woman’s “double shift.” She claimed that women who are wage earners, with one job in the factory and another in the home, have little time and energy to carry on the fight to better their economic status, and therefore need labor laws.<sup>113</sup> The three leaders stressed the “compensatory” rationale for women’s labor regulation. Anderson believed that women’s unequal position in the labor market due to their home responsibilities, and their limited organization in unions, was a reason for providing labor regulation for women. She evoked the claim that women’s “double burden” and unequal bargaining power in the market force justify labor legislation that could “compensate” them for their inferior market force status by granting them the same labor conditions enjoyed by their unionized male counterparts.<sup>114</sup>

In concert with middle-class social feminists,<sup>115</sup> they sought to develop a regulatory apparatus to provide better working conditions. At first, they aimed to regulate working hours and minimum wages in the states.<sup>116</sup> Even though working-class social feminists aimed to regulate hours and wages for all workers, men as well as women, they primarily were concerned with women workers as a more disempowered group. They hoped that regulating women’s working conditions would be a first step towards wider labor regulation. The desire for laws regulating hours of work and minimum wages for women stemmed also from a belief that it would be easier to convince the

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<sup>109</sup> *Id.* at 16.

<sup>110</sup> *Id.* at 133.

<sup>111</sup> See *id.* at 111; ANDERSON, *supra* note 86, at 117–33. Such was the relationship formed with the delegate from Sweden, a country which initiated maternalist-inspired reforms. See Barbara Hobson, *Feminist Strategies and Gendered Discourses in Welfare States: Married Women’s Right to Work in the United States and Sweden*, in *MOTHERS OF A NEW WORLD*, *supra* note 98, at 396, 403.

<sup>112</sup> ORLECK, *supra* note 15, at 45; Renan Barzilay, *Women at Work*, *supra* note 14.

<sup>113</sup> ANDERSON, *supra* note 86, at 71.

<sup>114</sup> See Anderson, *supra* note 15, at 10.

<sup>115</sup> For the differences between the two groups, see *infra* Part II.II.

<sup>116</sup> See Renan Barzilay, *Women at Work*, *supra* note 14, at 179–86.



powerful men in the legislature of their acute necessity for women, and that these laws may serve as an entering wedge for later legislation for all workers, so that, ultimately, labor conditions would be “corrected for both sexes.”<sup>117</sup> Anderson claimed that in the long run, laws that regulate women’s employment would also benefit men, as they “serve[ ] to bring the whole industry up to the standard required for the women working in it.”<sup>118</sup> She insisted that women would stay in the workforce and that their presence would improve working conditions for all workers.<sup>119</sup>

They began enacting state legislation regulating hours of work and minimum wages for women. To counter the legal claims that such protective labor regulation infringed on “liberty” and “freedom of contract,”<sup>120</sup> working-class social feminists argued that unionizing offered the eight-hour workday, which provided leisure and a greater possibility of health, recreation, and self-development.<sup>121</sup> They argued that no free people can live without liberty, but that freedom is meaningless if workers have no protections with regard to their labor conditions.<sup>122</sup> For working-class social feminists, regulation was based on the idea that government must enable and sustain “liberty” by acting for its subjects’ well-being,<sup>123</sup> and must promote a life enriched by leisure, civic participation, education, and culture to *assure actual* freedom.<sup>124</sup>

Thus, they believed that limiting work hours and creating a shorter work day for men and women would allow parents to “play together”<sup>125</sup> with their children, and enable relaxation, self-development, and family time, essential for workers’ well-being.<sup>126</sup> Working-class social feminists worked to create a world that would fit their needs as women—as caretakers and as workers—and produce a better future for all workers by “feminizing” the workplace through regulation.<sup>127</sup> They believed that as more women entered market work, the need for regulation would grow, and once in place, regulation would positively affect all workers.

<sup>117</sup> See, e.g., MARY ANDERSON, U.S. DEP’T OF LABOR, THIRD ANNUAL REPORT OF THE DIRECTOR OF THE WOMEN’S BUREAU 17 (1921).

<sup>118</sup> Anderson, *supra* note 15, at 16.

<sup>119</sup> See ANDERSON, *supra* note 86, at 141; Mary Anderson, *Women’s Future Position in Industry*, AM. INDUSTRIES 27, 28–29 (1920) [hereinafter Anderson, *Women’s Future Position*], microformed on Anderson Papers, *supra* note 15.

<sup>120</sup> See Renan Barzilay, *Women at Work*, *supra* note 14, at 183–186, 199–208.

<sup>121</sup> See Anderson, *supra* note 15, at 10.

<sup>122</sup> See Letter From Mary Anderson, Dir., U.S. Women’s Bureau, to Margaret Dreier Robins (Sept. 17, 1934), microformed on Anderson Papers, *supra* note 15, at reel 3 frames 811–13.

