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A Dilemma of Doctrinal Design: Rights, Identity and the Work-Family Conflict

*Lauren Sudeall Lucas**

I. INTRODUCTION

In the conversations that take place among my female friends and colleagues, it is difficult to think of a more popular topic than how to balance work and family. In the past year alone, the topic has given rise to several popular books and articles, including Anne-Marie Slaughter's highly publicized piece in *The Atlantic*, "Why Women Still Can't Have It All."¹ It is the perennial question—not just for my generation, but for several generations of women: How are women to balance work with starting and raising a family? Is it possible to have the same career one would have had without having children? Can one achieve the same status as men who are fathers but who are not burdened with the same caretaking expectations? What does it mean to be a good mother? Is that reconcilable with the professional goals we developed and nurtured before the ticking of our biological clocks was so audible in our minds? The quest to balance work and family is clearly about evolving the workplace to allow women more flexibility, but it is also a debate about identity: how we perceive ourselves vis-à-vis the workplace and the home; who we want to be as professionals and employees; and—for those of us who choose to be—who we want to be as parents. Regardless of how accommodating or progressive workplaces become, the onus will also remain on us—and, for those of us who have partners, on them as well—to strike our own personal

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¹ Anne-Marie Slaughter, *Why Women Still Can't Have It All*, THE ATLANTIC (June 13, 2012), <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/>.

balance between work and family, and to define our own identity as working parents.

My generation—now so mired in this dilemma—was born and raised in the wake of the women’s liberation movement, after landmark Supreme Court cases and other political milestones guaranteed women basic freedoms and allowed us to progress to a point where we can actively engage in this debate. The rights that emerged from the doctrine were critical for women to gain entry into and establish themselves in the American workplace; they have also embedded themselves into our culture and our sense of identity as women.² Formal equality, the dominant approach applied by the Court in creating and defining these rights, sought to ensure that women were treated just as men were treated—much in the way that, as a legal matter, Americans were to be treated equally regardless of race—and that women had the same rights as men.³ As a result, formal equality played an important role in ensuring that women would not be treated as second-class citizens.

But what do formal equality and the right to be treated as “same” mean in a world where only women can be pregnant and bear children? Or in a world where culturally and socially, women are expected to bear the majority of childrearing responsibilities? The Court has been less clear and less consistent in this respect.⁴ Similarly, those women who have decided to have children have had a difficult time reconciling formal equality’s expectation of sameness with the quality of difference they may feel or yearn for in their dual identity

² Cf. RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 1 (1999) (“The language of rights has been central to American political culture for centuries, and nearly every major issue in American political history has been argued as an issue of rights.”).

³ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 682, 690-91 (1973) (concluding that classifications based on sex, like classifications based on race, are subject to heightened scrutiny and holding unconstitutional a statute that automatically deemed spouses of male military members, but not those of female members, dependents for purposes of obtaining benefits); *Craig v. Boren*, 429 U.S. 190, 208-10 (1976) (invalidating, on Equal Protection grounds, statutes prohibiting sale of 3.2% beer to males under the age of 21 but allowing sale to females at the age of 18, reasoning that equal protection prohibits differential treatment based on gender just as it would differential treatment based on race, even if supported by quantifiable differences in drinking tendencies); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (“We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.”).

⁴ Compare, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 650 (1974) (invalidating school board rule precluding teachers from returning to work until the next full semester after the teacher’s child has attained the age of three months, holding that “the age limitation serves no legitimate state interest, and unnecessarily penalizes the female teacher for asserting her right to bear children”), with *Wimberly v. Labor & Indus. Relations Comm’n*, 479 U.S. 511, 513, 516, 522 (1987) (upholding application of state statute denying unemployment compensation to any claimant who leaves work “voluntarily without good cause attributable to his work or his employer” to employees who leave work due to pregnancy). See also *infra* Part II.

as working women and mothers or mothers-to-be. If our goal is not to be the “same,” what does equality look like, and toward what end are we striving?

The notion that formal equality does not provide a wholly satisfying answer to how women should be treated under the law is not a novel one:⁵ many feminist authors have advocated for alternative frameworks.⁶ In this piece, I do not focus on how the doctrine should manage the tension between sameness and difference. As to the doctrine’s role regarding the work-family conflict, we may have exhausted its potential in setting a constitutional foundation to allow women to be treated as equals in the workplace and requiring that they not be discriminated against in the event that they decide to start a family. For purposes of this piece, those accomplishments constitute the first phase or “first generation” of progress. Here, I am concerned with how the doctrine relates to what I refer to as the “second generation” of issues arising from the work-family conflict:⁷ how to balance work and family once some initial level of equality has been achieved; how to exercise the rights women now possess in practice; and the identity conflict faced by those struggling to be both the ideal parent and the model employee. As I attempt to demonstrate herein, the Court’s rights-driven framework is better limited to first-generation questions of exclusion and overt discrimination. I suggest that the rights-based paradigm⁸ is not particularly instructive—and may actually be counterproductive—in thinking about how to actually structure one’s life or reconceptualize one’s identity after making the decision to have a child. Four elements of the doctrinal rights-based framework in particular frustrate these aims: an overpowering emphasis on individual autonomy; its focus on enabling women to operate in a man’s world; the assumption of a uniform set of goals and priorities shared by all

⁵ Arianne Renan Barzilay, *Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL’Y REV. 407, 431 (2012) (“[L]iberal feminism, in its incarnation in jurisprudence as formal equality, has not been able to remedy the work-family conflict.”).

⁶ See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1993) (difference theory); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (cultural feminism); Catharine A. MacKinnon, *Difference and Dominance*, in FEMINISM UNMODIFIED: DISCOURSES IN LIFE AND LAW 40-44 (1987) (dominance theory).

⁷ Cf. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (distinguishing between “first generation” patterns of bias, which involve overt acts of discrimination, and “second generation” claims of discrimination, which “involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups”).

⁸ By “rights-based paradigm” or “rights-based framework,” I am referring to a paradigm focused on individual entitlements or freedoms grounded in constitutional law.

women; and its narrow, individualized accommodation of pregnancy.⁹ Given their fundamental nature to first-generation legal victories, these elements have been internalized not only legally but also culturally; as a result, they have spilled over into current policy debates. In that context, I suggest that they are not only unhelpful but may actually have a negative influence in resolving second-generation problems.

Doctrine tells us much about what we are or are not entitled to and how others are forbidden from treating us, but little about who we are or want to be as individuals; the former may be necessary but is not sufficient to determine the latter. The answer to the latter question is ultimately a very personal one that I do not and cannot attempt to answer globally. Instead, I merely suggest that the paradigm underlying such foundational rights may be ill-suited to answer many of the questions that lie ahead. Law still has an important role to play in evolving the workplace and changing cultural norms, but future policies would be well-served by following a set of guiding principles that are responsive to, and not derived from, the rights-based framework.

II. GENDER DISCRIMINATION DOCTRINE AND THE WORKING MOTHER

The story of gender discrimination as it relates to the workplace starts with a very specific idea of who women are and the roles they are capable (or not capable) of serving. In *Bradwell v. Illinois*,¹⁰ the Supreme Court affirmed the Illinois Supreme Court's denial of Myra Bradwell's application for a license to practice law.¹¹ Justice Bradley's oft-cited concurrence in *Bradwell* adopted what has come to be known as the "separate spheres" approach, recognizing "a wide difference in the respective spheres and destinies of man and woman."¹² As to the woman—characterized by a "natural and proper timidity and delicacy"—it was clear to Justice Bradley and others that her "paramount mission and destiny [were] to fulfil the noble and benign offices of wife and mother."¹³

With the advent of the women's rights movement came a very different vision of the woman's role in society and in the workplace. Heralded by attorneys like Justice Ruth Bader Ginsburg, in her former role as ACLU attorney, the liberal feminist approach emphasized formal equality—i.e., that men and women should be treated the

⁹ See *infra* Part III.A.1-4.

¹⁰ 83 U.S. (16 Wall.) 130 (1872).

¹¹ *Id.* at 138-39.

¹² *Id.* at 141 (Bradley, J., concurring).

¹³ *Id.*

same.¹⁴ Under the formal equality framework, the Court jettisoned the image of the woman as a stereotypical homemaker, instead embracing a vision of the working woman as self-sufficient and whose goal was to be viewed as man's equal in the workplace.¹⁵ Outmoded stereotypes and generalizations about women and their capabilities were no longer acceptable.¹⁶

In *Frontiero v. Richardson*,¹⁷ the Court analogized the historical treatment of women to that of racial minorities,¹⁸ concluding that classifications based on sex must be treated with heightened scrutiny and that, as it had held in *Reed v. Reed*¹⁹ during the previous term, laws could not provide "dissimilar treatment for men and women who are . . . similarly situated."²⁰ In *Craig v. Boren*,²¹ in which the Court adopted the standard of intermediate scrutiny for sex-based classifications,²²

¹⁴ Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment, 1971-2002*, 10 CARDOZO WOMEN'S L.J. 501, 520 (2004). This may relate to the fact that the demarcation of gender as a suspect classification was made, at least in part, by analogies to race, an area in which formal equality has also had much traction but in which the application of "sameness" is perhaps less problematic.

¹⁵ See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 n.11 (1975) ("[T]he presumption of complete dependency of wives upon husbands has little relationship to present reality."); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (rejecting the "romantic paternalism" of prior Supreme Court cases addressing gender roles and explaining that such paternalism "put women not on a pedestal, but in a cage"); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (holding company's refusal of employment to mothers but not to fathers of pre-school-age children was prima facie sex discrimination within the meaning of Title VII).

¹⁶ *United States v. Virginia*, 518 U.S. 515, 550 (1996) ("[G]eneralizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."); *Weinberger*, 420 U.S. at 645 (explaining in striking down statute providing differential survivors' benefits depending on the deceased's sex that the gender-based stereotype that men are the primary supporters of a family "cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support"); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (invalidating statute excluding a woman from acting as administrator of an estate if a male qualifies for the position).

¹⁷ 411 U.S. 677 (1973).

¹⁸ *Id.* at 685-86 (comparing sex to race in terms of immutability, visibility and past historical discrimination). "[I]ndeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Id.* at 685, 688.

¹⁹ 404 U.S. 71, 75-76 (1971) (holding statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause").

²⁰ *Frontiero*, 411 U.S. at 683-84 (quoting *Reed*, 404 U.S. at 77).

²¹ 429 U.S. 190 (1976).

²² *Id.* at 197.

Justice Brennan wrote that the Court would not tolerate laws grounded in “archaic and overbroad generalizations,” “old notions of role typing,” or “outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.”²³ In cases like *Weinberger v. Weisenfeld* (decided the year before *Craig*),²⁴ *Califano v. Goldfarb*,²⁵ *Califano v. Westcott*,²⁶ and *Wengler v. Druggists Mutual Insurance Co.*,²⁷ the Court continued in much the same vein, invalidating laws stemming from women’s traditional dependency on men.²⁸ In doing so, the Court acknowledged women’s equal role as wage earners and validated their equal status to men in the workplace.²⁹

In the landmark case *United States v. Virginia (VMI)*,³⁰ the Court held that women could not constitutionally be excluded from a traditionally all-male military college;³¹ the underlying narrative was that women should not be presumed incapable of performing even the most male of military roles.³² The Court gave short shrift to the notion that “real differences” justified women’s exclusion from VMI, holding that “generalizations about ‘the way women are’ . . . [could not] justify denying opportunity to women whose talent and capacity place them

²³ *Id.* at 198-99 (internal quotation marks omitted).

²⁴ 420 U.S. 636, 645 (1975) (holding gender-based differentiation in a statutory scheme for awarding social security benefits unconstitutional, finding it premised on assumptions about wives’ dependency).

²⁵ 430 U.S. 199, 205-07 (1977) (holding gender-based distinction between widows and widowers in a Social Security Act provision—allowing a widower to receive survivor’s benefits only if he was receiving at least half of his support from his wife, but allowing a widow to receive benefits based on earnings of her deceased husband regardless of her dependency—violated due process and equal protection).

²⁶ 443 U.S. 76, 79, 89 (1979) (invalidating statute providing benefits to families whose dependent children were deprived of parental support because of father’s unemployment, but not providing such benefits as a result of mother’s unemployment).

²⁷ 446 U.S. 142, 152-53 (1980) (holding provision of Missouri law denying a widower benefits on his wife’s work-related death unless he was either mentally or physically incapacitated or could prove dependence on his wife’s earnings but granting a widow benefits without proof of dependency violated equal protection).

²⁸ Another line of cases from the same era allowed for sex-based distinctions to compensate women for past or present inequalities. *See, e.g.*, *Califano v. Webster*, 430 U.S. 313, 318 (1977) (upholding Social Security Act provision allowing women to eliminate additional low-earning years from the calculation of their retirement benefit, finding the provision “work[ed] directly to remedy some part of the effect of past discrimination”); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (holding statutory scheme allowing women naval officers a longer tenure of commissioned service than male officers before mandatory discharge for want of promotion does not violate Due Process Clause); *Kahn v. Shevin*, 416 U.S. 351, 355-56 (1974) (upholding Florida statute that grants widows, but not widowers, annual \$500 property tax exemption).

²⁹ *See* SUSAN GLUCK MEZEY, *ELUSIVE EQUALITY: WOMEN’S RIGHTS, PUBLIC POLICY AND THE LAW* 16-17 (2011).

³⁰ 518 U.S. 515 (1996).

³¹ *Id.* at 545-46, 555-56, 558.

³² *Id.* at 549-50.

outside the average description.”³³ As in *Frontiero*,³⁴ the Court relied on race-based analogies, comparing Virginia’s treatment of women to Texas’s treatment of African-Americans years earlier.³⁵ Ultimately, the image of the doctrinal woman transformed into one whose goals and capabilities were no different from her male counterparts; she was undoubtedly entitled to the same treatment and any differences in treatment would be viewed with a very skeptical eye.

The doctrine has been less consistent and perhaps less clear when it comes to pregnancy and the workplace, in part because women and men can never be true equals in this context.³⁶ The question of how formal equality applies to men and women when only women bear children is a difficult one. Does pregnancy justify differential treatment, and if so, what kind of differential treatment is permissible? At its best, the doctrine ensures that women cannot be discriminated against or excluded from opportunity as a result of pregnancy. At its worst, it has treated pregnancy as a non-issue or as a justification for unfair treatment.

To elaborate, the rights-based framework is well designed to guard against exclusion or overt discrimination—e.g., protecting the individual from being shut out of the workplace as a result of pregnancy. In *Cleveland Board of Education v. LaFleur*,³⁷ for example, the Court invalidated a mandatory leave policy requiring pregnant teachers to take maternity leave at a certain point during their pregnancy, regardless of their individual condition. In doing so—relying on a substantive due process rather than equal protection rationale—the Court explained that female teachers could not be “unduly penalize[d] . . . for deciding to bear a child” and pushed back against the school

³³ *Id.* at 550.