<sup>123</sup> Renan Barzilay, *Regulatory State Revisited*, *supra* note 84, at 166–67.

<sup>124</sup> See Renan Barzilay, *Women at Work*, *supra* note 14, at 208; Renan Barzilay, *Regulatory State Revisited*, *supra* note 84, at 144–45, 154, 166, 212.

<sup>125</sup> Anderson claimed that “shorter hours mean family life, a life where father, mother, and the children have time to be with one another and learn together and play together.” ANDERSON, *supra* note 86, at 46.

<sup>126</sup> Anderson argued “that relaxation and self development are vital to a proper living and deserving of government protection through adequate legislation.” See Renan Barzilay, *Regulatory State Revisited*, *supra* note 84, at 141.

<sup>127</sup> See Anderson, *Women’s Future Position*, *supra* note 119, at 29.

As part of their agenda, the working-class social feminists supported the establishment of a federal bureau to advance women's work. After World War I, the Women's Bureau was established in the U.S. Department of Labor, and Anderson was appointed its director. As director of the Bureau, Anderson investigated women's working conditions and envisioned market-place labor as an important component in women's lives, independence, and identity, alongside family work.<sup>128</sup> She believed that since women entered the marketplace, they would no longer be content solely with domestic labor and that they ought to be supported in their quest for gainful employment in whichever field they choose.<sup>129</sup> Schneiderman's activity also branched out of the organization; she was appointed to an official post in New York's Labor Bureau, and later, as a federal administrator on the National Recovery Administration's Labor Advisory Board. Together, Anderson and Schneiderman promoted the idea of equal wages for equal work.<sup>130</sup> Newman remained extremely active in the organization and other unions.<sup>131</sup>

When the Great Depression hit, the women reformers saw it as a "golden moment"<sup>132</sup> to press for their reform agenda, given the growing concern for breadwinning men's unemployment and the Roosevelt administration's eagerness to solve it.<sup>133</sup> Women reformers were part of the network of the Roosevelt administration and an engine of its reform.<sup>134</sup> Their efforts to establish minimum wages and maximum hours of work so as to enable the worker to experience different dimensions beyond wage work were partially successful when in 1938, the Fair Labor Standards Act was passed, establishing minimum wages and maximum hours for workers employed in interstate commerce.<sup>135</sup> It was then that labor regulation—limiting hours of work and providing minimum wage—was (somewhat) expanded to include both men and women.<sup>136</sup>

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<sup>128</sup> Renan Barzilay, *Regulatory State Revisited*, *supra* note 84, at 162–63, 236–42.

<sup>129</sup> *Id.* at 237.

<sup>130</sup> *Id.* at 196, 224.

<sup>131</sup> See ORLECK, *supra* note 15, at 128.

<sup>132</sup> Renan Barzilay, *Women at Work*, *supra* note 14, at 193 (citation omitted).

<sup>133</sup> See Deborah C. Malamud, *Engineering the Middle Classes: Class Line Drawing in the New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2236 (1998).

<sup>134</sup> See generally WARE, *supra* note 100 (discussing the political prominence of the woman's reform network in the 1930s). For a trajectory of women's push for labor regulation leading up to the New Deal's Fair Labor Standards Act, see generally Renan Barzilay, *Women at Work*, *supra* note 14.

<sup>135</sup> See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as 29 U.S.C. §§ 201–19); Suzanne B. Mettler, *Federalism, Gender & the Fair Labor Standards Act of 1938*, 26 POLITY 635, 642 (1994).

<sup>136</sup> See Fair Labor Standards Act §§ 201–19. Excess hours were not prohibited altogether, but were deterred by the overtime penalty. There is a historical debate over whether this strategy benefited or harmed women. Compare ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH CENTURY AMERICA (2001) (claiming this strategy curtailed women's employment opportunities), with SKLAR, *supra* note 98 (claiming it was beneficial for workers). I think this debate must be understood in relation to class and the differences in work experiences between working-class women and professional women.

B. *Working-Class Social Feminism's Unique Features*

On the one hand, working-class social feminists cooperated with middle-class social feminists in developing the American bureaucracy; they shared progressive values and methods of enlisting the state to create a better society; and they worked together to create a federal bureau and lobby for federal regulation for improved working standards.<sup>137</sup> On the other hand, working-class social feminists differed from their middle-class allies regarding their articulation of women's "roles." Middle-class social feminists firmly adopted middle-class notions of womanhood as belonging to the domestic sphere.<sup>138</sup> This ideology of domesticity adhered to the traditional middle-class family notion of husband as breadwinner and wife as homemaker. Thus, a woman's role was to mother: nurture her children, insist on nursing them, and raise them on her own.<sup>139</sup> It sprang from the belief that women are natural nurturers with parenting abilities far superior to men's.<sup>140</sup> Middle-class reformers sought to ensure the "family-wage," that men's earnings would be sufficient to enable wives to stay at home with their children, and did not contemplate a reworking of the marketplace or the family to enable both men and women to take active and meaningful roles in both worlds.<sup>141</sup> As a result, they focused on obtaining mothers pensions and mostly worked at the U.S. Children's Bureau to carry out their policy.<sup>142</sup> They are therefore considered "maternalists" for stressing women's maternal roles.