³⁴ *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

³⁵ *VMI*, 518 U.S. at 553–54.

³⁶ A discussion of the doctrine surrounding work and family—particularly when it involves a discussion of pregnancy—would not be complete without mention of a woman’s right *not* to be pregnant, i.e., to terminate a pregnancy. Women cannot participate in society as equals without the ability to choose whether and when to have a child. Cf. Kristina M. Mentone, Note, *When Equal Protection Fails: How the Equal Protection Justification for Abortion Undercuts the Struggle for Equality in the Workplace*, 70 *FORDHAM L. REV.* 2657, 2659 (2002) (arguing that this line of reasoning “may help to equalize women who choose not to be mothers, but it perpetuates the view that mothers cannot be truly equal because motherhood interferes with their professional success” and that “the equal protection argument for abortion aggravates the work/family conflict for mothers”). While I do not cover the entirety of abortion law here, in part because it raises a host of other issues, I do acknowledge that a woman’s right to choose not to be pregnant or have a child and the ways in which that right has been restricted in recent years have had and will have an important impact on women’s ability to achieve equality in the workplace and otherwise, particularly for those of limited financial means and without adequate healthcare or access to child care.

³⁷ 414 U.S. 632 (1974).

board's "presumption of physical incompetency" and desire to "insulate the classroom from the presence of potentially incapacitated pregnant teachers."³⁸ Similarly, in *UAW v. Johnson Controls, Inc.*,³⁹ decided nearly two decades later, the Court "explicitly rejected the notion that a woman's reproductive function was a legitimate workplace concern,"⁴⁰ holding that pregnant women could not be excluded from jobs involving actual or potential exposure to lead for fear of potential damage to the developing fetus.⁴¹ In doing so, the Court rejected the "separate spheres" framework, presenting a "modern day counterpoint to *Bradwell*."⁴² In both cases, the Court emphasized the importance of the woman's individual autonomy and the impermissibility of making generalized assumptions about a woman or her pregnancy: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role."⁴³

In contrast, the rights-based framework has been less helpful when it comes to negotiating workplace dynamics after the initial hurdle of inclusion has been overcome, or the application of existing structures to women who are no longer similarly situated. The Court in *Geduldig v. Aiello*⁴⁴ emphasized that pregnancy constituted a "real" physical difference between women and men justifying differential treatment and that the denial of disability benefits for pregnancy did not constitute impermissible sex-based discrimination: the division being drawn by employers was not between men and women, but placed men and non-pregnant women on one side and pregnant women on the other.⁴⁵ Two years later, in *General Electric Co. v. Gilbert*,⁴⁶ the Court suggested that pregnancy need not be treated like any other "disease or disability" under a company's benefits plan because it is a "voluntarily taken and desired condition."⁴⁷ In combination with *LaFleur*, these cases suggest that while women could not be forced out

³⁸ *Id.* at 644, 648. See also *id.* at 653 (Powell, J., concurring) ("The records before us abound with proof that a principal purpose behind the adoption of the regulations was to keep visibly pregnant teachers out of the sight of schoolchildren.").

³⁹ 499 U.S. 187 (1991).

⁴⁰ Lens, *supra* note 14, at 555.

⁴¹ *Johnson Controls*, 499 U.S. at 192, 200, 206, 211.

⁴² Lens, *supra* note 14, at 555.

⁴³ *Johnson Controls*, 499 U.S. at 211.

⁴⁴ 417 U.S. 484 (1974). *Geduldig* has never been overruled by the Court, but was later effectively overruled by congressional enactment of the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006).

⁴⁵ *Geduldig*, 417 U.S. at 496-97 n.20.

⁴⁶ 429 U.S. 125 (1976).

⁴⁷ *Id.* at 136. *Gilbert*'s interpretation of Title VII was eventually rejected by Congress, following its passage of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006).

of employment as a result of their pregnancy, there was no requirement that the workplace accommodate their pregnancy and certainly not that it adapt in response. In *Wimberly v. Missouri*,⁴⁸ the Court again divorced pregnancy from gender, upholding Missouri's decision to refuse unemployment compensation to women who had voluntarily left their position of employment (in this case, the plaintiff was not rehired because no position was available).⁴⁹ To resolve the case otherwise, in the *Wimberly* Court's view, would be to require "preferential treatment for women on account of pregnancy."⁵⁰ Under this approach, the Court rendered pregnancy a non-issue in the workplace, despite its prejudicial effect on women choosing to conceive and bear a child—an example of more formalist "equal treatment" resulting in unequal treatment in practice.⁵¹

Supreme Court doctrine has not had much to contribute to conversations about work-family balance beyond the point of pregnancy.⁵² Perhaps this involves some recognition of its own limitations: questions of childrearing do not involve the same biological component as

⁴⁸ 479 U.S. 511 (1987).

⁴⁹ *Id.* at 513, 522.

⁵⁰ *Id.* at 521.

⁵¹ In contrast, a decade earlier in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), the Court held that employers could not deny women the opportunity to accumulate job seniority while on maternity leave. Rather than viewing the refusal as providing a benefit to women because they were pregnant, the Court viewed the refusal as "impos[ing] on women a substantial burden that men need not suffer." *Id.* at 142. Under this difference theory type of approach, the Court attempted to address the fact that pregnancy did constitute a tangible difference between the experience of men and women in the workplace and attempted to compensate women for the potential challenges they may face as a result.

⁵² The Court has touched only indirectly on the ramifications pregnancy may have for ongoing parental differences between men and women. For example, in *Nguyen v. INS*, 533 U.S. 53 (2001), the Court seemed to suggest that the ability to bear a child necessarily results in a closer relationship between parent and child. In its words, because the mother is always present at the birth of a child, there is a greater "opportunity for mother and child to develop a real, meaningful relationship." *Id.* at 65. The Court went on to observe that "[t]he same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father." *Id.* In her dissent, Justice O'Connor pushed back against what she viewed as the application of stereotype: "Indeed, the idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization. A mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war, of the sort apparently present in this case. There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms." *Id.* at 86–87 (O'Connor, J., dissenting).

See also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (finding a genuine issue of material fact to exist with regard to whether the family obligations of women with preschool age children were "demonstrably more relevant to job performance for a woman than a man" and could constitute a "bona fide occupational qualification" under federal statutory law).

pregnancy and are perhaps even more enmeshed with social and cultural issues that the Court is ill-equipped or poorly suited to address.

Given the Court's institutional limitations, much of the law regarding gender and the workplace has been written by legislatures. Statutory law has obviously been an important source of rights regarding women's equality in the workplace, and much of Supreme Court doctrine is based on the Court's review or interpretation of these statutes. Some of the rights grounded in statutory law mirror the Court's emphasis on formal equality: for example, the Family Medical Leave Act's guarantee of twelve weeks of unpaid leave to both men and women,⁵³ and the Equal Pay Act's requirement that both sexes be paid the same amount of wages for the same work.⁵⁴ Other statutory provisions specifically address the unique needs of women with children: for example, the Fair Labor Standards Act's requirement that employers provide time and appropriate conditions for breastfeeding mothers to express milk during the workday;⁵⁵ and the Pregnancy Discrimination Act's provision that discrimination "on the basis of pregnancy, childbirth, or related medical conditions" constitutes unlawful sex discrimination under Title VII.⁵⁶ I cannot attempt to cover the vast array of Supreme Court cases interpreting statutory law regarding gender and the workplace in this short piece. For purposes of this article, which focuses on the gender-based discrimination framework and correlating rights grounded in constitutional law, what is most interesting about some of these cases is the Court's implicit acknowledgement that legislation and public policy may be better suited to address second-generation issues of work and family balance, given their ability to bridge the gap between fundamental doctrinal rights and the individual project of constructively structuring one's own life. In *California Federal Savings & Loan Ass'n v. Guerra*,⁵⁷ for example, the Court interpreted a state statute requiring employers to provide maternity leave and reinstatement to pregnant women not as "preferential treatment" but as a means to allow "women as well as men, to have families without losing their jobs."⁵⁸ In holding that the statute was not preempted by federal law, the Court noted Title VII's purpose to "guarantee women the basic right to participate fully and equally in

⁵³ Family and Medical Leave Act (FMLA) of 1993 § 102 (FMLA), 29 U.S.C. § 2612(a)(1)(A)-(E) (2011).