By contrast, working-class social feminists focused primarily on women workers in the marketplace.<sup>143</sup> They were less committed to the middle-class family model to begin with, emphasized the "Bread and Roses" ideology, and stressed that ever since women entered the marketplace, they were no longer content solely with their domestic role. These working-class women argued that often women are breadwinners as well as caretakers.<sup>144</sup> The

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<sup>137</sup> The federal bureau created was the Women's Bureau in the Department of Labor, which Anderson subsequently directed for a quarter century. The federal legislation enacted was the Fair Labor Standards Act of 1938. See Renan Barzilay, *Women at Work*, *supra* note 14, at 194–95.

<sup>138</sup> This ideology termed "domesticity" was characteristic of middle-class women occupying a sister agency to Anderson's Women's Bureau, the Children's Bureau, in the Department of Labor. See LINDA GORDON, *supra* note 100, at 53; ROBYN MUNCY, *CREATING A FEMALE DOMINION IN AMERICAN REFORM, 1890–1935*, at 38–65 (1991).

<sup>139</sup> See MUNCY, *supra* note 138, at 38–65.

<sup>140</sup> See ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 78 (2d ed. 1977).

<sup>141</sup> See generally ADDAMS, *supra* note 100.

<sup>142</sup> See GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917–1942*, at 27–52 (1996).

<sup>143</sup> For the differences between the Women's Bureau headed by Anderson and aimed to assist women in the marketplace, and the Children's Bureau headed by maternalist Julia Lathrop, see GORDON, *supra* note 100, at 54, and MUNCY, *supra* note 138, at 38–65.

<sup>144</sup> See WOMEN'S BUREAU, U.S. DEP'T OF LABOR, *BULLETIN 23: THE FAMILY STATUS OF BREADWINNING WOMEN* (1922), available at [http://fraser.stlouisfed.org/docs/publications/women/b0023\\_dolwb\\_1922.pdf](http://fraser.stlouisfed.org/docs/publications/women/b0023_dolwb_1922.pdf).

lives of such labor movement careerists as Anderson, Newman, and Schneiderman represented a larger spectrum of womanly roles.<sup>145</sup> While they did not abrogate the family-wage ideal, their positions signify a nascent feminist shift towards a different idea of the family. Their experiences in intense, mundane factory work led them to the conclusion that alongside gainful employment, workers must be enabled to enjoy other dimensions in life, and they therefore concentrated efforts in obtaining labor regulation to enable workers to enjoy the versatile dimensions life has to offer. Unlike middle-class social feminists stressing women's maternal nature, working-class feminists stressed women's unequal bargaining power in the marketplace labor force as the least unionized, most exploited group of workers.<sup>146</sup>

Working-class social feminism also differed from liberal feminism, the prominent feminist strand at the time, which supports formal equality and continues to govern much of the discourse on women's equality in marketplace labor to this day.<sup>147</sup> After suffrage, a rift occurred in the feminist movement between liberal feminists, most of whom were elite, professional women advancing formal equality, and the working-class social feminists, who strived for government intervention in the market and acknowledgement of women's different roles as workers, family members, and community participants.<sup>148</sup> In short, liberal (sameness) feminism seeks formal equality between males and females and is premised on the liberal belief that women are autonomous creatures that are substantially no different from men. As a result, liberal (sameness) feminism requires the same rights for men and women (such as the vote) and the same treatment for both sexes. Resting on liberal theory and individualism, it demands removal of legal and political barriers to ensure equal opportunity.<sup>149</sup> After suffrage and the passing of the Nineteenth Amendment, which granted women the right to vote, professional, elite liberal feminists continued with the idea of formal equality that had succeeded in the suffrage campaign and argued for an equal rights amendment to the U.S. Constitution, which would create formal equality between them and their brothers.

By contrast, working-class social feminists such as Anderson, Newman, and Schneiderman, who considered themselves "good feminists," objected that "over articulate theorists were attempting to solve the working woman's problems . . . with the working woman's own voice far less adequately heard."<sup>150</sup> Anderson claimed the theoretical approach, espoused by women

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<sup>145</sup> See COTT, *supra* note 14, at 137; Renan Barzilay, *Regulatory State Revisited*, *supra* note 84, at 93–98, 170–74, 236–45, 256–58.

<sup>146</sup> Renan Barzilay, *Women at Work*, *supra* note 14, at 182.

<sup>147</sup> See Tracy A. Thomas, *Elizabeth Cady Stanton and the Notion of a Legal Class of Gender*, in *FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND LAW* 139–40 (Tracy A. Thomas & Tracey Jean Boisseau eds., 2011).

<sup>148</sup> Middle-class social feminists also supported government regulation, but more so in an effort to protect women's frailty than because of their weaker bargaining power in the marketplace. See Renan Barzilay, *Women at Work*, *supra* note 14, at 182 n.102.

<sup>149</sup> See Patricia Smith, *Introduction*, in *FEMINIST JURISPRUDENCE* 4 (Patricia Smith ed., 1993).

<sup>150</sup> COTT, *supra* note 14, at 134–35.

of the elite upper class, does not reflect the needs of working women.<sup>151</sup> To the working-class social feminist, the formal equality approach seemed too abstract and vague.<sup>152</sup> Working-class social feminists thought that declaring equality was not enough; they feared that formal equality may turn out to be an “empty slogan,” a hollow, abstract legal principle with no real force. While liberal feminism focused on removing legal and political barriers towards equality, working-class social feminism went further to demand state intervention for increased economic power for working-class women. They demanded government intervention in the labor market to ensure some of the benefits their male counterparts enjoyed through the powerful unions.

C. *Theorizing Working-Class Social Feminism as Constructive Feminism*

Working-class social feminists demanded “constructive legislation for constructive equality.”<sup>153</sup> They wanted to achieve equality through a “constructive”<sup>154</sup> approach that was grounded in working women’s actual conditions and prescribed for their constructive improvement through specific legislation. They thought this was a practical way of obtaining equality<sup>155</sup> and hoped that specific legislation would improve working conditions and would contribute to the greater good.<sup>156</sup> I therefore term working-class social feminists’ approach “constructive feminism” because they adhered to the constructive nature of specific regulation, particularly labor regulation, as a method of obtaining actual equality.

However, working-class social feminists were influenced by the prominent liberal feminists in that they believed that all people, male and female, were not inherently different: they were all entitled to enjoy the different life dimensions, such as work, family, civic association, and culture. But, working-class social feminists believed there were differences *in reality* between men and women, in their political and economic power, and in their familial responsibilities, which needed to be addressed. Constructive feminism therefore sought to promote a legal standard tailored to women’s actual lives (regulation of labor), which would be enacted for all workers, men and women. Thus, they wanted to turn the ordinary standard of uninhibited labor into one that suited their needs (i.e., regulated labor), and they wanted to turn uninhibited freedom of contract into actual freedom to participate in life’s multidimensions. Enacting such standards for men and women was premised on the notion that only their execution for all workers would promote women’s opportunities and realities in substantial ways.

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<sup>151</sup> See Letter From Mary Anderson, Dir., U.S. Women’s Bureau, to Elizabeth Christman (Dec. 1, 1933), *microformed on Anderson Papers*, *supra* note 15, at reel 1 frame 69.

<sup>152</sup> See COTT, *supra* note 14, at 137–38.

<sup>153</sup> “Equal Rights? Yes, But How?,” *in* Anderson *supra* note 151, *microformed on Anderson Papers*, *supra* note 15, reel 1 frames 69–72 (capitalization removed).

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> Renan Barzilay, *Regulatory State Revisited*, *supra* note 84, at 166–69, 182–83.

Several principles can, therefore, be deduced from working-class social feminists' actions and ideology to articulate what I have termed "constructive feminism."<sup>157</sup> The first and most important principle I term "multidimensionalism." According to the multidimensional principle, each person has different dimensions and should be enabled to enjoy different roles such as worker, family member, and community participant. Second, multidimensionalism should be achieved through government regulation. Hence, we should aspire to create a world that acknowledges and sustains multidimensionalism through government regulation. I term this principle "feminization by regulation," since it specifically holds that we should regulate with attention to women's actual lives, and change the (usually male) rule or standard prevalent in the marketplace to a new rule or standard that is sensitive to women's lives, on the one hand, and that is also sensitive to the quest for multidimensionalism for all, on the other. So for example, labor should be regulated in accordance with women's actual caretaking performance, but also with an aspiration for multidimensionalism, for their participation in market work, family care, civic participation, and culture. The third principle holds that such legal reforms should apply to men and women, since applying them to all would be most beneficial for equality, and would serve to raise legal standards for all workers. Therefore, I claim, it is possible to design a current feminism that is grounded in constructive feminism but that is geared towards today's society. The Article now turns to develop a theoretical framework inspired by constructive feminism.