⁵⁴ Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d) (2006).

⁵⁵ Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 207(r)(1)(A)-(B) (2011).

⁵⁶ Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k) (2006).

⁵⁷ 479 U.S. 272 (1987).

⁵⁸ *Id.* at 289.

the workforce, without denying them the fundamental right to full participation in family life.”⁵⁹

So where does the doctrine leave us? In an effort to ensure that women are not unfairly excluded from the workplace or treated as a subordinated class of citizens or employees, the Court has, for the most part, adopted a framework of formal equality, emphasizing sameness of treatment for men and women, and disallowing the use of stereotypes about a woman’s role or place in society. The overwhelming message is that women must have the freedom to pursue any opportunity open to men and they must not be shut out of the workplace based on temporary periods of difference (i.e., pregnancy). While this may be empowering from the vantage point of someone who otherwise would not have such access at all, it is also a view that, as I discuss below, may create tension—both as a practical matter and internally, as a matter of identity—once the same woman has gained entry and is attempting to figure out how the rights she exercised to get there mesh with her current reality.

III. THE NEXT PHASE: RESPONDING TO THE RIGHTS-BASED FRAMEWORK

The constitutional victories within gender discrimination doctrine provide an invaluable foundation for the discussion we can now have about what role we perceive in today’s workplace for women who are also mothers and for men who are also fathers. However, while the rights-based framework has provided a critical basis for women’s progress, it is only the first step in a longer journey. It is limited as a framework for the next phase: determining how, as individuals, we will all personally negotiate the terrain that has been carved out by the rights and entitlements guaranteed to us and to others by the doctrine. No one can fulfill multiple roles at full capacity simultaneously, and yet for many women who grew up with these cases as our guideposts, even unconsciously or culturally, the rights-based framework may lead us to believe we are entitled or should strive to do just that.

⁵⁹ *Id.* (quoting 123 CONG. REC. 29658 (1977) (statement of Sen. Williams)). In some cases, the Court has gone further, acknowledging that even statutory law may have difficulties overcoming deeply entrenched social and cultural norms. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (“Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . 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.”). While the FMLA provides for leave for both men and women, in practice, many workplaces do not treat maternity and paternity leave the same, and certainly the cultural expectations surrounding maternity and paternity leave are very different.

A. Where Rights Go Wrong

Under the doctrinal paradigm, the focus is on rights and entitlements: that which a woman has a right to pursue (i.e., equal treatment, full participation in the workplace); the right to accommodation of her pregnancy (i.e., ability to accrue seniority and other benefits while on leave or the right to reinstatement post-leave); and the right to be free from discrimination in the workplace as a result of her sex or her pregnancy. Four dominant aspects of this paradigm, described below, operate in parallel to the work-family debate; their influence may be problematic in addressing second-generation questions of identity and balancing work and family in practice.

1. Individual Autonomy

Perhaps the strongest unitary theme throughout the doctrine is that of a woman's individual autonomy, whether in the form of seeking to shed her status as economically dependent on her husband, desiring to define the terms of her maternity leave and when and how she will stop and resume working, or aiming to control what jobs or working conditions are appropriate for her (whether pregnant or not).⁶⁰ Contrary to the "separate spheres" mentality, under which women had a pre-ordained destiny (largely within the confines of the home), it is now more widely acknowledged—at least by the doctrine—that women have the right to determine their own destiny.⁶¹ The *Johnson Controls* Court may have been correct when it observed: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."⁶² Yet a woman's ability to exercise individual autonomy can only be part of the equation. Focusing on women's autonomy alone puts an undue amount of

⁶⁰ See, e.g., *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (rejecting one-way presumption of dependence of a wife on her husband in determining unemployment benefits); *Califano v. Goldfarb*, 430 U.S. 199, 206-07 (1977) (rejecting gender-based Social Security classification scheme making "assumptions as to [women's] dependency"); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640, 648 (1974) (providing greater autonomy to a woman in defining terms of maternity leave); *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (emphasizing the individual woman's ability to make choices about her working conditions and their potential impact on her fertility).

⁶¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (rejecting legal traditions of "romantic paternalism," referencing *Bradwell*, which placed "women, not on a pedestal, but in a cage" (internal quotation marks omitted)).

⁶² *Johnson Controls*, 499 U.S. at 211.

pressure and responsibility on women, and our cultural focus on individualism can be isolating or debilitating as well as empowering.⁶³ The doctrine's structure implies that while it is a woman's choice to make, or her balance to strike, the costs of that decision are her cross to bear, to say nothing of the judgment that may follow.

Focusing on the woman's autonomy to make decisions about her own career or body without attention to context or the costs that accompany the exercise of one-sided autonomy render it a Catch-22. For example, a woman's choice to focus primarily on her career cannot be fully realized without the parallel ability for her partner to take on a greater role as caregiver or affordable child care options. A woman's autonomy to make her own choices would be much more meaningful if it were not presumed that she must be the one taking on such responsibilities (or that she could take on all of them if only she could find a way to strike an impossible balance).⁶⁴ Other actors must also be enabled or incentivized to relieve some of the burden on women, so that women also have the autonomy to *disclaim* responsibility—for example, by allowing men and other family members more flexibility to serve as caregivers.⁶⁵

It is the value of individual autonomy that is perhaps most responsible for the persistence of the “having it all” debate. There is an underlying premise to the debate that we are entitled to “have it all” (isn't that what our predecessors were working for?) and, but for the inflexibility of workplace dynamics or unwilling spouses, it would be possible; if we just try hard enough, we will figure out the solution—

⁶³ See Elizabeth Fox-Genovese, *Women's Rights, Affirmative Action, and the Myth of Individualism*, 54 GEO. WASH. L. REV. 338, 343 (1986) (“Many women cling to the promise of individualism with all the fervor of those long excluded We have long assumed that all we required was admission to those inner sancta, those corridors of power, for us to flourish as our brothers have flourished. It has not worked that way. Or rather it has only worked that way for a few. And for those for whom it has worked have had a disconcerting tendency to look very much like honorary men”). Similarly, autonomy's emphasis on the vast array of options available to women in theory—when, in reality, any person can select only some (whether due to financial infeasibility or simply a lack of capacity)—may be just as stressful as it is liberating. Cf. MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) (arguing that the dominance of the “autonomy myth” in public thought obscures the inevitability and normality of societal dependency).

⁶⁴ See Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L.J. 573, 598 (2007) (noting that certain policy changes “will be insufficient, especially if men do not take the leave when it is available, or if women continue to have responsibility for home life” and that “we need to focus on getting men to change their behavior, and to a lesser extent, women to change their behavior”).