PART III: A THEORETICAL FRAMEWORK FOR WORK-FAMILY REGULATION  
INSPIRED BY CONSTRUCTIVE FEMINISM'S COMMITMENT  
TO MULTIDIMENSIONALISM

As we have seen, already a century ago, working-class social feminists demanded recognition as workers and family members and as multidimensional persons, meriting government intervention for sustaining multiple dimensions in life. Although many aspects of life have changed and more women are in the workforce than a century ago, I claim that from their approach, we can and should glean inspiration for a theoretical framework for reconciling work-family imbalance, and for law's central role in such reconciliation.

The multidimensional framework thus derives from constructive feminism and sees importance in the sustainability of versatile dimensions in a person's life, especially dimensions of work, family, and political, social, and cultural participation for the protection of "liberty."<sup>158</sup> The approach

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<sup>157</sup> In deducing these principles, I am guided by the history and informed by the insights gained through current feminist theories.

<sup>158</sup> According to constructive feminism, unencumbered freedom of contract to labor unilaterally, is actually an encroachment on liberty, and people are in fact free when they are guaranteed some time away from work to focus on other dimensions.

proposes that the law must take seriously *all* these dimensions in a person's life, and enable them to exist meaningfully alongside each other, so that people may actually experience freedom. However, this Article focuses mainly on dimensions of work and family, and proposes to first design them in accordance with the multidimensional approach. According to multidimensionalism, a person ought to be entitled to her realization in different dimensions without having to give up one to meaningfully fulfill another. Thus, the Article suggests thinking about the working parent as a legal subject entitled to have both dimensions of work and family supported by law. The multidimensional approach stems from the understanding that in order to reconcile the work-family conflict, the law ought to recognize the versatile dimensions of worker and of family member. Indeed, some may claim that such recognition may require people to perform expected roles, instead of allowing them to develop an individual self-realization.<sup>159</sup> However, I contend that as long as in reality men and women are in fact performing dimensions of family member and worker, these ought to be recognized. Additionally, according to the multidimensional approach developed here, there remains ample individual subjectivity to define and design each dimension internally.

The multidimensional approach is comprised of “internal” and “external” multidimensionalism. “External multidimensionalism” signifies recognition of different dimensions in a person's life, especially work, family, culture, civic life, and leisure (those dimensions important to working-class social feminists). These dimensions represent different roles that continue to exist alongside each other. External multidimensionalism deals with the relationship between the different dimensions. It prescribes that one dimension must not exclude another. External multidimensionalism is objective, meaning that each dimension—work, family, civic participation, culture, and leisure—must reside alongside the other dimensions, so that the other dimensions may exist in meaningful ways. Dynamic social interests may influence the construction or weight of these dimensions, but for the time being, these shall guide us. “Internal multidimensionalism” deals with each dimension internally. In this case, it is concerned with the dimension of work and the dimension of family, and it deals with the internal meanings of each dimension. Each dimension internally is rich and flexible enough to contain a variety of meaningful experiences in a robust and continuous manner. Internally, in each dimension, there is significant subjectivity and flexibility so that one may design one's own variety of the dimension, but there are also objective contours that will make sure that it retains sufficient meaning.<sup>160</sup>

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<sup>159</sup> See generally Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183–85 (2001).

<sup>160</sup> The internal dimension makes sure that each dimension does not lose its meaning. For example, some countries have enacted very long paid maternity leaves, which may comport to external multidimensionalism, but may fail on internal multidimensionalism because they cre-

The internal aspect of the family dimension contends that family relationships are an important part of human life. For many, parenting is a source of happiness and challenge. Parenting enriches the parents because of their relationship with the child and because of the meaningful experiences that one goes through while parenting, experiences that can be empowering and satisfying (as well as exhausting and challenging). While I do not claim that each parent needs to experience parenting to the fullest, or that children are neglected when a parent does not experience parenting's full potential, I do claim that law must at least enable a substantial parenting experience. Furthermore, I do not claim that each person, in the design of her internal family dimension, will necessarily choose parenting.<sup>161</sup> The internal dimension of family, may receive significance from substantial familial relations with a partner, a spouse, a parent, a sibling, or even an important next-of-kin. The internal dimension of family should respond to the human need for relationships, and it justifies removing barriers to the realization of such relationships between family members.

So it is also with the internal aspect of the work dimension. Work has deep meanings for human life, as a source of livelihood, for sure, but also as a means of self-realization, self-expression, and socialization. Work is a venue in which people may devote their talents and abilities to the creation of projects and goals. Work may satisfy important aspects of one's personality. Work has important potential for positive self-esteem and satisfaction.<sup>162</sup> All this merits introducing labor practices that will enable each worker to take part in meaningful work, in a way that is balanced and that allows for the development of self-realization at work.