⁶⁵ Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1073 (1996) (“[M]en are socially and legally excluded from caring and nurturing roles.”).

and the burden is on us to do so.⁶⁶ There is a distinction, however, between autonomy—the ability to make an unrestrained life choice—and the necessity of exercising personal judgment to determine *which* life choices one will actually make, particularly when some choices are not compatible or feasible. For example, exercising one’s autonomy to be treated as man’s absolute equal in the workplace may not necessarily be compatible with exercising one’s autonomy to have one’s pregnancy or role in childrearing fully accommodated by the workplace. The contradictory nature of the rights doctrine provides us with different choices, but it cannot resolve for us which one to make. Moreover, while autonomy is a critical element to ensuring freedom of profession and life choices, it does little to address the inner conflict or tension that may result from trying to actually strike a work-life or work-family balance. For example, when a young female employee in a male-dominated and male norm-driven workplace is debating whether to take her entire maternity leave and wondering how it will be perceived by her colleagues, male and female, it may be of little comfort to know that she has the “right” to do so. And without the financial, social and cultural support to make any choice she so desires,⁶⁷ autonomy may be a meaningless promise.

2. Claiming a Place for Women in a Man’s World

To the extent it is concerned with sex-based discrimination, the doctrine often assumes that change will happen primarily in one direction: women should be allowed into what has traditionally been a male sphere. Therefore, it is our ideas about women that must change, and women who must be afforded rights that allow them to be treated just like men.⁶⁸ In much the same way, the “having it all” debate still

⁶⁶ Anne-Marie Slaughter frames the supportive spouse myth as follows: “[H]aving a supportive mate may well be a necessary condition if women are to have it all, but it is not sufficient.” Slaughter, *supra* note 1.

⁶⁷ See *infra* Part III.A.5.

⁶⁸ While much of sex-based discrimination doctrine is based on cases involving male plaintiffs—see generally *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding that a state nursing school could not limit its enrollment to women)—in many of those same cases, including *Hogan*, the exclusion or differential treatment of men was held in disfavor due at least in part to its basis in impermissible stereotypes about women (i.e., nursing is an exclusively female profession). *Id.* at 729-30 & n.16 (“Indeed, the only statement of legislative purpose is that in § 37-117-3 of the Mississippi Code . . . a statement that relies upon the very sort of archaic and overbroad generalizations about women that we have found insufficient to justify a gender-based classification.”); see also, e.g., *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 151-53 (1980) (striking down law denying widower benefits on his wife’s work-related death unless he was either mentally or physically incapacitated or could prove dependence on his wife’s earnings but granting a widow death benefits without proof of dependence, stating that the “bare assertion [that men are more likely to be the principal supporters of their spouses and families] . . . falls far short of

presents as a “women’s” dilemma. Most of the articles and books describing work-family balance are targeted at women; it is much rarer to hear a commentator ask whether men can “have it all” or discuss the struggle men also face in balancing work and family and resisting pressure to conform to certain identity expectations. Many commentators writing on the topic acknowledge that no one can in fact have it all, and yet an inordinate amount of time and energy has been spent on behalf of women trying to discern the formula that will yield that result.⁶⁹

Given the historical and political context, it makes sense that rights doctrine focuses almost exclusively on the woman’s right to equal treatment. It was women who were discriminated against and being refused treatment as equals, both legally and socially; it is logical to focus on gaining entrance for women into a man’s world when the primary problem is exclusion. However, the questions now posed relate to how women will function in that world and what that world will look like (and what it will expect or allow of both men and women). While some focus on women is clearly still needed, focusing discussion of the work-family conflict exclusively on women puts an undue burden on women to solve the balancing dilemma on their own and renders men passive actors, ignoring their necessary role in the equation and the fact that they too may be dealing with similar identity issues.

Moreover, assuming a male norm⁷⁰ or assuming that women must incorporate themselves into a pre-existing (previously all-male)

justifying gender-based discrimination on the grounds of administrative convenience”); *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (striking down statutes requiring a widower to prove dependence on his wife in order to claim benefits relating to her employment because of their basis in a presumption of wives’ dependency).

⁶⁹ See, e.g., Slaughter, *supra* note 1; see also *Our Struggle to Have it All—10 Views*, CNN.COM (Mar. 14, 2013), <http://www.cnn.com/2013/03/12/opinion/roundup-having-it-all> (profiling a group of ten prominent women describing “when they realized they could—or could not—have it all”); Debora Spar, *Why Women Should Stop Trying to Be Perfect*, THE DAILY BEAST (Sept. 24, 2012), <http://www.thedailybeast.com/newsweek/2012/09/23/why-women-should-stop-trying-to-be-perfect.html> (describing the dilemma of juggling work and family as a “women’s problem” and suggesting strategies that women might employ to solve it); cf. CHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (Knopf 2013) (noting the dearth of women in leadership positions, urging women to be more assertive in their professional ambitions, and emphasizing the inevitability of trade-offs, particularly for women who are also attempting to start or raise a family).

⁷⁰ Formal equality is often faulted for basing equality on a male norm, or attempting to find a place for women in a world structured by male terms. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 34 (1987) (critiquing an approach that measures women “according to our correspondence with man, [and judges] our equality . . . by our proximity to his measure”); see also CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 225 (1991) (“The women that gender neutrality benefits . . . are mostly women who have achieved a biography that somewhat approximates the male norm, at least on paper.”).

framework without any expectation that the framework itself will evolve,⁷¹ sets misguided expectations and results in a mindset of “accommodation,” in which women must carve out workable space in a workplace defined on male terms.⁷² A major flaw of the “having it all” debate is that it presumes that the traditionally “male” approach⁷³—working full-time and prioritizing career over family obligations (at least in terms of time allotment)⁷⁴—is the ideal, and any alternative that women create in order to accommodate family or other obligations should be measured against that norm.⁷⁵ What may be creating so much cognitive dissonance today, for working women (and men) with children, is the fact that many of them have internalized that norm—even if unconsciously or unwillingly—and it may not mesh with their newly developing identity as a parent or as someone who wishes to play a prominent role in their children’s upbringing.

The assumption that work-family balance is a “woman’s problem” prevents us from engaging in a universal conversation about how any individual can balance career and family or personal life. As Deborah Rhode has observed: “At issue is not simply equality between the sexes, but the quality of life for both of them.”⁷⁶

3. Making Group-Based Assumptions

The group-based rights paradigm assumes that, as a class, women possess a shared set of priorities or goals about the role they wish to

⁷¹ Compare the radical critique of *VMI*, which posits that the decision simply allowed women to be admitted into an inhospitable environment founded on a sexist philosophy rather than requiring the institution to take affirmative steps toward restructuring itself. DANIEL A. FARBER, WILLIAM N. ESKRIDGE JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 407 (4th ed. 2009).

⁷² Note that “accommodation” could also be conceptualized as the need for the workplace to adapt so that it more effectively satisfies the needs of its various constituents. See *infra* Part III.A.4.

⁷³ I am not assuming this is the ideal for some or all men, but rather the norm that developed in a male-oriented workplace. See generally Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004) (explaining that both women and gender non-conforming men may not comport with notions of masculinity in the workplace). The undertone of many of the articles written in this vein suggests this is the path women would pursue but for their decision to have children and that maximizing one’s productiveness at work is the goal both pre- and post-children.

⁷⁴ *Id.* at 380-84 (describing five identified masculinities present in the workplace: authoritarianism, paternalism, entrepreneurialism, informalism, and careerism).

⁷⁵ See *Gender Norms: Spending more time with our families*, ECONOMIST.COM (Jun. 22, 2012), <http://www.economist.com/blogs/democracyinamerica/2012/06/gender-norms> (acknowledging the male-centric paradigm and societal skepticism about “reorder[ing] our society to guarantee that one group of people shouldn’t have to choose between competing priorities, just because nature has decreed that they weigh those priorities differently”).

⁷⁶ DEBORAH RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 320 (1989).

play in the workplace and about how they wish to be treated as pregnant women or as mothers. In doing so, it creates and builds upon a value system that may not mesh with a given individual's values. Regarding anti-essentialist critiques, Jessica Clarke has written: "Any claim to rights based on 'women's experiences' is essentialist because it assumes the category of women has a unitary and coherent essence, whether based in biology or culture."⁷⁷ To the extent that the doctrine surrounding gender in the workplace has, for the most part, been dominated by a formal equality approach, it has presumed "sameness" and therefore a male norm as the baseline—assuming that the goal for all women is to be treated just as men are or have been treated.⁷⁸

The irony of rights formation is that it is difficult to designate a right without making implicit judgments about the group claiming the right. Moreover, rights definition may also solidify that group's status and enable further group-based subordination:

To have a right as a woman is not to be free of being designated and subordinated by gender. Rather, though it may entail some protection from the most immobilizing features of that designation, it reinscribes the designation as it protects us, and thus enables our further regulation through that designation.⁷⁹

And although women may be protected as a group, their individuality and their own notions of identity may simultaneously be placed in jeopardy. In the words of Martha Minow: "People who share a trait, like race or gender, may differ in many other ways. . . . The gap between the representative who shares the group trait and the interests and needs of people in the group may lead to painful disputes over authenticity and over the relationship between identity and experience."⁸⁰ Similarly, social theorist Judith Butler has observed:

The minute that the category of women is invoked as describing the constituency for which feminism speaks, an internal debate invariably begins over what the descriptive content of that term will be. . . . In the early 1980s, the feminist 'we' rightly came under

⁷⁷ Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1242 (2011).

⁷⁸ See MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 70, at 221 ("Gender neutrality is the male standard. The special protection rule is the female standard. Masculinity or maleness is the referent for both.").

⁷⁹ Wendy Brown, *Suffering the Paradoxes of Rights*, in LEFT LEGALISM/LEFT CRITIQUE 420, 422 (Wendy Brown & Janet Halley eds., 2002); *see also* Clarke, *supra* note 77, at 1242 ("Other feminists have argued that in creating rights against discrimination, the law produces the very stigmatized identities it is intended to protect.").

⁸⁰ MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 35 (1997).

attack by women of color who claimed that ‘we’ was invariably white, and that the ‘we’ that was meant to solidify the movement was the very source of painful factionalization. The effort to characterize a feminine specificity through recourse to maternity, whether biological or social, produced a similar factionalization and even a disavowal of feminism altogether. For surely all women are not mothers; some cannot be, some are too young or too old to be, some choose not to be, and for some who are mothers, that is not necessarily the rallying point of their politicization in feminism.⁸¹

A rights-focused approach not only runs the risk of essentialism, it also presents the danger of promoting a universal vision for women’s destiny: “[R]ights for women based on their role as mothers do not simply reflect the reality that many women are mothers; they promote that vision of reality.”⁸² Regardless of the way in which rights are structured and their undoubted value, their formation may have the unintended effect of making assumptions about or imposing expectations on the affected class.

4. Making Room for Motherhood

While the Court has been fairly consistent in emphasizing individual autonomy, it has been less clear about how pregnancy should be treated in the workplace. While the right to equal treatment in the workplace can serve to empower women in forging new professional paths, rights in the context of pregnancy are typically framed as the right to be free from discrimination—pregnant women cannot be forced out of the workplace and they must be allowed back in—or the right to accommodation. While many such accommodations are necessary, there is an important distinction between viewing accommodations as narrow measures that begrudgingly allow an individual to continue on in an otherwise unchanged environment and thinking about accommodation as the adoption of more universal measures or environmental adaptations that are seen as benefiting society as a whole.⁸³ Regardless of the necessity for accommodation, a paradigm

⁸¹ Judith Butler, *Contingent Foundations: Feminism and the Question of “Postmodernism,”* in *FEMINISTS THEORIZE THE POLITICAL* 15 (Judith Butler & Joan W. Scott eds., 1992). This seems like an apt point at which to clarify that in writing on this topic, I am by no means assuming or suggesting that all women have children or attempt to balance work and childrearing. I am merely focusing on the audience to which some of these observations may be applicable.

⁸² Clarke, *supra* note 77, at 1243.

⁸³ As to the latter view, see Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008) (describing the benefits of accommodation to third parties) and Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 31, 2012, at A25, available at

that assumes an existing framework into which pregnant women must be shoehorned—perhaps at the risk of great hostility—is likely to have negative emotional, social, and cultural ramifications.

Under the rights-based framework—which, in the context of pregnancy, focuses largely on anti-discrimination—pregnancy has been, at best, viewed as a “burden” requiring compensatory treatment and at its worst, as a legitimate basis for discrimination or an imposition preventing women from achieving their full potential.⁸⁴ Pregnancy is very rarely, if ever, viewed as a positive aspect of a woman’s identity or something that should be celebrated, largely because in the doctrine it typically arises in the context of a woman claiming pregnancy-related discrimination. It is not viewed as part of what makes a working woman successful, because in doctrine the vision of the self-sufficient working woman and that of the woman embracing motherhood do not often co-exist. More often, women in doctrine are trying to deal with or handle pregnancy in an attempt to re-attain their equal or “sameness” status. Anti-discrimination law, which is typically protective or compensatory, is a necessity for women’s progress but may not always be a basis for empowerment.⁸⁵

When women are being empowered in the doctrine, it is most often in their pursuit of male achievement—the more they are treated like men, the more success they have achieved. Because pregnancy does not fit into the male paradigm, it is not part of the vision for success. It is hard, if not impossible, to find examples in the doctrine of women affirmatively empowered by pursuing the dual role of working woman and parent, in part because of how cases arise—i.e., typically demanding a response to discriminatory or degradative action taken by others. A different way to conceive of accommodation is to imagine that the workplace itself should adjust in nature to facilitate different choices, rather than forcing individuals who make different choices to adjust themselves to comport with their existing role in the workplace.

5. Other Limitations of Rights-Based Doctrine

Because each case arises under its own unique circumstances, rights tend to be defined in isolation. By its very nature, doctrine can-

http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html?_r=0 (explaining that many accommodations for pregnant workers promote economic security and public health and may even have a positive impact on the bottom line for businesses).

⁸⁴ See *supra* notes 36-51 and accompanying text.

⁸⁵ For a discussion of how “accommodation” laws fit into the larger anti-discrimination legal framework, see generally Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

not serve as all-encompassing sociocultural analysis, but is instead restricted to the resolution of conflicts that have arisen in the context of litigation. This makes it a poor framework in which to think about identity, which is by its nature a holistic concept. Those facing this dilemma are not litigants in their day-to-day existence; rather, they deal with every variation of the work-family conflict as part of their own life experience.⁸⁶

The rights framework also has the potential to disguise shared interests and, at its worst, can pit groups against each other rather than facilitate productive discussion. Creating rights in a static framework makes it harder to envision how the duties or assumptions giving rise to those rights may be redistributed: “Legal rights based on gender may prevent people from dividing, sharing, permuting, and questioning gender roles.”⁸⁷ Failing to view pregnancy as a sex or gender-based characteristic, as the Court has sometimes done, unduly prejudices women, yet to assign pregnancy—and, by extension, childrearing—to the woman’s “sphere” prevents us from adopting the broader view of childrearing and caretaking as a social enterprise for which all parties involved must assume responsibility.