External multidimensionalism enables each dimension to exist significantly alongside the other dimensions. According to external multidimensionalism, a person is multifaceted. She is not only a worker in the marketplace; she is also a family member and a member of a civic community, and she is therefore entitled to take part in each of these dimensions in meaningful ways. Moreover, people may be benefited in each dimension internally when enabled to take substantial parts in other dimensions. People are enriched at work by taking part in parenting and reproduction, and are enriched in their parenting by gaining important experiences at work.<sup>163</sup> In this way external multidimensionalism may also work to enhance each internal dimension. In an (external and internal) multidimensional framework, work takes up a significant, but balanced, place in one's life, and its goal is not only economic but also to provide a place for social connection

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ate a workforce in which mothers are relegated to second-class workers, depriving them, in effect, of their internal work dimension.

<sup>161</sup> See Franke, *supra* note 159.

<sup>162</sup> See generally CAROL JEAN AUSTER, *THE SOCIOLOGY OF WORK: CONCEPTS AND CASES* 1-3 (1996); Frederick C. Gamst, *Considerations of Work*, in *MEANINGS OF WORK: CONSIDERATIONS FOR THE TWENTY-FIRST CENTURY* 1 (Frederick C. Gamst ed., 1995); Nancy C. Morse & Robert S. Weiss, *The Function and Meaning of Work and the Job*, 20 *AM. SOC. REV.* 191 (1955); Vicki Schultz, *Life's Work*, 100 *COLUM. L. REV.* 1881 (2000).

<sup>163</sup> See Schultz, *supra* note 162, at 1910.



and for personal growth and fulfillment. Family takes up a significant, but balanced, place in one's life, and reproduction and parenting are viewed as lifelong activities.

In accordance with constructive feminism, multidimensionalism may be realized through labor regulation. Women's massive entry into the labor force in the last few decades has not been accompanied by changes in work structures. The underlying assumption is that work-family conflict is a private matter appropriately left to the responsibility of individual caretakers to resolve.<sup>164</sup> Thus, families are left to negotiate work-family balance vis-à-vis individual employers, and the market is perceived as the appropriate institution through which to negotiate and resolve these issues.<sup>165</sup> However, work-family imbalance is not a strictly private matter but has developed because of an underlying labor structure valuing the "ideal worker,"<sup>166</sup> supported, passively and actively, by the state.<sup>167</sup> Additionally, work-family imbalance is not the problem of women only; as scholars have shown, it has cross-class implications for both men and women.<sup>168</sup> Others have already claimed the merits of state and federal intervention in this context.<sup>169</sup> Constructive feminism supports this view. As we know, liberal feminism, in its incarnation in jurisprudence as formal equality, has not been able to remedy the work-family conflict. Constructive feminism, however, is committed to an understanding of liberty that supports regulation to sustain meaningful liberty for all, and thus is supportive of regulating the labor market and of redistribution in accordance with the three principles stated. Accordingly, labor market regulation can play an important role in advancing the multidimensional approach. Based on the principle I termed "feminizing by regulating," regulation ought to be constructed by enacting new rules for the labor market that are sensitive to the current life realities of women (as caregivers and workers), on the one hand, and to the aspiration for multidimensionalism for all, on the other. Multidimensionalism may thus provide a framework for the design of such work-family regulation.

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<sup>164</sup> See Eichner, *State Support*, *supra* note 13, at 1595.

<sup>165</sup> See *id.*

<sup>166</sup> WILLIAMS, UNBENDING GENDER, *supra* note 7, at 2.

<sup>167</sup> For the active way in which law supports the breadwinner model, on which the "ideal worker" can exist, see Renan Barzilay, *Decent Families*, *supra* note 22.

<sup>168</sup> Joan Williams has recently emphasized the cross-class implications of work-family imbalance for both women and men. See WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE, *supra* note 2.

<sup>169</sup> See, e.g., Lester, *supra* note 10. Some may still argue their liberty of contract is encroached by any regulatory limitation. Yet, liberty is a social construct; the way it is tailored and interpreted to begin with is not natural or neutral. Furthermore, even on a liberal premise, regulation may actually enhance freedom, by allowing people *real* choices and enabling opportunities to participate in different dimensions.

## PART IV: MULTIDIMENSIONALISM IN ACTION

Legal measures can be developed to promote the multidimensional approach. As explained in Part I, today's workplace demands extremely long hours from workers (especially professionals), and provides no economic security or flexibility for lower classes. Perhaps most importantly, it does not allow for parenting as an ongoing task, so that many parents are a mere "one sick child away from being fired."<sup>170</sup> Evaluating the FMLA through the multidimensional framework explains what we are missing.

The FMLA, under its current form, only partially adheres to the multidimensional framework. On the one hand, by providing leave for caretaking, the FMLA enables men and women to occupy dual roles as workers and parents. Thus, the FMLA aims to fulfill external multidimensionalism. The FMLA facilitates the labor force attachment of childbearing women by requiring employers to offer a minimal leave for pregnancy and a child's birth. Importantly, the FMLA restructures the baseline employment relationship for all workers, requiring covered employers to internalize unpaid parental leave,<sup>171</sup> and allows fathers to assume caregiving roles. Thus, the FMLA "feminizes by regulating." It takes women's caregiving roles, uses women's experience as primary caretakers, and extends these experiences, by regulation, to all workers.<sup>172</sup> It importantly promotes the dimensions of work and family, acknowledging familial caregiving alongside marketplace labor. However, lacking provisions for paid leave or wage subsidies, the FMLA hinders external multidimensionalism for many in the lower and working class. There are workers who could have entered or stayed in the workforce if there had existed supported family leaves, but who must give up their work dimensions to address their family or medical needs.<sup>173</sup> Still others may forgo their family dimension, and relinquish their desire to parent, to create, enlarge, or sustain a family, simply because they cannot afford unpaid leave. The FMLA thus grants limited external multidimensionalism only to those who can afford to take unpaid time off work.

On the other hand, the FMLA does not offer ample meaning to each internal dimension of work and family, and therefore comes short of fulfilling internal multidimensionalism. The internal family dimension is impoverished by two major aspects of the Act. First, the unpaid leave hinders the feasibility of parents who must work (to sustain a reasonable standard of living), simultaneously providing important personal care for their families and sustaining important familial bonds. Second, today's extremely long hours of work and the FMLA's framing of leave for "medical emergency-

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<sup>170</sup> WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*, *supra* note 2, at 42.

<sup>171</sup> Dinner, *supra* note 29, at 440–41.

<sup>172</sup> Such regulation tilts all workers' conditions "upward." Cf. Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 901–02 (2008) (claiming that disability accommodations benefit third parties in the workplace).

<sup>173</sup> See Lester, *supra* note 10, at 3.

like” situations rather than ongoing care,<sup>174</sup> curtail much of the meaning of the internal family dimension: if workers are allowed to take leave only in extreme medical circumstances, they are, in fact, denied time away from work to care personally and engage directly with their family in meaningful, continuous, ongoing, everyday ways. Similarly, the internal work dimension is also penurious under the FMLA. As others have shown, the FMLA significantly fails to enhance substantive employment equality.<sup>175</sup> Employment equality forms the basis of the internal work dimension, as one finds it particularly difficult to become fulfilled at work when she is continuously discriminated against.

This also brings us back to the recent *Coleman* case. Evaluating the FMLA’s self-care provision through the multidimensional framework reveals that this provision is an important aspect of multidimensionalism. For one, multidimensionalism insists that workers are entitled to have a full life outside of work, and that would necessarily mean that they be entitled to time off for self-care, especially medical care, when needed. Additionally, by weakening the self-care provision, it is likely that women, who still perform the vast majority of family care, will be taking leave disproportionately and will consequently become, in the eyes of employers, less attractive employees to hire and promote, further relegating them to second-class workers. It therefore seems specifically timely to develop policies that abate *Coleman*’s effect, and promote the multidimensional paradigm. Legal measures can be developed to promote the (internal and external) multidimensional imperative. The goal of enabling men and women to fulfill dimensions of work and family, to achieve multidimensionalism, it seems, requires a transformation of both work regulation and familial gendered roles. Enhancing men and women’s participation in both family caregiving and market paid work, respectively, can be achieved through a combination of social policies,<sup>176</sup> such as affordable, high-quality, public childcare,<sup>177</sup> effective antidiscrimination law enforcement,<sup>178</sup> and a shorter work schedule.<sup>179</sup> I would specifically like to point out a few of the most important paths towards enhancing multidimensionalism.

Several policies have significant importance under a multidimensional paradigm. First, as explained, paid leave may better provide for external multidimensionalism and may even enhance the internal family dimension by enabling caretakers time to bond with their family and by protecting these

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<sup>174</sup> Kessler, *The Attachment Gap*, *supra* note 29, at 424–26.

<sup>175</sup> Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL’Y 17, 18–19 (2004).

<sup>176</sup> Lester, *supra* note 10, at 4.

<sup>177</sup> See, e.g., GORNICK & MEYERS, FAMILIES THAT WORK, *supra* note 10, at 185–235; DEBORAH L. RHODE, JUSTICE AND GENDER 129–31 (1989).