Finally, rights also have the potential to be exclusive: low-income women who cannot make a claim to equal treatment based on wealth are left little recourse other than to appeal to the empathy or generosity of those with political clout to effect change. I would be remiss if I did not at some point observe the “having it all” debate’s near exclusion of lower-income, working-class women who may not be as concerned with “having it all” as they are with having no choice but to juggle everything, and too few resources to address more basic needs.⁸⁸

⁸⁶ For a discussion of the multidimensional framework, which derives from constructive feminism and recognizes that each person has multiple dimensions to his or her life—including work, family, leisure, culture and civic life—that must all exist alongside one another, see generally Barzilay, *supra* note 5.

⁸⁷ Clarke, *supra* note 77, at 1243.

⁸⁸ See Slaughter, *supra* note 1 (“I am well aware that the majority of American women face problems far greater than any discussed in this article. I am writing for my demographic—highly educated, well-off women who are privileged enough to have choices in the first place.”); Sherilynn Ifill, *Forget “All”: Why Most Women Never Even Get Half*, BEACON BROADSIDE (Jul. 23, 2012), <http://www.beaconbroadside.com/broadside/2012/07/why-most-women-never-even-get-half.html> (emphasizing that women who are at the economic bottom—in sharp contrast to the fabled top 1%—have far greater challenges and are denied the “luxury” of making the types of choices referenced by Slaughter); see also Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 8 (2007) (“[A]lthough working-class women and professional women had access to maternity or family leave at nearly the same rate in the early 1960s, professional women now have far more access than working-class women.”); Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL’Y 7, 8 (2006) (“As a result of the focus on professional women, the policy proposals many work-family scholars have advocated tend to reflect the interests, and the op-

This phenomenon may itself have a doctrinal basis, given the doctrine's failure to require equal treatment on the basis of wealth⁸⁹ or to recognize the practical implications of poverty on rights enforcement.⁹⁰ The failure not only of doctrine, but also of statutory law in this regard,⁹¹ to recognize that only those with means have the ability to ask this question—or to structure their life in such a way that they have a meaningful choice—is also shared by the “having it all” debate.

B. Rebounding From Rights: Where Do We Go From Here?

For women who have been raised to appreciate the gains of the women's liberation movement and the rights that arose from the battles fought (and those that are still being fought), it is hard to escape the tendency to define oneself by one's rights. How, in the context of that framework, can women fully realize the potential carved out for them in the workplace while simultaneously maintaining a meaningful role at home and in the raising of their children?

While the doctrinal framework is critical to ensuring the ability of women to pursue certain ends, its emphasis on individual autonomy, its focus on fitting women to a male mold, its assumption that all women share certain goals and priorities, and its inability to empower

tions, of those same women. The most frequently mentioned proposals—creating more and better part-time work, shorter work hours and greater workplace flexibility—are proposals that are of utility primarily to professional women, those, in other words, who can afford to trade less income for more family time.”).

Although as demonstrated by the popularity of books like *Lean In*, see *supra* note 69, there is certainly a hungry audience for policy proposals and general advice directed toward women at the top of the socio-economic ladder, there is also a great need for women with the benefits of educational and economic privilege to use their access to the microphone, so to speak, to advocate for women whose voices are not as powerful. See Ifill, *supra* (advocating that women in the 1% “have the power to take the lead in changing the conditions that make it nearly impossible for [low-income women] to work and parent effectively” and “to transform the work/family reality for women at the economic bottom, who are seeking the luxury of the kind of choices about which Slaughter and I wring our hands”).

⁸⁹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973) (declining to review under “heightened scrutiny” a claim that a state discriminated against residents of less wealthy school districts in its provision of educational benefits).

⁹⁰ See, e.g., *Mahe v. Roe*, 432 U.S. 464, 478-79 (1977) (holding Equal Protection Clause does not require a state participating in Medicaid program to pay expenses incident to nontherapeutic abortions for indigent women); see also, e.g., *Plyler v. Doe*, 457 U.S. 202, 245 (1982) (Burger, C.J., dissenting) (“The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility; it is not an all-encompassing “equalizer” designed to eradicate every distinction for which persons are not ‘responsible.’”).

⁹¹ See, e.g., Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 492 (2001) (“FMLA leave is disproportionately accessible to low-income men and women—those who need its protections most—who either do not meet the eligibility criteria or who cannot afford to take unpaid leave.”).

woman in her dual role make it a poor framework for defining identity. Perhaps the guiding principles for this next phase of the journey—and those that should form the basis of the framework for thinking about future policy initiatives—can instead be found in responding to the failings of the rights-based paradigm.

First, we must recognize the importance of defining one's own goals and priorities, rather than adhering to a traditionally male norm as the ideal. Adhering to a "male" norm is not only unworkable, but it is undesirable for many women (and men). We need to redefine the notion of "success," for ourselves and as a culture, and the role that work and family will play for each of us in that individualized vision—whether that vision includes having children or not, doing so with a partner or not, and simultaneously working or not. In doing so, we can avoid some of the cognitive dissonance that comes with trying to pair a lifestyle and set of goals that are incompatible. Of course, the best way to facilitate the freedom to define one's own goals and priorities would be to have as broad a range of policies and working arrangements as possible, so that one could delineate one's own preferences and then have the policies available to enable those preferences.⁹² Policies should enable and even incentivize choice but avoid making assumptions.

Second, although as a society we must continue in the quest to ensure that women are truly afforded equal treatment in the workplace,⁹³ we should stop casting work-family balance as a problem reserved exclusively for women or that women have exclusive responsibility to solve. As discussed above, this unfairly places the burden on women to resolve a much larger societal problem and prevents the encouragement of a universal conversation about the role of both men and women in childrearing.⁹⁴

⁹² See RHODE, *supra* note 76, at 124 ("[T]he preferable approach is to press for the broadest possible maternal, paternal, and medical coverage for all workers.").

⁹³ The Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), highlights the need to remain cognizant of the workplace equality issues women continue to face. *See id.* at 624-25 (holding that plaintiff's claims of sex-based salary discrimination were time-barred because even though disparate pay was received during the statutory limitations period, the decision giving rise to that discrimination occurred outside of the limitations period). The *Ledbetter* decision was later effectively overturned by Congress's passage of the Lilly Ledbetter Fair Pay Act of 2009. *See* 42 U.S.C.A. § 2000e-5 (West 2013) (providing that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new paycheck affected by that discriminatory action).

⁹⁴ *See* Barzilay, *supra* note 5, at 431 ("[R]egulation 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 of multidimensionality for all, on the other.").

Third, rather than focusing on autonomy at all costs, we need to recognize that, in attempting to strike a work-family balance, autonomy—or the pure (theoretical) ability to make choices—is not enough. We also need to acknowledge that the exercise of autonomy cannot be maximized without cost or at least without great strain. By expanding the notion of autonomy to include not just the freedom to claim responsibility but also to disclaim it, by providing others (i.e., men) with the autonomy to make similar choices, and by making the notion of “choice” a more realistic one by implementing supportive structures that enable choice for all individuals (including those without financial means), women would be much freer to define their own identity or work-life balance.

Fourth, we need to shift our mindset so that pregnancy and childrearing is not merely something to be “accommodated” in an already existing frame; accommodation should be a two-way, not a one-way street. Environments should accommodate people, as well as expecting accommodation by the individual. In the same vein, the working woman who decides to have children should be empowered in her dual role as employee and mother, rather than viewing the two as competing ends.

Some examples of policies that would further the above goals are: the implementation of paid parental leave,⁹⁵ expanded and standard paternity leave/caretaking policies,⁹⁶ broadened definitions of who can take leave to provide care for a child,⁹⁷ and restructuring the school day to more closely mirror the workday.⁹⁸ One real-world example of a law that has accomplished much of the above and has played an important norm-changing role is that governing Sweden’s parental leave system. In 1974, Sweden replaced maternity leave with a 13-month paid parental leave, and then in 1995, introduced “daddy leave”: fathers were not forced to stay home, but the family would lose one

⁹⁵ See Natasha Bhushan, Note, *Work-Family Policy in the United States*, 21 CORNELL J. L. & PUB. POL’Y 677, 691-92 (2012).

⁹⁶ See Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1052 (1994); see also Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 31-32 (1998).

⁹⁷ See Bhushan, *supra* note 95, at 692-93 (noting that state versions of the FMLA have been expanded to include grandparents and the children of domestic partners); see generally Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1 (2013) (arguing for expansion of the ability of grandparents to serve as caregivers).

⁹⁸ See, e.g., Selmi & Cahn, *supra* note 88, at 24-25. Selmi and Cahn acknowledge that this would result in a much longer day for children, but rightfully point out that many children of working mothers already spend that long in daycare or in school and after-care. See *id.* at 24 & n.73.

month in subsidies if a father chose to forgo his leave.⁹⁹ This policy has greatly increased the number of men taking leave—after the change in 1995, more than eight in ten men took leave—and has been described as a “striking example of social engineering.”¹⁰⁰ The broadness of the policy—covering both men and women—and its provision for paid leave encourages each parent to play a role in providing child care, provides both sexes with real options (and for women, the ability to *disclaim* some amount of responsibility), and allows both men and women to strike their own balance.¹⁰¹ Now that the responsibility to care for children has been imposed more broadly, the workplace has itself adapted out of necessity, making “accommodation” less necessary.¹⁰²

None of these policy suggestions are novel and some may be much more feasible than others. Regardless, there is a benefit in distancing ourselves from the rights-based framework in this next phase of the discussion: thinking about how we build a bridge from foundational rights to a new reality. I am not suggesting abandonment of law, by any means. Law—and statutory law in particular, as evidenced by the Sweden example—has an important role to play in changing the workplace and the cultural norms influencing it. In developing policy measures, however, the guiding principles discussed above would

⁹⁹ Katrin Bennhold, *Paternity Leave Law Helps to Redefine Masculinity in Sweden*, N.Y. TIMES, June 15, 2010, at A6. Parents also have the flexibility to use their paid leave however they wish up until their child’s eighth birthday. *Id.*

¹⁰⁰ *Id.*

¹⁰¹ As Arianne Renan Barzilay notes, Sweden’s policy could be further improved—particularly considering the significant single-parent family population in the United States—by offering “daddy leave” not only to fathers, but to “partners or other persons significantly involved in childrearing, such as a grandparent.” Barzilay, *supra* note 5, at 434.

Contrast mandatory maternity leave policies, which avoid the difficult choice, but can be even more restrictive with regard to identity development. See generally Julie C. Suk, *From Anti-discrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMP. L. 75 (2012).

¹⁰² Cf. Barzilay, *supra* note 5, at 434 (“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 men and women have active caretaking duties, in the hope that that will decrease workplace gender discrimination against women caregivers.”). No policy solution comes without cost, and it may be that the European model has other adverse effects regarding women’s position in the labor market. See Julie Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 65 (2010) (observing that Sweden’s labor market remains “highly segregated by gender,” that such “occupational segregation is not the result of discrimination,” and that “[b]y protecting part-time workers and parents’ right to work part-time in the first few years of a child’s life, both French and Swedish law have facilitated women’s disproportionate concentration in part-time jobs.”); see also *id.* at 66 (concluding that “generous parental leave policies do not undermine gendered patterns of working and caring, and may encourage gender stratification”).

serve as a better basis for adopting some policies and rejecting others than the principles underlying a rights-based framework.¹⁰³

IV. CONCLUSION

The purpose of this piece is not to undermine the importance of sex or gender-based discrimination doctrine or of rights. The point this Article seeks to make is that while the doctrine and the rights resulting from that doctrine provide a necessary foundation, they do not provide the answers to the dilemma facing many women today. If anything, the doctrine may make the search for identity more problematic, given its mixed messages about the role of women in the workplace and as mothers, and its tendency to carve out absolute roles distanced from the compromise many of us seek in our day-to-day reality. While a rights-based strategy founded in formal equality was necessary for making inroads into a world from which women had traditionally been (and, in some cases, continue to be) excluded, rights-based discourse or litigation may have limited utility in the context of identity formation or development. For example, Kenji Yoshino has observed:

When I think about the elaboration of my gay identity, I am grateful to see litigation has had little to do with it. . . . I am troubled that Americans seem increasingly to turn toward the law to do the work of civil rights precisely when they should be turning away from it.¹⁰⁴

What role, then, should law play in the ongoing debate regarding work family balance? Although, as Joan Williams has noted, there may be many political barriers to structural change,¹⁰⁵ law still has important potential to enable choice and shift cultural norms. My point here is not to suggest that law has no role to play, but rather that for second-generation problems, the rights-based paradigm—and, by ex-

¹⁰³ For example, focusing only on enhanced maternity policies supports the idea that pregnancy and childbearing remain in the woman's "sphere." See RHODE, *supra* note 76, at 122 (noting that "[m]ommy tracks" often become "mommy traps," relegating women to slower career tracks). Degendered or gender-neutral policies fail to recognize women's unique differences and may leave women feeling that their identity as women is not being adequately recognized.

¹⁰⁴ KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 193-94 (2006); see also *id.* at 194 (explaining that some of the best advice the author received was to "speak my truth and make the law shape itself around me").

¹⁰⁵ Joan C. Williams, *Want Gender Equality?: Die Childless at Thirty*, 27 *WOMEN'S RTS. L. REP.* 3, 16 (2006) ("[P]ublic policy clearly is a more direct route to resolving work-force/workplace mismatch. Yet the reality is that, given the current political climate, public policy is going to take small steps.").

tension, the Court—cannot accomplish those aims alone.¹⁰⁶ To assume otherwise would be to expect the impossible in light of the Court's institutional limitations, which are much better suited to the task of rights definition. That said, even if rights continue to serve as a necessary backdrop, we should be wary of applying the same approach the Court has applied in defining rights when thinking about current policy problems.

A productive conversation about how to move the discussion of work-family balance forward need not remain rooted in the rights-based discourse that was necessary to its origination.¹⁰⁷ Ultimately, the next phase of the work-family debate should be driven by the recognition that one's identity is more than a compilation of individual rights or entitlements and that those rights are not exercised in a vacuum. It will be more important to explore how we can allow both men and women to actualize their ideal balance of work and family and to recalibrate what and who we value such that the decision to start a family is not solely affiliated with the exercise of individual rights, but also allows for the formation of new identities that are holistically supported by society and the workplace.

¹⁰⁶ See *supra* notes 57-59 and accompanying text.

¹⁰⁷ Cf. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991) (“The most distinctive features of our American rights dialect are the very ones that are most conspicuously in tension with what we require to give a reasonably full and coherent account of what kind of society we are and what kind of polity we are trying to create. . . . Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead towards consensus, accommodation or at least the discovery of common ground.”).