<sup>178</sup> See Williams & Segal, *supra* note 29, at 77–79.

<sup>179</sup> See Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 131 (Judith Fudge & Rosemary Owen eds., 2006); Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 COLUM. J. GENDER & L. 271, 357–58 (2002).

bonds. Furthermore, allowing for leave for ongoing care is an important component of multidimensionalism, particularly to fulfill the internal family dimension. Thus, extending protected leave for ongoing caretaking, such as accompanying a child to her first day at school or addressing a childhood ailment, seems undoubtedly necessary.<sup>180</sup> Additionally, so that these measures to do not backfire on women in the workforce, thus depleting their internal work dimension, a purposive intervention in familial caretaking roles is merited. In countries like Sweden, Norway, and Iceland, paternal involvement in childrearing is incentivized by active measures in the labor market, such as the “daddy quota.”<sup>181</sup> Seeing that most of caregiving and childrearing is still performed by women, and knowing of the adverse effect of these gendered patterns on workforce equality, these countries initiated specific incentives for fathers to take active, meaningful roles in childrearing. For example, in addition to paid maternal or gender-neutral parental leave (usually used up by women), these countries offer fathers, additional, state-paid paternal leave of several weeks, in the months after a child’s birth. To be paid, fathers must take leave for caretaking.<sup>182</sup> If a father refrains from taking leave, such entitlement is “wasted.” This mechanism thus encourages fathers to make use of the leave, normalizes men’s caretaking roles and responsibilities and educates the labor market that both women and men have active caretaking duties, in the hope that that will decrease workplace gender discrimination against women caregivers. For the United States, however, with its significant single-parent family population, it makes sense to consider offering such a “daddy quota” not only to fathers but also to partners or other persons significantly involved in childrearing, such as a grandparent. Additionally, today, the United States does not have any substantial limitation on hours of work.<sup>183</sup> Adopting constructive feminism’s multidimensional paradigm, however, requires some limitation on possible work hours lest the “ideal worker” model of uninhibited labor continue to dominate the market.<sup>184</sup> Such limitation is necessary under the multidimensional paradigm so that all workers may enjoy external multidimensionalism

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<sup>180</sup> See GORNICK & MEYERS, GENDER EQUALITY, *supra* note 10, at 31–43.

<sup>181</sup> For similar policies enacted in different European countries, see THE POLITICS OF PARENTAL LEAVE POLICIES: CHILDREN, PARENTING, GENDER AND THE LABOUR MARKET (Sheila B. Kamerman & Peter Moss eds., 2009). See also Rebecca Ray et al., *Who Cares? Assessing Generosity and Gender Equality in Parental Leave Policy Designs in 21 Countries*, 20 J. EUR. SOC. POL’Y 196 (2010).

<sup>182</sup> The legal implications of such a mechanism may encounter challenges based on a claim of gender discrimination by giving special rights to men. However, such a claim may be countered by showing that the policy serves a compelling government interest: incentivizing men’s caretaking would help create equality in the workforce. Daddy-leave may also be justified by constructive feminism’s principle of “feminizing by regulating” as feminizing the labor force may require (at least at first) actively incentivizing men to take on more caretaking roles.

<sup>183</sup> There is only an overtime pay provision for work in excess of the number of hours accorded by U.S. law. See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2012).

<sup>184</sup> As explained, while some may claim that any limitation encroaches on their liberty of contract, some limit on work hours may actually enhance liberty and the freedom to choose to participate in different dimensions without suffering penalties in the work force.

in their lives, importantly family, but also leisure, culture, and civic participation. It should be noted that the neglected history I have described, of working-class social feminism is inextricably tied up with a neglected understanding of liberty, and thus provides a richer account of the history that should inform the meaning of liberty protected today by the Fourteenth Amendment,<sup>185</sup> and accordingly, may allow for a more apt interpretation of Congress' Section Five enforcement powers than afforded in *Coleman*. Such an interpretation also gives additional ground for enhancing the FMLA.

#### CONCLUSION

There is much going on in the law of work and family. A dire necessity of regulation is convincing legislators to enhance measures to ameliorate the work-family conflict. Counterintuitively, a recession, like this great one currently being experienced, may actually be a golden moment to pursue work-family measures. These could include job sharing, as during the New Deal era, and more modern measures like “daddy-quotas” and paid leave. This Article has provided a historical narrative and a theoretical paradigm with which to address the law of work and family. It has conceptualized the neglected history of working-class social feminists as constructive feminism, outlined its principles, and offered a theoretical multidimensional paradigm to put their ideology to use in the law of work and family in the twenty-first century.

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<sup>185</sup> For a similar interpretative move with regard to antislavery history, see PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 13–14 (1997).